

# THE COMMON LAW OF THE ANGLICAN COMMUNION

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The aim of this short paper is to examine whether and how canon law might be acknowledged as one of the instruments of Anglican unity.<sup>2</sup> First, the study proposes that there are principles of canon law recognised by churches. These are rooted in the canonical tradition shared by churches of the catholic and apostolic tradition. Secondly, the following proposes that the profound similarities between Anglican legal systems indicate, as a matter of descriptive fact, what Anglicans share in common juridically. Together, the principles of canon law and the similarities between Anglican legal systems represent the common law of the Anglican Communion. Thirdly, the study addresses some methodological issues raised in ascertaining and formulating the canonical principles of the Anglican *ius commune*. Finally, it suggests some reasons and justifications for an acknowledgement of the Anglican common law.

## I. THE PRINCIPLES OF CANON LAW: CANONICAL TRADITION

### 1. *Recognition of the Principles of Canon Law*

At least four Anglican churches formally recognise the existence of the principles of canon law. The constitution of the Province of the West Indies provides: 'If any question or dispute shall arise as to the interpretation or constitutionality of any provision of this Constitution or the Canons, Rules, Regulations or Standing Orders made thereunder, the determination thereof shall be governed by the general principles of Canon Law thereto applicable and ... shall be made by the House of Bishops whose decision shall be final'.<sup>3</sup> The canons of the Province of Southern Africa state: 'It is hereby declared that 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 appli-

<sup>1</sup> This paper was delivered at the Anglican Communion Legal Advisers' Consultation which took place in Canterbury 6–13 March 2002. For John Rees' report of the Consultation, see (2002) 6 Ecc LJ 399–401. The Consultation was held as a result of a decision at the meeting of the Primates of the Anglican Communion at Kanuga, North Carolina, USA, 6 March 2001, at which the Primates discussed a paper delivered at that meeting and reproduced in this Journal: see N. Doe, 'Canon Law and Communion', (2002) 6 Ecc LJ 241–263.

<sup>2</sup> The Virginia Report of the Inter-Anglican Theological and Doctrinal Commission (1997) identified as the four instruments of Anglican unity: the Archbishop of Canterbury, the Lambeth Conference, the Primates' Meeting, and the Anglican Consultative Council.

<sup>3</sup> West Indies, Const. Art. 6.2(1).

cable'.<sup>4</sup> Similar provisions exist in Anglican laws in Central Africa<sup>5</sup> and Nigeria.<sup>6</sup>

Recognition of the principles of canon law, as a phenomenon, is not peculiar to churches of the Anglican Communion. The Roman Catholic Code of Canon Law (1983) 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 canonical equity' (Canon 19). Also, the 1990 Code of the Eastern Catholic 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' (Canon 1501).<sup>7</sup>

## 2. *Nature and Form*

The principles of canon law, recognised formally in these laws, are in the nature of general propositions or maxims which express fundamental values. Principles have what is sometimes called 'a dimension of weight'.<sup>8</sup> For Roman Catholics, typically, the principles of law are those which 'have been known to canonical tradition', or 'the universal and fundamental principles ... contained in the *Regulae Juris* ... and in authentic collections of canon law', or 'the vast treasure house of laws and jurisprudence accumulated by the Church in the course of centuries'.<sup>9</sup> Indeed, in some Anglican churches, the law makes express provision for the continuing authority of pre-Reformation canon law and its principles.<sup>10</sup>

The fundamental nature of principles is illustrated, for example, in the provision in Roman Catholic canon law that 'the salvation of souls in the Church is the supreme law' (Canon 1752). Some canonical principles are descriptive: such as the principle that 'Custom is the best interpreter of laws'.<sup>11</sup> Others are prescriptive: '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>12</sup> Principles of this sort are different from more detailed *rules*, which apply to specific circumstances; the provision, 'If the minister shall refuse ... to baptise any ... infant, the parents ... may apply to the bishop',<sup>13</sup> is a rule rather than a principle: if X, then Y.

<sup>4</sup> Southern Africa, Canon 50.

<sup>5</sup> Central Africa, Canon 32.1.

<sup>6</sup> Nigeria, Const. Art. XIX.V.

<sup>7</sup> See N. Doe, 'The principles of canon law: a focus of legal unity in Anglican and Roman Catholic relations', (1998) 5 *Ecc LJ* 221.

