TOWARD A CRITIQUE OF THE ROLE OF THEOLOGY IN ENGLISH ECCLESIASTICAL AND CANON LAW

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1. INTRODUCTION

The Roman Catholic canonist is assisted by a number of factors in writing about canon law. The rules of Roman canon law are contained mainly in the 1983 Code, comparisons may be made with the 1917 Code, and appeal may be made to the official teaching of the Church as a yardstick against which to explain or criticise the Church's present substantive law. But above all, the Roman canonist has the tradition of centuries to which reference may be made for the method by which he/she discusses canon law; a method of scholarship, learning, exposition and criticism which has been distilled and handed down by generations of canonists. Not least, of course, the Roman canonist has the benefit of formal training in his discipline. For the Anglican, however, writing about canon law is difficult. The canonist who comments on the law of the Church of England, for example, has a wealth of sources to hand: that is unquestioned. But there is no immediate native or indigenous method, or style of approach, to which appeal may be made in the exposition of the Church's law. We are told, nevertheless, that canon law has a theological basis and it is the purpose of this essay to draw out the implications of this proposition for the Anglican canonist and his/her methodology, to examine this idea against the developing methodology of the Anglican canonist, to expose the problems that it entails and to apply it to a selected group of actual principles and practices in English ecclesiastical and canon law.

2. DEVELOPING A METHODOLOGICAL APPROACH TO CHURCH LAW

The object of the Ecclesiastical Law Society, as stated in its constitution, is the promotion of the study of ecclesiastical law, for the benefit of the public, through the education of those who hold authority or judicial office or who practise in the courts of the Church of England, through enlarging the knowledge of and learning in ecclesiastical law among the clergy and laity of the Church of England (and churches in communion with it), and through practical assistance to the governing bodies of the Church of England.[1] The educative role of the Society has been achieved through conferences, working parties and more informal discussion groups, and, not least, through the Society's journal. And the importance of the journal cannot be over-emphasised. The *Ecclesiastical Law Journal* is now the central written medium by which English ecclesiastical and canon law is presented for public view.

The journal, as an educative device, expresses several styles of methodology in the handling of ecclesiastical law. Since the first issue in July 1987 English Church law has been described, unravelled, developments explained,

1. The Constitution and Rules of the Ecclesiastical Law Society, 1, 2, (1988) 1 Ecc. L.J. (3) 41.

defects exposed, shortcomings criticised and reforms suggested. Normally, however, discussions appearing in the journal, and at Society conferences, have concentrated in the main upon expositions of the actual rules of English Church law.[2] At this time, in the formative period of the renaissance of canon law in the Church of England, such descriptions are without question a considerable advance in the learning of Church law and valuable contributions to the exchange of ideas and the enlargement and up-dating of literature in this field. Yet, the methodology of treating these rules has not been purely legalistic. There have been notable occasions when writers have woven into their descriptions of English Church law discussions from historical,[3] ecumenical,[4] comparative (though there have been few comprehensive attempts at relating Anglican arrangements to that of, for example, the Roman Catholic Code of Canon Law),[5] and sometimes civil law perspectives.[6] The incipient methodology in these commentaries is one in which appeal is made to past canonical practices, canonical practices of other Churches, and, importantly though less conspicuously, appeal to analogous themes in civil law. By and large in the journal, however, discussions of canon law from a theological perspective, strangely, have been neglected (though there have been some worthy exceptions such as David Harte's account of the role of doctrinal considerations in the exercise of the faculty jurisdiction,[7] or the paper given at the Cardiff Conference in 1991 on marriage discipline). On these occasions, admirable attempts have been made to extricate the subject from a legal vacuum and to expose the theological integrity and legitimacy of canon law.

In short, commentators on English Church law are finding their feet, so to speak, in formulating a methodology by which to examine the subject. The modern criminal law commentator naturally turns to large moral ideas as a crucial yardstick for discussion and criticism of the criminal law. The commentator on tort law turns to social ideas of fault and policy in the treatment of actual rules. The constitutional lawyer turns to the aims and objectives of political practice and science. However, the modern Anglican canonist may have become, in a sense, severed from the rich canonical traditions of the past, principally the canonical tradition of subjecting the rules of canon law to a rigorous analysis against the central Christian theological doctrines and against the rules of other legal systems (principally, traditionally, Roman law). Indeed, one of the achievements of