<sup>8</sup> R. Dworkin, 'Is law a system of rules?', in R. Dworkin (ed), *The Philosophy of Law* (Oxford, 1977) 38.

<sup>9</sup> See generally *The Canon Law: Letter and Spirit* (1993) 77.

<sup>10</sup> England, Submission of the Clergy Act 1534; Wales, Const. XI.47; compare Australia, Can. 11 1992, 3(1): 'all canon law of the Church of England made prior to the Canons of 1603 ... shall have no operation or effect in a diocese'; however, 4: this lists the canons of 1603 which have no effect in a diocese but a right is reserved to a diocese to adopt them.

<sup>11</sup> Roman Catholic Code (1983) Canon 27.

<sup>12</sup> England, Canon A 8.

<sup>13</sup> England, Canon B 22.

### 3. *Theological Content of Canonical Principles*

Given the relationship between canon law and theology, it is not surprising that theological ideas surface in many canonical principles. Canonical principles are characterised not only by their generality, but also by expressing distinctive theological values, such as the provision in the canon law of the Anglican church in Korea that the laity 'must strive to live according to Christ's teachings, to preach the gospel and to realise God's justice in society'.<sup>14</sup> Some canonical principles, however, may have no obvious theological dimension. They may indeed be shared with secular legal systems, such as the principle that individuals should not be inflicted with penalties except in accordance with the law.<sup>15</sup>

### 4. *The Use and Usefulness of Principles*

Many Anglican churches formally appeal to principles in their own legal systems: in Australia, for example, 'a law ... shall be read as including a reference to [*inter alia*] a principle, a practice or a tradition of the Church of England'.<sup>16</sup> The law of the church in Kenya defines a 'canon' as 'any rule, law or decree laid down by the Provincial Synod as a fundamental principle governing any particular subject in relation to which it is made or enacted'.<sup>17</sup> And, of course, Anglican legal systems often contain texts styled 'Fundamental Principles' or 'Ruling Principles', many of which are shared with other Anglican churches.<sup>18</sup>

Principles are used by churches in particular as the foundation for more specific, detailed rules. The reason behind the principle is to give shape, coherence, meaning and purpose to clusters of individual rules. In the Church of England, for example, one device which is beginning to make its mark in church laws is the employment by draftsmen, at the opening of an enactment, of a 'general principle'.<sup>19</sup> In legal texts in the Roman Catholic Church, too, the word '*principia*' is frequently used.<sup>20</sup> Indeed, the same idea is seen in secular law; the Treaty of Rome, for instance, speaks of 'general principles of law common to the member states' of the European Union (Art. 215).

### 5. *The Location, Origin and Authority of Principles*

Needless to say, many canonical principles are written in the formal canon law, such as the principle of English canon law that 'Every bishop is the chief pastor of all that are within his diocese, as well laity as clergy, and their

<sup>14</sup> Korea, Canons 42–45.

<sup>15</sup> See eg Roman Catholic Code (1983), Canon 221.

<sup>16</sup> See eg Australia, Canon 18 1992.

<sup>17</sup> Kenya, Const. Art. 32.9.

<sup>18</sup> See N. Doe, *Canon Law in the Anglican Communion* (Oxford, 1998) Ch. 1.

<sup>19</sup> England, Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s. 1: 'General Principle ... 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>20</sup> See N. Doe, 'The principles of canon law', (1999) 5 *Ecc LJ* 229.

father in God' (Canon C 18). Other principles are located outside the formal laws. Some are written, some are unwritten; they operate as general propositions or foundations, and may be implicit in church laws. The principle of the separation of powers (shared with many secular legal systems), for example, is implicit in the laws of many Anglican churches: the law of the West Indies provides that the Provincial Synod may determine matters 'concerning the common life of the Church ... save and except ... such matters as lie within the jurisdiction of the Ecclesiastical Courts'.<sup>21</sup>

Again, in the Roman Catholic Church, the *regulae iuris* are to be found outside the Code of 1983, and are treated as *fontes*: that is, they are not themselves 'law', but 'the sources' or 'the formal causes of the existence of law'.<sup>22</sup> They are sometimes called 'legal proverbs',<sup>23</sup> such as 'No one can be obliged to do the impossible', or 'Necessity renders licit that which the law declares illicit'.<sup>24</sup>

Many principles may enjoy only the authority of the law in which they appear; the principle in Welsh church law that the minister and parochial church council must co-operate in the mission of the church enjoys the status of constitutional law in the Church in Wales.<sup>25</sup> By way of contrast, laws frequently portray a principle as having a deeper authority, beyond that of the formal law in which the principle appears, through the antiquity of its pedigree or its underlying spiritual origin. 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, the church 'believes that it was by the guidance of the Holy Spirit that those principles came to be recognised and those customs adopted'.<sup>26</sup>

## 6. *Underlying Assumptions*

It is possible, then, that there are principles of canon law, derived from the canonical tradition, that are common to all churches of the catholic and apostolic tradition. The recognition by churches of the idea of the principles of canon law suggests that canon law is perceived as a generic phenomenon. It is perceived as having an existence independent of the legal systems of particular communions and particular churches. Canon law and its principles overarch individual church legal systems.<sup>27</sup>

In this respect, we might speak of the same principles of canon law applicable to the Roman Catholic Church, the Eastern Catholic Churches, the

<sup>21</sup> West Indies, Const. Arts. 3,4.

<sup>22</sup> R. Ombres, 'Faith, doctrine and Roman Catholic canon law', (1989) 1 Ecc LJ 33.

<sup>23</sup> L. Orsy, *Theology and Canon Law* (Collegeville, Minnesota, 1992) 77.

<sup>24</sup> See A. Gauthier, *Roman Law and Its Contribution to the Development of Canon Law* (Ottawa, 1996).

<sup>25</sup> Wales, Const. VI,22.

<sup>26</sup> Constitution (1930), Declaration 11: 'Of the authority of the principles and customs set out in the preceding Declarations'.

<sup>27</sup> For this sort of approach, see eg R. E. Rodes, 'The canon law as a legal system—function, obligation and sanction', *Natural Law Forum* (1962) 45.

Orthodox Churches, and the churches of the Anglican Communion. In turn, the principles of the generic canon law are merely particularised in individual canonical systems. By way of analogy, canon law is postulated as an entity in the same way as, in the secular world, civil law or common law. In the secular world, the common law or the civil law are often postulated as having an existence independent of the States which operate them. The common law or the civil law is particularised in an individual secular State. As such, people talk of a *common law system* or a *civil law system*.<sup>28</sup> Similarly, Anglican legal systems are canon law systems.

In sum, the canonical tradition links Anglican churches to each other as well as to other ecclesial communions of the catholic and apostolic tradition. All these churches live out, in their juridical orders, the canonical tradition and its principles. Whether they are conscious of the fact or not, Anglican churches participate in, or belong to, the canon law tradition by perpetuating it through their own legal systems. The principles of the canonical tradition are foundational, expressing the fundamental values, sometimes with a high degree of generality, of the church and its juridical order.

## II. THE ANGLICAN COMMON LAW: AN UNWRITTEN *IUS COMMUNE*

There is no explicit, formal *corpus* of binding canon law globally applicable to all churches in the Anglican Communion. However, by implication fundamental Anglican canon law exists as an abstract but objective reality. Its basic principles can be induced from the factual coincidences of actual laws of each particular Anglican church.<sup>29</sup>

### 1. *From Observation to Similarities*

There are, as an evidential matter of fact, profound similarities between the actual laws of Anglican churches. Identifying the similarities is merely an exercise in careful, clinical observation. It is based on a comparison of legal texts, juxta-posing one with another. For instance: in the West Indies, 'general neglect of duty' is an ecclesiastical offence; in Papua New Guinea, 'neglect of duty'; in Canada, 'wilful or habitual neglect'; in Scotland, 'grave neglect'. The same basic formula applies in the overwhelming majority of Anglican legal systems.<sup>30</sup>

<sup>28</sup> See Walker, *Oxford Companion to Law* (Oxford, 1980) 253. 'Common Law Systems' (eg UK, USA).

<sup>29</sup> P. Thomas, 'A family affair: the pattern of constitutional authority in the Anglican Communion', in S.W. Sykes (ed), *Authority in the Anglican Communion* (Toronto, 1987) 119: in an introductory survey of constitutions, the author was 'impressed by the measure of agreement and the flexibility of faith which they display. It seems to me that a comparative study of this material could reveal a distinct pattern of authority and thereby encourage a clearer understanding of Anglican self-consciousness today'.