2. See, for example, T. Coningsby, 'An honourable estate – a personal view of the Report of the Working Party of the General Synod', (1988) 1 Ecc. L.J. (3) 10; R. D. H. Bursell, 'What is the place of custom in English canon law?, (1989) 1 Ecc. L.J. (4) 12; D. McClean, 'Women priests – the legal background', (1989) 1 Ecc. L.J. (5) 15; J. D. C. Harte, 'The religious dimension of the Education Reform Act 1988', (1989) 1 Ecc. L.J. (5) 32; C. C. A. Pearce, 'The roles of the Vicar-General and Surrogate in the granting of marriage licences', (1990) 2 Ecc. L. J. 28; P. Sparkes, 'Exclusive burial rights', (1991) 2 Ecc. L. J. 133.
3. See E. Kemp, 'The spirit of the canon law and its application in England', (1987) 1 Ecc. L. J. (1) 5; E. Kemp, 'Legal implications of Lambeth', (1989) 1 Ecc. L. J. (5) 15; J. H. Baker, 'The English law of sanctuary', (1990) 2 Ecc. L. J. 8; R. D. H. Bursell, 'The seal of the confessional', (1990) 2 Ecc. L. J. 84.
4. Q. Edwards, 'The canon law of the Church of England: implications for unity', (1988) 1 Ecc. L. J. (3) 18; C. Hill, 'Rome, Canterbury and the law', (1991) 2 Ecc. L. J. 164.
5. See, for instance, D. McClean, 'State finance for European Churches', (1990) 2 Ecc. L. J. 116; T. G. Watkin, 'Vestiges of establishment: the ecclesiastical and canon law of the Church in Wales', ibid., 110; W. J. Hemmerick, 'The ordination of women: Canada', (1991) 2 Ecc. L. J. 177.
6. R. G. Routledge, 'Blasphemy: the Report of the Archbishop of Canterbury's Working Party on Offences Against Religion and Public Worship', (1989) 1 Ecc. L. J. (4) 27; I. Leigh, 'Regulating religious broadcasting', (1990) 2 Ecc. L. J. 287.
7. J. D. C. Harte, 'Doctrine, conservation and aesthetic judgments in the Court of Ecclesiastical Causes Reserved', (1987) 1 Ecc. L. J. (2) 22; T. Coningsby, op cit., 10-12; Viscount Brentford, 'In favour of keeping Sunday "special" ', (1990) 2 Ecc. L. J. 14; J. M. Hull, 'Religious education and Christian values in the 1988 Education Reform Act', ibid., 69.

modern historical canonical study has been to reveal the diversity of extra-canonical ideas which ecclesiastical lawyers in the past employed in their expositions of the substantive rules of canon law. Both Richard Helmholz and Walter Ullmann have, recently, uncovered these canonical practices, particularly in the medieval period.[8] More to the point, this should be possible, for the modern Anglican canonist, in relation to much, if not all, of contemporary ecclesiastical and canon law.

As Father Robert Ombres pointed out in a paper given to the Society and published in this journal in 1989,[9] there is not only a theology of canon law but also a theology in canon law, and it should be the task of Anglican canonists as a matter of habitual practice or routine, given the setting of law within the Church, to expose the theological basis and purpose of ecclesiastical and canon law in the treatment of its substantive rules. In point of fact, most articles in Roman Catholic journals on canon law (such as *The Jurist, Studia Canonica* or *Concilium)* start from, or contain, discussions about the theological basis of actual rules of Church law. Admittedly, this is an exercise more easily achieved given the abundant availability of official documents expressing the teaching of the Roman Catholic Church, especially after the Second Vatican Council. The appeal to theology by Roman canonists in their expositions of canon law is embodied in their principle of interpretation that 'the Council governs the Code'. As James Coriden puts it: 'The theology of the Church articulated at the Council . . . is the context for approaching and applying the law'; 'Many hundreds of the canons of the revised Code are directly derived from or inspired by documents of the Council', and 'It is in those documents and their conciliar elaboration that the true background, context and meaning of the canons are to be found'.[10] But in this journal, as suggested above, the practice, style and perspective of Church of England canonists have been rather different. The practical approach to English canon and ecclesiastical law is, of course, understandable and necessary, but it is not too trite an observation to say that the Church of England is Christ's Church, and His teaching, and that of the Church itself, are the fundamental desiderata towards which the Church's law, and its makers and administrators, must move.

Later on in this essay we shall examine some basic principles of English ecclesiastical law, including those concerning synodical legislative supremacy and the judicial doctrines of precedent, in the context of theological doctrine. It is not proposed that the theological approach to canon law, with all the benefits and burdens that such an approach involves, should oust the historical, comparative or civil-law approaches. The suggestion is that in the literature which Anglicans are beginning to produce about their systems of canon law (in the Church of England and in the Church in Wales) the theological setting of a legal subject ought to be given due prominence.

3. REFINING THE METHODOLOGY: THE THEOLOGICAL STUDY OF CHURCH LAW

The study of Church law stands at the intersection of so many different disciplines. We have already suggested that Anglican canonists in England and

8. R. H. Helmholz, *Roman Canon Law in Reformation England* (Cambridge, 1990) especially Chapters 4 and 5; W. Ullmann, *Law and Politics in the Middle Ages* (London, 1975) 119-189; see also S. Kuttner, 'Some considerations on the role of secular law and institutions in the history of canon law', in S. Kuttner, *Studies in the History of Medieval Canon Law* (Variourum, Aldershot, 1990) Chapter 6.
9. R. Ombres, 'Faith, doctrine and Roman Catholic canon law', (1989) 1 Ecc. L. J. (4) 33.
10. J. A. Coriden, 'Rules for interpreters', in J. Hite and D. J. Ward (eds.), *Readings, Cases, Materials in Canon Law* (Liturgical Press, Collegeville, 1990) 145 at 158-159.

Wales are breaking new ground in formulating their own methodology in the study and exposition of canon law. This is facilitated by the wealth of sources to which appeal may be made to elucidate and clarify our understanding of actual rules – by reference to their history, development, social setting, their place as against rules in civil law, and canonical systems of other Churches. Moreover, this bringing into play, in the exposition of rules, extra-legal ideas and ideas from other legal systems is one of the achievements of academic study in modern non-ecclesiastical legal subjects. Much work has been done in recent years on the nature of legal reasoning, formal reasoning (and the appeal by practising and academic lawyers to statutes, judicial decisions and other types of formal legal rule) and consequentialist reasoning, which involves appeal to moral argument, matters of public policy, purposive argument (discovering the purpose for which particular rules are made) and looking to the consequence for society in applying a given rule in any case.[11] Legal rules do not exist in a vacuum. They are the product or working out of political ideas, moral ideas, particular sociological standpoints, economic interests and social engineering. And the methodology of the civil lawyer, in the exposition of secular law, has reached a degree of sophistication far beyond the simple concentration upon rules. The appeal to policy, economics, history, sociology and moral philosophy has entered the civil lawyer's mind to such a degree that it is not putting it too strongly to suggest that the civil lawyer approaches his subject widely from many perspectives and not narrowly, simply from the perspective of legal rules. To this extent there has in recent years been a radical departure from the spirit of classical positivism characteristic of last century.

The same ought, of course, to be the case for the ecclesiastical lawyer. Garth Moore emphasised in his book that 'The basis of the canon law is theological', and that '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'.[12] The same is true for the practitioner of ecclesiastical law: ecclesiastical legislation enacted by the General Synod is made, as we shall see, from theological as well as practical motives, and the ecclesiastical judge often appeals to matters of pastoral concern in his disposing of ordinary cases.[13] Indeed, the need to weave theology into expositions of ecclesiastical law (as Garth Moore made every attempt to achieve in legal discussions in his book) is produced by virtue of the subject-matter of ecclesiastical law (dealing as it does with rules about the worship of God, about the sacraments, about the responsibilities that individuals and institutions owe to the Church). Ecclesiastical law is also something of a theological discipline by virtue of its objects and purposes. The *Report of the Archbishops' Commission on the Canon Law of the Church of England* (1947) stressed that Church law aims to promote the Church's 'purpose as an institution for the help of [people] in their following of our Lord'; to this end 'in its legislative activities the Church is guided by the criterion of utility . . . to have such laws in force as to assist it in its work of training up the followers of our Lord

11. See, for example, N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford, 1978); J. Raz, *Practical Reasons and Norms* (London, 1975) 35-48, and *The Authority of Law* (Oxford, 1979) 30-33. For similar trends in American jurisprudence, see for instance, R. A. Wasserstrom, *The Judicial Decision* (Stanford, 1961) and B. N. Cardozo, *The Nature of the Judicial Process* (Yale, 1977). See, for the use of extra-legal ideas in specific areas of substantive English law, W. Twining (ed.), *Legal Theory and Common Law* (Oxford, 1986).
12. E. G. Moore and T. Briden, *Moore's Introduction to English Canon Law* (2nd ed., London, 1985) 1.
13. J. D. C. Harte, op cit., at 25. See footnotes 35-44 below.

. . . and to prevent anything creeping into [the Church's] life that may hinder it from performing its proper functions'.[14] The purpose of Church law, then, is in part spiritual: its purpose is fixed by determining the purpose of the Church. In so far as any statement about the purpose of a given rule of canon law ought to be a statement about the purposes of the Church, so such statements necessarily become theological statements: rules expressing a particular ecclesiology are by nature expressing theological ideas. Lastly, ecclesiastical law is connected to theology by virtue of its sources. If we accept that Church law, most widely, is composed not only of rules created by the Church for itself (canon law properly so called), nor of rules created for the Church by the State (public ecclesiastical law), but also of rules created for the Church by God (the divine law),[15] then, again, at least two of its fundamental sources are theological. Indeed, Garth Moore himself listed theology as a source of canon law: 'Theology, to be culled from the usual theological sources . . . the Bible . . . patristic writings . . . liturgical formularies . . . [I]n order to ascertain the law of the Church, it is at times necessary to return to first principles, and that the main structure of the canon law is based on the (often hidden) foundations of theology'.[16]

To comprehend more fully the idea that canon law has a theological basis, we may look with benefit at this point to some observations of the Roman Catholic canonist Teodoro Urresti. His comments clarify in a general sense the difficulty for any canon lawyer, Roman Catholic, Orthodox, Nonconformist or Anglican. For Urresti, the study of the nature of the Church, as instituted by Christ, is a theological study. So, 'The results of this theological study will form the data for the discipline of Canon Law'.[17] It is our understanding of the Church, and its nature, which moulds our view of Church law and its purposes. In so far as canon law is derived from theological ideas, from ecclesiology (our view of the Church and its purposes), Urresti suggests that there is a 'theology of canon law' and a 'theology in canon law' (as we have seen, an idea also used by Robert Ombres). The theology in canon law consists of those theological statements which come to the surface in specific, actual canonical rules. Indeed, Roman Catholic canonists such as Eugenio Corecco suggest that the whole corpus of Church law expresses an ecclesiology: in relation to the 1983 Code Correcco says that this 'contains two ecclesiologies, which can be defined as being of *societas* and of *communio*'.[18] And, as Pope John Paul II emphasised, in promulgating the new Code in the Apostolic Constitution *Sacrae Disciplinae Leges* in 1983, 'this new Code could be understood as a great effort to translate [the Second Vatican Council's] doctrine and ecclesiology into *canonical* language'.[19] The theology of canon law is that set of ideas, for example, which relate to the purposes of the