<sup>30</sup> See N. Doe, *Canon Law in the Anglican Communion*, 84.

## 2. *The Role of Common Sources*

Needless to say, each Anglican church is responsible for the existence of these legal similarities. Normally, a similarity is produced because different churches have used the same common, historical source for a legal provision. For example: in England, in an instrument of 1955, attendance at worship is listed as a duty of church membership. It is listed as a duty of church members in Southern Africa, Chile, Mexico and Korea. Probably these provisions were based on a resolution of the Lambeth Conference 1948 setting out attendance as one of the duties of church membership.<sup>31</sup> Similarly, as one might expect, shared liturgical and ritual principles are the result of churches using the rubrics of the *Book of Common Prayer* 1662 as a common source, such as the requirement to instruct candidates before confirmation.<sup>32</sup>

## 3. *From Similarities to Shared Principles*

A consequence of actual legal similarities is the possibility of identifying shared principles. This, too, is a scientific task. Many shared principles emerge from the similarities between Anglican legal systems. For instance: from similar rules on 'excommunication', 'suspension', 'exclusion', or 'repulsion' from holy communion, may be induced the principle that eucharistic discipline is ultimately in the keeping of the bishop.<sup>33</sup> The theological basis for exclusion may be found in scripture,<sup>34</sup> and doctrine,<sup>35</sup> and the historical antecedents of the principle are rooted in the canonical tradition.<sup>36</sup> The similarities of texts on excommunication produce a general proposition, which underscores a fundamental ecclesial value. Indeed, it is sometimes possible to recast the principle as a more specific *rule*: the excommunication provisions, for example, could be recast as: if an individual engages in certain proscribed forms of conduct, then that person may be excluded from holy communion.<sup>37</sup> In this sense, from the similarities both general principles and more detailed rules may be induced.

## 4. *From Shared Principles to Common Law*

The process of observation and induction indicates the unwritten common law of the Anglican Communion—what may be styled the Anglican common law.<sup>38</sup> The collective effect of similarities between individual legal sys-

<sup>31</sup> N. Doe, *Canon Law in the Anglican Communion*, 166; Lambeth Conference 1948, Res. 37.

<sup>32</sup> See eg Melanesia, Canons. A.3-A-D; Ireland, Const. IX.28(1); see also the Canons Ecclesiastical 1603, Canon 61.

<sup>33</sup> See N. Doe, *Canon Law in the Anglican Communion*, 266.

<sup>34</sup> Matt. 18 : 17; 1 Cor 5 : 1–5.

<sup>35</sup> Thirty-Nine Articles of Religion, Art. 33.

<sup>36</sup> See eg Canons Ecclesiastical 1603, Canon 26.

<sup>37</sup> See eg Wales, *Book of Common Prayer* 1984: here the provision itself is cast as a rule: 'If they do not heed the warning [of a priest about their conduct], the Priest shall report the matter to the Bishop and proceed as he directs'.

<sup>38</sup> In the common law tradition, of course, classically the unwritten common law is induced from judicial decisions, among other sources.

tems, and the shared principles which emerge from them, is the *ius commune* of the Anglican Communion. The common law is not imposed from above. On the contrary, the common law grows from, or is already immanent in, the similarities between Anglican legal systems. (By way of contrast, in the Roman Catholic Church, the Code of Canon Law (1983) was promulgated for the worldwide Latin church, from top to bottom so to speak, by the universal and supreme authority of the Pope.)

##### 5. *Individual Churches Make the Common Law*

The immanence of common principles in actual legal similarities, means that each Anglican church is the legislator of the common law. Whenever a single church legislates, it contributes to the common law. And the law which an individual Anglican church makes may function as a precedent for other churches. The other churches are autonomous, but as a matter of practice they follow or adopt precedents from (ie provisions already contained in) the legal systems of fellow Anglican churches. When it was founded in 1920, for example, the Church in Wales adopted an abundance of provisions already found in the law of the Church of Ireland and the Church of England.