14. *Report of the Archbishops' Commission on the Canon Law of the Church of England* (SPCK, London, 1947) see generally 3-5.
15. For the incorporation of divine law into the definitions of canon law by Roman Catholic canonists, see, for example, G. May, 'Ecclesiastical law', in K. Rahner (ed.), *Encyclopedia of Theology* (London, 1981) 395. For ideas about the juridical nature of scripture, see for instance, P. S. Minear, *Commands of Christ* (Edinburgh, 1972) 12-15, and J. Knox, *The Ethic of Jesus in the Teaching of the Church* (London, 1961) 48-51, 97-99. See also, W. Steinmuller, 'Divine law and its dynamism in Protestant theology of law', (1969) 8 *Concilium* (5) 13.
16. Moore, op cit,. 9.
17. T. J. Urresti, 'Canon law and theology: two different sciences', (1967) 8 *Concilium* (3) 10. See also his 'The theologian in interface with canonical reality', (1982) 19 *Journal of Ecumenical Studies* (2) 146.
18. E. Corecco, 'Ecclesiological bases of the Code', (1986) 185 *Concilium* 3.
19. For the Apostolic Constitution see J. A. Coriden, T. J. Green and D. E. Heintschel, *The Code of Canon law: A Text and Commentary* (Paulist Press, New York, 1985) xxiv at xxv.

Church and the purposes of its law. Whenever we define canon law we make a theological statement if our definition, as it must, makes reference to the Church. Robert Ombres puts it this way: 'We explore the theology of canon law whenever we consider why there is canon law at all in a Church founded on the unique saving grace of Jesus Christ'.[20]

In order for us to develop further this relation of theology to canon law, it is of course essential to present a working understanding of theology. Ultimately, to determine its relation to English ecclesiastical and canon law, it will be essential to have, as far as is possible, a reasonably clear Anglican understanding of theology. There are, obviously, very many meanings of theology and of what constitutes valid theology, ideas varying between churches. A working definition of theology (one naturally subject to challenge) might include such ideas as the formation of systematic doctrines on the nature of God, His relation to creation, and a rational account of Christian faith and the nature and purposes of the Church.[21] Simplistically, a theological statement is any statement relating to these matters. If it is desirable that we accompany canonical analysis with theological discussion, or that we expose the theological root of canonical subjects, then we have to be clear that a canonical discussion has a theological equivalent. This is our difficulty. How do we recognise when a canon law subject is theological, and how do we recognise what is authoritative theology to inform our canonical discussion?

For many Protestant theologians, such as Karl Barth, theological statements contained in a Church proclamation, doctrinal statements of the Church, of the fathers and confessional statements, will be truly theological and valid only in so far as they conform accurately to the revealed Word of God as attested in scripture. A theological statement will possess complete authority if it expresses accurately the revealed Word of God. Indeed, for Barth scripture itself, containing as it does theological statements, shares in the authority of revealed data when it is a faithful attestation or record of truths communicated by God. For the Roman Catholic theologian Karl Rahner, on the other hand, a theological or doctrinal statement will possess authority if it obtains the tacit or express approval of the authoritative Church. Christ conferred on the primitive Church the authority to create valid doctrine, scripture is a species of this valid doctrine created by the authoritative Church: theological statements in scripture have authority because they issue from authoritative teachers who witnessed the personal revelation in Jesus. The same applies to theological statements created by the Church. They possess authority because they issue from a body which derived its authority to make theological statements from the apostolic Church.[22]

This is not offered, of course, as a definitive description of how to identify a proposition as theological or as valid theology. It is simply intended to

20. R. Ombres, op cit., 33.
21. See, for example, F. Whaling, 'The development of the word "theology"', (1981) 34 *Scottish Journal of Theology* 289. See also P. Avis, *The Methods of Modern Theology* (London, 1986). See generally, S. W. Sykes, 'Theology', A. Richardson and J. Bowden (eds.), *A New Dictionary of Christian Theology* (SCM Press, London, 1983) 566.
22. For Barth, see K. Barth, *Church Dogmatics: The Doctrine of the Word of God,* Translated by G. W. Bromiley (2nd ed., T. & T. Clark, London, 1975) Vol. 1, 2. For description of Barth's theology, see for instance, H Hartwell, *The Theology of Karl Barth* (London, 1964) and G. W. Bromiley, *An Introduction to the Theology of Karl Barth* (Edinburgh, 1979). K. Rahner, *Theological Investigations,* Translated by D. Bourke (London, 1965-84) Vols X, 41f., XII, 3-5, 9f., 11-15, 23, XVII, 23f., 67f. and XX, 135f. The problem of determining the legitimacy of a theological doctrine, the problem of what gives doctrine authority, is a large one; for the different views, from the subjective analyses of theologians such as Schleiermacher and Ritschl, to the more objective approach of theologians like Barth and Brunner (all resting on a particular understanding of revelation), see A. I. C. Heron, *A Century of Protestant Theology* (London, 1980) and P. Avis, *The Methods of Modern Theology* (London, 1986).