The chronology is simple. One Anglican church unilaterally legislates on a subject; it creates a rule which becomes a binding piece of its own legal system. Another Anglican church, in the development of its own legal system, may follow that church and create similar law; or it may use a common source shared with that church as the basis of its legislative action. And then another church follows suit. And so on. The adoption of the same rule by other churches adds to the store of similarities, and, in turn, these similarities generate a shared, common principle. The pattern is cyclic. For example: Canon 21 of the Fourth Lateran Council 1215 forbids priests to breach the seal of the confessional; this general principle is repeated by the Church of England in Canon 113 of the Canons Ecclesiastical 1603; and it is adopted by the province of Southern Africa (where the prohibition today appears in its Prayer Book of 1989). In other words, unilateral legislative action by one Anglican church, which repeats or adopts a particular provision found in an earlier legal source in another church, multiplies the authority of the principle.

The introduction by a church of new rules may also generate the development of common law, when this new rule is replicated in other churches. For example: churches are increasingly creating laws to forbid racial discrimination in the membership and government of the church;<sup>39</sup> also, churches are developing rules on the admission of the unconfirmed to holy communion.

<sup>39</sup> See eg Uganda, Const. Art. 3: 'In conformity with established Christian doctrine, the Church of this Province shall proclaim and hold that all people have equal value, rights and dignity in the sight of God, and, while mindful to provide for the special needs of different people committed to its charge, shall not allow discrimination in the membership and government of the Church solely on the grounds of colour, sex, tribe or region'.

particularly children.<sup>40</sup> Such examples may indicate the evolutionary character of the *ius commune* of the Anglican Communion.<sup>41</sup>

There are, of course, differences between the legal systems of Anglican churches. However, much of the time differences, and arguably conflicts, between the details of laws are in the nature of conditions under which shared principles are applied. The principles are shared, differences exist with regard to their detailed application in each church.<sup>42</sup> For example: laws vary as to the grounds for exclusion from holy communion; these include: 'living in grievous sin' (England); 'malice and hatred' (Canada); 'bringing the church into disrepute' (Wales); 'indictable offences' (West Indies). The laws of all churches spell out the grounds for exclusion. Whilst the grounds vary, the principle of exclusion from communion is common to all churches. The variety of grounds are simply different means to the same end: regulating admission to holy communion.

#### 6. *The Nature of the Common Law*

In what sense, technically, might the shared principles represent a common law? (1) The common principles are unwritten, but they are knowable and capable of articulation; sometimes, the principles may be recast as more detailed rules. (2) The principles are induced from similar decisions made by individual churches and embodied in their laws. (3) These decisions may function as (persuasive) precedents for other Anglican churches and become binding when incorporated into their own law. (4) The fact that principles are or become shared in common by churches is the result of an evolutionary process. (5) The principles have the appearance of laws: they are culled from legal rules, and they are prescriptive in nature, expressed as rights and duties. (6) The principles are often rooted, in turn, in the principles of canon law and the canonical tradition. (7) For some churches, the 'principles of canon law' are enforceable directly by authorities within those churches which explicitly recognise them. (8) The individual legal systems from which the principles are induced are themselves binding in the particular church within which they operate. (9) Many common principles are fundamental to the nature of the church, and their authority and the respect owed to them are based on the consensus between churches which is evidenced in their similar laws. (10) As an exercise of their own autonomy, Anglican churches may depart from the general principles of the common law.

<sup>40</sup> For developments in New Zealand, Australia and England, see N. Doe, *Canon Law in the Anglican Communion*, 264ff.

<sup>41</sup> The idea is an old one for Anglicans: see eg R. Helmholz, 'Richard Hooker and the European *Ius Commune*', (2001) 6 *Ecc LJ* 4.

<sup>42</sup> For the difficulties of induction and the formulation of its general principles see N. Doe, *Canon Law in the Anglican Communion* (Oxford, 1998) 374, 375: sometimes there is unanimity, sometimes a majoritarian approach has to be used to induce a principle, sometimes principles are induced from the silence of laws.