convey the difficulties of recognising when a statement is theological and when it is authoritative. And, in turn, this makes the practice of relating canonical rules to theology all the more complicated. Often we do not know which theology to turn to for our discussion of canon law. When we say that the meaning of canonical rule X is Y, a full understanding of that rule is possible only when the theology behind the rule is clearly Z. This is the basic difficulty that bedevils the suggestion that discussions of canon law must embrace theology, simply because certainty is problematic about whether the original or underlying theological doctrine is Z. Though Garth Moore explained that 'theology' might be 'culled from the usual theological sources, first and foremost from the Bible, but also from many other sources of various weight, such as the patristic writings, the opinions of other authors, the pronouncements of Lambeth Conferences, liturgical formularies, the views of the Convocations, and much else besides', he was stating the basic problem: he continued: 'This is a flexible and imprecise list; but theology, though the queen of the sciences, is not itself a precise science'.[23]

Now, Urresti, quite properly, distinguishes 'the science of canon law' from that of theology. He suggests that the set of ideas which flows from the theological science of working out the nature and purposes of God and the Church have 'to be given particular shape by the positive rulings of the hierarchy itself, by the rulings of ecclesiastical law'. For Urresti, 'Theology studies revealed data: its aim is to formulate revealed truth; it moves on a level appropriate to this truth, and defines it with doctrinal judgements'. On the other hand, canon law 'receives these theological data in generic form as they concern the basic social structure of the Church, and particularizes them in its laws'. In short, 'theology studies what is the will of Christ, while canon law prescribes how this will of Christ is to be fulfilled in the social-ecclesial field, that is to say, it studies the will of the Church, which has to be upheld within the will of Christ'.

For the treatment and exposition of canonical arrangements, as a matter of methodology, the implications of Urresti's thesis are that theology is to be used as the starting point for canonical investigation. According to Urresti, 'the task of canon law' is to effect the actualisation of the divine law and to order the ecclesial structure in fidelity 'to its transcendent aim of *salus animarum*'. Canon law, for Urresti, is 'a science of implementation'. In this context, it is one of the tasks of theology, discovering the will of Christ, to 'deliver its judgements (of theological valuation) on whether canon law is being faithful or not . . . in order to decide whether its reform is necessary'. Theology's task is to identify what is revealed – that of the Church in the creation of canon law is the implementation or particularisation of what is revealed in rules. Given the efficacy of this view, we might say that one of the tasks of the commentator on Church law, Roman Catholic, Orthodox, Nonconformist or Anglican, is not only to present and unravel the rules of canon law but also to expose in a critical way their theological basis. And it is part of the neglected canonical tradition of inquiry to ask questions such as 'What theology do actual legal arrangements disclose, is that theology clear, who has created it, and are those legal arrangements faithful to that theology'? The assumption, to which we seem to be moving, is that all canonical arrangements are or ought to be expressions of a theology, given their ecclesiological basis – but some, as we shall see, may not be.

The idea is that, in an important respect, the study of canon law is a theological study simply because, given its ecclesiological basis, canon law is an attempt to implement the theology of the Church, its views of itself, its

23. Moore, op cit., 9.

organisation and its purposes. It must also be stressed, of course, that there are important benefits in exposing the theological derivation of canon law. These have been put no more forcibly than by the Roman Catholic canonist Libero Gerosa: 'Today, more than ever, canonists have to show the theological bases and ecclesiological meaning of Church law itself and, for their part, Church legislators have the duty to do everything possible to make every rule laid down in the Church law somehow communicate these theological reasonings to the faithful'.[24] The theological dimension of canon law ought, as a matter of principle, to be presented for public view in discussions about canon law in order to convey its legitimacy,or not, to the Church as a whole and beyond. This applies as much to the Church of England, and to any Church, as to the Roman Catholic Church.

But, as we have seen, implementing this ideal is exceptionally difficult given the problems of ascertaining the specific theological basis, and ascertaining its authority and validity. As Garth Moore expresses it, in our 'return to first principles', we fall upon the 'often hidden . . . foundations of theology'.[25] In the Roman Catholic tradition the appeal to theology in the exposition of canon law appears to be less problematic. There commentators on canon law may appeal to 'official' doctrinal statements issuing form the *magisterium:* doctrinal statements made by the supreme authority in the Roman Church themselves actually possess an authoritative status.[26] The Protestant method is rather different. The idea of 'official' statements of doctrine is less well developed. As Garth Moore explains, certainly, theological doctrine expressed in the Book of Common Prayer, in the Thirty-nine Articles, in the canons, in 'Acts of Parliament and . . . the judgments of the courts . . . may be said to be authoritative – not necessarily right, but binding until altered'. Here we have a concrete source of theological data for use in our expositions of Church law. Indeed, the revised Canons Ecclesiastical 1964-70 expressly confirm the legal authority of the Thirty-nine Articles and the Book of Common Prayer, adding that 'The doctrine of the Church of England is grounded in the Holy Scriptures, and in such teachings of the ancient Fathers and Councils of the Church as are agreeable to the said Scriptures' (Canons A2, 3). But the position is more problematic in relation to episcopal doctrinal statements, statements issued by the Lambeth Conference, reports of commissions, the theologies contained in the classical Anglican ideas of authority – scripture, tradition, reason, the creeds – and so on; the difficulty is magnified when we read statements from, for example, the Doctrine Commission in 1922 that 'There is not, and the majority of us do not desire that there should be, a system of distinctively Anglican Theology' – an outlook considered in the Report of the Doctrine Commission, *Believing in the Church,* in 1981.[27] It is difficult to discover the theology of the Church of England, and, needless to say, an appeal to a theological doctrine contained in scripture as being derived from the authority of revelation does not get us very far in practical terms. Whenever we move beyond the legally recognised or approved theologies, there will always be argument. In consequence, to say that a piece of canon law is acceptable or not by reference to a theological