### 7. Analogies with Secular Common Law Systems

In these respects, the Anglican experience of its common law is very much like the experience of secular common law systems. In these too, classically: the common law is unwritten; it originates in a decision which functions as a precedent; these decisions are followed in subsequent and similar cases; general principles emerge from single precedents; the common law is developed in an evolutionary manner; departure from a precedent is permissible if it is right and just to do so; and principles of the common law are formulated inductively from single cases and the similarities between them.<sup>43</sup>

### 8. Examples of Shared Principles of the Common Law

From the juridical evidence in each church, it is possible to state the principles of the common Anglican canon law: some facilitate, others order and limit; most are familiar, and many self-evident; what is striking is the range and depth of these principles.<sup>44</sup> Whilst the following is not exhaustive, in relation to ecclesiastical government, in which churches share a high degree of legal unity in their institutional organisation: final competence to legislate for a church rests with its central legislative assembly representative of the bishops, clergy and laity; special procedures must be followed for the amendment of constitutions;<sup>45</sup> churches are episcopally led and synodically governed;<sup>46</sup> governance must be according to law;<sup>47</sup> disciplinary processes must give rights to be heard and to appeal.<sup>48</sup>

Principles of ministry include: ordained ministry is exercised by the three-fold ministry of bishops, priests and deacons; diocesan bishops should be elected; bishops exercise general oversight of the governing, teaching and liturgical life of a diocese; removal of bishops is for the collective action of bishops in an individual church; ordination must be episcopal; the right to determine suitability for ordination ultimately belongs to the bishop; clerical ministry must be authorised by the diocesan bishop; clergy owe a duty of canonical obedience to the bishop.<sup>49</sup>

With doctrine and liturgy: the sources of doctrine are scripture, the creeds, the dominical sacraments; clergy must assent to canonical doctrines; liturgy

<sup>43</sup> There may also be parallels between the Anglican common law and international law.

<sup>44</sup> Some are clearly fundamental, whilst others relate to the detail of church life.

<sup>45</sup> It is only in the conditions under which law-making power may be exercised, and the composition of legislatures, that diversity is found: see N. Doe, *Canon Law in the Anglican Communion*, Chs. 1 and 2.

<sup>46</sup> Bishops, clergy and laity collectively possess the power of governance; compare the Roman Catholic Code (1983), Canon 129: only clergy possess the power of governance.

<sup>47</sup> Legislative, executive, quasi-judicial and judicial powers, including episcopal powers, must be exercised in accordance with law; the rule of law is a fundamental of all legal systems, civil and ecclesiastical.

<sup>48</sup> See N. Doe, *Canon Law in the Anglican Communion*, Ch. 3: this is something shared, of course, with secular legal systems.

<sup>49</sup> Doe, Chs. 4–6.

must be in accordance with the doctrine of the church; liturgical life should be characterised by flexibility.<sup>50</sup> Principles applicable to rites include: no minister should refuse baptism of infants; marriage is effected by the exchange of consents; exclusion from holy communion ultimately belongs to the bishop; the seal of the confessional is inviolable.<sup>51</sup> These, and other principles applicable to church property, even down to the principle that ecclesiastical registers must be kept,<sup>52</sup> might be multiplied. Equally, though, the juridical evidence suggests which principles are not part of Anglican canon law; often there is insufficient juridical evidence to suggest a general principle.<sup>53</sup>

In sum, the construction of the principles of the common law, what Anglican legal systems have in common, is a scientific task. It is based on the extraction of common provisions shared by churches in the Anglican Communion. These coincidences, and the principles which flow from them, indicate well, even define, the nature of the Communion itself: individual canonical systems, and the common law derived from them, represent a concrete expression of the very character of Anglicanism and Anglican polity.

### III. CRITERIA TO RECOGNISE THE COMMON LAW: METHODOLOGY

The Revd Wayne Hankey wrote in an essay in 1988: ‘the diversity of the canon law and the attitudes toward it in the various Anglican Churches is overwhelming ... Strict legal uniformity is not to be expected in the Anglican Communion, nor can it be found. But there are common legal traditions and patterns. The Communion has a unity in fundamental canon law, although it cannot be doubted that this unity is at risk’.<sup>54</sup> The following section, therefore, raises questions of critical practical importance to the search for the unwritten common law of the Anglican Communion: When does a similarity between Anglican legal systems become a candidate principle for the unwritten common law of the Communion? What method might be used to establish whether there is a principle of common law on a particular subject? The following may be offered as criteria to recognise whether a proposition becomes part of the Anglican common law:

1. If a provision appears in the laws of all Anglican churches, then the principle induced from the similarities shared by those laws is a principle of the

<sup>50</sup> Doe, Chs. 7 and 8.

<sup>51</sup> Doe, Chs. 9 and 10.

<sup>52</sup> Doe, Ch. 11: churches are united in that oversight of property belongs to the central church assembly, but that ownership and management at the lower levels of the church are vested in local ecclesiastical authorities, and that church buildings cannot be used for profane purposes.

<sup>53</sup> It is not a general principle that: episcopal visitation is a duty (in some churches it is, in others it is discretionary); courts have jurisdiction over the laity (in some they do, in others they do not); decisions of church courts are creative of law (in a small minority they are); the rights and duties of the laity must be defined (in a small number of churches they are); the laity must assent to the canonical doctrines.

<sup>54</sup> W. Hankey, ‘Canon law’, in S.W. Sykes and J. Booty (eds), *The Study of Anglicanism* (London, 1988) 200.

Anglican common law. For example: in all churches, candidates for admission to the office of diocesan bishop must be elected to that office. The basis of the principle is unanimity.<sup>55</sup> And/or:

2. If a provision is found in the laws of a majority of Anglican churches, then from the similarities of the laws emerges a general principle of the Anglican common law. For example: a minister duly ordained as priest or deacon may officiate in any place after he has received authority to do so from the bishop of the diocese.<sup>56</sup> The basis of the principle is agreement between the majority of churches. And/or:

3. If a provision is found in the laws of a minority of churches but its underlying principle is accepted by other legal traditions, then it is a strong candidate for inclusion in the canonical common law. For example: later laws abrogate earlier laws. The basis of the principle is that it is understood to be a principle of law. And/or:

4. If a proposition found in actual laws were reversed, and that reversed proposition would not be accepted as a part of the Anglican common law, then the original proposition may be part of the common law. For example: the unacceptability of the proposition that ‘assistant bishops are NOT subordinate to the overriding jurisdiction of the diocesan bishop’ would suggest that the proposition ‘assistant bishops are subject to their commissioning bishop’ is a principle of Anglican common law.<sup>57</sup> The basis of the principle is the unacceptability of its reversed form. And/or:

5. If the principle induced from the similarities of actual laws is traceable back to a common, historical source, then it is a part of the Anglican common law, even when some laws may be silent on the matter. For example: clergy must obey the lawful commands of their bishops.<sup>58</sup> The basis of the principle is a common source. And/or:

6. If the provision in actual laws can be traced to, or if it equates with, a principle of the canonical tradition, then it may be treated as common law. For example: priests and deacons must not engage in any occupations or habits which are inconsistent with their sacred calling.<sup>59</sup> The basis of the principle is canonical tradition. And/or:

7. If the principle which emerges from similarities of actual laws is a general, foundational proposition expressing a basic ecclesial value, it may be part of the common law, even if it does not appear in the formal laws of all churches.

<sup>55</sup> For the evidence from actual laws, see N. Doe, *Canon Law in the Anglican Communion*, 109f.

<sup>56</sup> Doe, 145.

<sup>57</sup> Doe, 120ff.

<sup>58</sup> See *Book of Common Prayer* 1662, The Ordering of Priests: ‘Will you reverently obey your Ordinary ... and submitting yourselves to their godly judgments?’ This is found in the vast majority of churches; see eg Australia, Canon 15, 1998: ‘An oath or affirmation of canonical obedience shall be taken by a member of the clergy on ... ordination ... first licensing ... consecration as an assistant bishop’.

<sup>59</sup> See N. Doe, *Canon Law in the Anglican Communion*, 144.

For example: a priest must not disclose information received in the confessional.<sup>60</sup> The basis of the principle is a fundamental ecclesial value (in this case, trust). And/or:

8. If the principle has explicitly or implicitly a distinctive theological dimension, then it may be part of the common law. For example: confirmation is validly administered by the episcopal laying on of hands. And/or:

9. If the principle emerging from actual laws is recognised by churches as one held in common with churches of the Communion, it is part of the *ius commune*. For example: there should be no discrimination in the membership and government of the church.<sup>61</sup> The basis of the principle is face validity or perception. And/or:

10. If the principle is different from, or in conflict with, the laws of a minority of churches, but the difference or conflict is capable of reconciliation, it may still be common law. For example: in some churches deposition from holy orders is reversible (eg Wales), but in others it is not (eg Nigeria). Yet all churches operate the principle that clergy may be lawfully deposed in appropriate cases. The basis of the principle is reconciliation. And/or:

11. If the breach of the alleged principle results in disagreement, or crisis, at the global level of the Communion, it may be a principle of the common law when it has been induced from concrete similarities between laws.