24. L. Gerosa, 'Penal law and ecclesial reality: the applicability of the penal sanctions laid down in the new Code', (1986) 185 *Concilium* 54 at 56.
25. Moore, op cit., 9.
26. See J. A. Coriden, *An Introduction to Canon Law* (Geoffrey Chapman, London, 1991) 104. See the Code, Canons 750, 752-754.
27. *Believing in the Church: The Corporate Nature of Faith,* A Report by the Doctrine Commission of the Church of England (SPCK, London, 1981). For other discussions of the difficulties of constructing an Anglican theology, including the 1922 Doctrine Commission's view, see G. R. Evans and J. R. Wright (eds.), *The Anglican Tradition: A Handbook of Sources* (SPCK, London, 1991) 345,401: the difficulty arises in the world-wide Anglican Communion, in part, of course, from the lack of a central body, such as the Lambeth Conference, possessing authority to issue official and binding theological statements: ibid., 383, 389-390, 401.

statement will very often be nothing more than an exploratory exercise (even when interpreting the formally recognised theology of the legally authorised theological documents) for the Anglican in his exposition of canon law. If we are to introduce the methodology of appealing with confidence to theology in our discussions of canon law, then we must be prepared to meet the challenges that this project necessarily involves.

4. APPLYING THE METHODOLOGY: THE DEPLOYMENT OF THEOLOGY

Our proposition thus far is that in our expositions of canon law we are in the process of developing for ourselves a methodology in presenting, discussing and criticising the rules of English ecclesiastical and canon law. Though they have their own intrinsic difficulties and confusions, the appeals to past practices, to the social setting of legal rules, to other systems of canon law, for the purpose of comparison, and to the civil law, have entered the mind of the modern Anglican canonist. However, equally, part of our outlook is based on the notion that canon law has a theological basis, and is, therefore, intimately connected to theology. The meaning and effect of this proposition, if we are to take it seriously, are problematic – for the simple reason that theology is a diffuse concept with, in the Anglican tradition, open-ended practical scope in its expression.

Be that as it may, it is desirable that we expose theological ideas in the exposition of canon law. It is desirable not only in order to communicate the theological integrity of canon law but also, perhaps above all, because of the ecclesiological basis of canon law. After all canon law has, what might be described as its end, a purpose formulated by theological doctrine. The canon law exists to serve the purposes for which Christ instituted the Church,[28] it exists to facilitate order in the Church,[29] it exists to make the Church more visible in society,[30] it exists because the early Church might be said to have possessed a rudimentary system of canon law,[31] it exists to enable and organise the constitutional, liturgical, sacramental, pastoral and proprietorial life of the Church,[32] and it exists to distribute duties and to confer and protect the rights of its members.[33]

The remaining part of this paper is an attempt to apply the proposed methodology, along with the problems it entails, to actual legal arrangements, principles and rules in the Church of England, and also to appeal to the Roman Catholic canonical system, and that of civil law, by way of comparison. We shall examine first the idea that theology and canon law are linked, not only for the ecclesiological reasons sketched above, but because theological considerations are used as the motive in creating and applying canon law. Secondly, we shall

28. For this idea, and the view of canon law as servant, see Apostolic Constitution, op cit., xxv-xxvi: Pope John Paul II explained that the purpose of the 'juridical formulae' in the Code is to 'serve the whole Church'. For an Anglican perspective, see H. Box, *The Principles of Canon Law* (Oxford, 1949) 9.
29. See the Archbishops' Commission *Report* 1947, 3-5. For the Roman view, see the Apostolic Constitution, op cit., xxv: of the Code, the pope said, 'its purpose is rather to create such an order in the ecclesial society that, while assigning the primacy to love, grace and charisms, it at the same time renders their organic development easier in the life of both the ecclesial society and the individual persons who belong to it'.
30. For some observations of T. Green, see Coriden, Green and Heintschel, *Commentary*, 893f.
31. J. A. Coriden, *An Introduction to Canon Law*, 7f,; J. Taylor, 'Canon law in the age of the Fathers', in Hite and Ward, *Canon Law*, 43.
32. See, for example, P. Winninger, 'A pastoral canon law', (1969) 8 *Concilium* (5) 28; see also N. Doe, 'A facilitative canon law: the problem of sanctions and forgiveness', in N. Doe (ed.), *Essays in Canon Law: A Study of the Law of the Church in Wales* (University of Wales Press, Cardiff, 1992) 69.
33. For the idea in Roman Catholic law, see J. H. Provost, 'Protecting and promoting the rights of Christians: some implications for Church structures', (1986) 46 *The Jurist* (1) 289, and other articles in this issue.

suggest that a more adventurous and rigorous use of theology may be made with benefit in the criticism of actual practices. And, thirdly, that the appeal to theology in the exposition of Church law may produce conclusions that are often uncomfortable (and perhaps too problematic to solve). The point of the remaining discussion is not to apply the methodology exhaustively to English canon and ecclesiastical law, but to suggest how it may work in specific areas.