#### IV CHALLENGES AND OPPORTUNITIES: POLICY CONSIDERATIONS

##### 1. *Weaknesses of the Canonical Contribution: Burdens*

(1) Acknowledgement of an Anglican common law may be perceived by churches as a threat to their autonomy. On the other hand, the common law may be perceived as the result of an exercise of the autonomy of churches, and their promotion of communion through their contributions to it. The bottom line is that autonomy means they are free juridically to depart from the common law.

(2) Acknowledgement of the common law raises too many questions about its authority and its enforcement. The idea that its authority derives from the consensus of churches, expressed in the similarities between legal systems which generate the common law, may be too complex.

(3) There are too many methodological problems which obstruct an articulation of the principles of the Anglican common law. It may be thought that its principles lack precision, meaning and clarity.

(4) It may be thought that the common law would contribute to global divisions, disagreement and conflict between Anglican churches.

<sup>60</sup> See eg England, Canons Ecclesiastical 1603, Canon 113.

<sup>61</sup> For an example of this, see note 39 above.

## 2. *The Canonical Contribution to Anglican Unity: Benefits*

(1) An examination of the coincidences between individual canonical systems discloses a high degree of juridical similarity and unity among churches of the Anglican Communion. From these emerge, as a result of scientific observation, an abundance of common principles. Recognition of the common law is simply a statement or description of fact.

(2) Individual legal systems, and the shared principles extracted from them forming the Anglican common law, are a concrete expression of the very character of Anglicanism. The collective effect of the similarities between individual canonical systems is a major contribution both to Anglican identity and to cohesion in the Communion.

(3) An acknowledgement of the Anglican common law, as an instrument of Anglicanism, promotes Anglican unity at the global level, and it protects the integrity of fundamental principles shared by churches in the Communion. Recognition of the common law makes these more evident. Indeed, acknowledgement that particular Anglican churches contribute to the common law underscores their individual responsibility in shaping Anglican identity and in maintaining Anglican integrity.

(4) Recognition of the principles of canon law, and their role as a foundation of the common law, indicates that each church shares in the inherited canonical tradition: they particularise the generic canon law to their own circumstances. This is a real contribution to global unity and to ecumenical understanding and dialogue with non-Anglican churches which participate also in the canonical tradition.

(5) Acknowledgement of the common law may reduce the likelihood of inter-Anglican conflict. An understanding of first principles may also function as a practical aid to canonical development in churches.<sup>62</sup>

<sup>62</sup> *Postscript*: The Anglican Communion Legal Advisers' Consultation (6–13 March 2002) tested the hypothesis proposed in this paper, and it agreed on 44 principles induced from actual legal systems. The Consultation concluded: '1. There are principles of canon law common to the Churches within the Anglican Communion. 2. Their existence can be factually established. 3. Each Anglican Province or Church contributes through its own legal system to the principles of canon law common within the Anglican Communion. 4. These principles have a strong persuasive authority and are fundamental to the self-understanding of each of the Churches of the Communion represented amongst us. 5. These principles have a living force, and contain in themselves the possibility for further development. 6. The existence of these principles both demonstrates unity and promotes unity within the Anglican Communion'. See the report of the Consultation at (2002) 6 Ecc LJ 399. In turn, following a report on the Consultation to the Primates' Meeting at Canterbury in April 2002, 'The Primates recognized that the unwritten law common to the Churches of the Communion and expressed as shared principles of canon law may be understood to constitute a fifth "instrument of unity" ... Given that law may be understood to provide a basic framework to sustain the minimal conditions which allow the Churches of the Communion to live together in harmony and unity, the observances of the ministry of Word and Sacrament call us all to live by a maximal degree of communion through grace'. On the recommendation of the Primates' Meeting, the Anglican Consultative Council, in September 2002, approved the establishment of an Anglican Communion Legal Advisers' Network: its tasks will be to produce a statement of the principles of canon law common to the churches, and to examine shared problems and possible solutions.