The proposition that it is properly the task of the Church to implement its ideas which are the result of theological investigation – canon law implements or expresses theological doctrine – may take a number of forms. First, theological data may be used by a legislator in creating canon law: debates in the General Synod of the Church of England concerning the enactment of new canons or measures are frequently theological, as with the Archbishop of Canterbury's appeal (and criticism of it by others) to the doctrine of forgiveness in the debates about the Clergy (Ordination) Measure 1990 (allowing the Synod to make by canon provision *inter alia* for the ordination of divorced persons), as well as, of course, discussions about the theology of baptism and canonical reform in Synod's response to Canon Martin Reardon's paper *Christian Initiation – A Policy for the Church of England,* and, currently in debates about the ordination of women.[34] Discussion of theological questions may also form part of the deliberations of Synod committees when considering the alteration of Church law; the Report *An Honourable Estate* is a case in point: a working party established by the standing committee of the General Synod published the report in January 1988, and in it explored amongst other things the theological basis of the present law on marriage and the theological reasons for altering it; the report was received and Synod passed a motion that there should be no change in the extent of the Church's responsibility to solemnise the marriage of all parishioners who might request that ministry.[35] A detailed analysis of these discussions reveal neatly the difficulty of identifying *which* theology might form the basis of canonical provisions.

Second, the result may be a coincidence between an actual canonical rule and a theological doctrine: the substance or content of a canon law may be theological. This may be achieved when a canonical rule approves in general terms a set of specific theological doctrines contained in documents outside that rule: the Act of Uniformity 1662 approves the doctrinal statements of the Book of Common Prayer, appended to the statute, and the revised Canons Ecclesiastical 1964-70 state that 'The Thirty-nine Articles are agreeable to the Word of God' and 'The doctrine contained in the Book of Common Prayer . . . is agreeable to the Word of God' (Canons A2, 3). Again, a general theological subject or concern may be dealt with by a set of provisions in a specific Church enactment. For example, the Church of England (Ecumenical Relations) Measure 1988, and the canons made thereunder make provision for the ministry of ministers and laity of other churches (who subscribe to the doctrine of the Holy Trinity and which administer the sacraments of Baptism and Holy Communion) in Church of England churches and for the participation of Church of England clergy and laity in services of churches of other denominations. The measure reflects a general

34. For Dr. Robert Runcie's use of ideas of forgiveness, see the minutes of the debate in Synod for Wednesday, 8 November 1989, 1064 at 1066: compare the view of Mr Oswald Clark, ibid., 1069-1070. For baptismal policy and theological considerations, see M. Reardon, *Christian Initiation – A Policy for the Church of England* (Church House Publishing, 1991) 19-31. The paper was discussed by Synod 13 July 1991.

35. *An Honourable Estate: The Doctrine of Marriage according to English Law* (Church House Publishing, 1988). For observations on this see T. Coningsby, 'An honourable estate: a personal view of the Report by the Working Party of General Synod', (1988) 1 Ecc. L. J. (3) 10.

theology of ecumenism.[36] Indeed, any cluster of ecclesiastical rules dealing with a theological subject, ecumenical relations, ecclesiastical discipline, the administration of the sacraments, rules regulating acceptable forms of worship, measures on pastoral matters, will in some sense be legal expressions (explicit or implicit) of ecumenical theology, moral theology, liturgical theology, sacramental theology or pastoral theology.

More particularly, individual rules of Church law may express a specific theological doctrine in the form of a command, prohibition or permission. The canons themselves, of course, are frequently legal expressions of theological doctrine. For example, the theology contained in Article XXVII of the Thirty-nine Articles states that baptism is (fundamentally) an initiation process, entering the Church, the body of the faithful: 'they that receive baptism are grafted into the Church'; so Canon B21 of the revised canons states that it is desirable that every minister shall normally administer the sacrament of Holy Baptism 'on Sundays at public worship when the most number of people come together'. Again, as the theology of Article XXVII also states that 'the Baptism of young children is in any wise to be retained in the Church, as most agreeable with the institution of Christ', so Canon B22 prescribes that 'If the minister shall refuse or unduly delay to baptise any such infant, the parents or guardians may apply to the bishop of the diocese who shall, after consultation with the minister, give such direction as he thinks fit'. Similarly, it is a theological doctrine that part of the divinely-instituted sacrament of the Eucharist is Christ's command to the faithful to celebrate (amongst other things) his memory at the Holy Communion; the theology of remembrance emerges in the Church's eucharistic rites and Christ's command is repeated (with canonical additions) in Canon B15: 'It is the duty of all who have been confirmed to receive Holy Communion regularly'. Again, the Report *An Honourable Estate,* dealing with 'theological considerations' of marriage, asserts that 'The understanding of marriage which has been held by the Church of England is contained in the Form of Solemnization of Matrimony in the Book of Common Prayer' – and Canon B30 'reiterates' this theology.[37]

The problem for the canonist (to which we shall return later) is that of the specific legal rule which does not possess a conspicuously theological character. Be that as it may, one possible view is that when theology is expressed in law, or approved by law, when there is a coincidence between law and theology, then theology *becomes* law. When theology is expressed in law, law *is* theology: the Synod's laws, when it makes law using theology, are in a real sense theological; when it makes law it makes or formalises theology. In Urresti's words, all these examples are merely attempts by the Church to implement or particularise the results of theological inquiry and formulation. And they thereby communicate the (theological) legitimacy of that specific rule or that general enactment.

Third, on the formal level, a Church administrator or ecclesiastical judge may apply, or refuse to apply, a canonical rule for theological or ecclesiological reasons: theological doctrine is then the jusitification for the application or non-application of a piece of canon law. For example, the use of pastoral argumentation in faculty jurisdiction cases is now fairly well-settled. As the Dean of the Arches explained in *Re St. Mary's, Banbury* (1987), in setting out guide-

36. For a brief account, see J. Bullimore and B. J. T. Hanson, 'Synod news – November 1988,' 1 Ecc. L. J. (4) 2.
37. *An Honourable Estate,* 6, 7.

lines for the exercise of the faculty jurisdiction, 'A church is a house of God, which does not belong to conversationists, to the State or to the congregation', and 'the court should have in mind . . . the persons most concerned with the worship in the church', their present 'religious interests', 'as well as to the future needs of the worshipping community'.[38] Confirming the pastoral emphasis in *St. Michael and All Angels, Great Torrington* (1985), Sir Ralph Gibson in *St. Stephen's, Walbrook* stressed that 'The principle . . . recognises the importance of the commitment of parishioners to the church of encouraging and supporting that commitment by giving a positive response to their pastoral work and efforts when such a response is justifiable'.[39] Indeed, the Court of Ecclesiastical Causes Reserved was set up to ensure that sensitive questions relating to doctrine were referred to a forum of suitable standing and composition, including senior lay judges and bishops; and under s.45 of the Ecclesiastical Jurisdiction Measure (No. 1) (1963), of course, provision is made for eminent theologians and liturgiologists to be involved in the determination of cases.[40]

The same pastoral principle has been used in cases concerning clerical discipline,[41] for instance, and a fairly dramatic example of an ecclesiastical judge deciding not to apply a legal requirement for essentially theological reasons is that of Chancellor Garth Moore's use of the doctrine of necessity. At the beginning of this century there was much debate about the reservation of the sacrament, held to be illegal, according to the theological doctrine contained in the Book of Common Prayer, in *Bishop of Oxford v Henly* (1907) and *Capel St. Mary, Suffolk* (1927): even in *Re Lapford Parish Church* (1954) reservation was held to be strictly illegal by the Arches Court – the only case when it was permitted was for the communion of the sick, provided the bishop sanctioned the reservation.[42] The basis of this relaxation of ecclesiastical law was suggested by Chancellor Garth Moore in *Bishopwearmouth (Rector and Churchwardens) v Adey* (1958) to be the doctrine of necessity. In *Adey*, concerning the granting of a faculty for an aumbry on the ground that it would be needed to accommodate the sacrament for the communion of the sick, Moore explained of necessity that it was 'a doctrine which has its place in the common law of England' (though he was keen to point out that he 'would not lightly subscribe to a theory that it could be proper to grant faculties for what is illegal'); moreover, necessity 'would be a sufficient reason in law to sanction faculties for reservation in an aumbry'. He decided to grant the faculty for reasons of pastoral utility, of benefit for both clergy and laity: 'For practical reasons a separate celebration at each sick-bed is often impossible, and, in the present case, I am satisfied that, if the sick are to receive the Holy Communion, reservation is a necessity'.[43] The decision, and the relationship between canon law and theology in it, might be understood in two ways. On the one hand, Moore was using what may loosely be described as a theological principle, that of practical pastoral utility, to justify his application of the doctrine of necessity in not applying the strict legal requirement which forbade reservation. On the other hand, there was no real need for him to invoke the doctrine of necessity: he might have

38. [1987] 3 W.L.R. 717.
39. [1987] 2 All E.R. 578 at 597-598; *St. Michael and All Angels, Great Torrington* [1985] 1 All E.R. 993.
40. For a discussion see Moore, op cit., 148, and J. D. C. Harte, op cit.
41. *Bland v Archdeacon of Cheltenham* [1972] 1 All E.R. 1012: the Deputy Dean of the Arches Court, Sir Cecil Havers, considered that 'The act of refusal to baptise a child is not a doctrinal offence as such . . . It is concerned with pastoral work and activity': ibid., at 1017.
42. *Bishop of Oxford v Henly* [1907] P. 88; *Capel St. Mary, Suffolk (Rector and Churchwardens) v Packard* [1927] P. 289, [1928] P. 69; *Re Lapford (Devon) Parish Church* [1955] P. 205 at 210. For a short discussion see G. H. Newsom, *Faculty Jurisdiction of the Church of England* (London, 1988) 130f.
43. [1958] 3 All E.R. 441 at 446-447; see also Chancellor Moore's appeal to the doctrine in *Re St. Peter and St. Paul, Leckhampton* [1967] 3 All E.R. 1057 at 1060.

disposed of the case before him simply on the basis of cases like *Re Lapford* and *Re St.Mary, Tyne Dock;* in this sense, his appeal to pastoral need merely contributed in a general way to the justification of his decision as one based on legal *and* theological grounds.[44] In any event, Chancellor Moore's decision produced a coincidence between a legal arrangement and a theological principle, that of pastoral need.

These simple examples go some way to show that rich diversity of means by which theology and English ecclesiastical and canon law may intermingle. And there are doubtless other forms in which our basic proposition may be expressed, and considerable work needs to be done if we are to understand for English Church law the full implications of the idea that canon law has a theological basis. Above all, however, these points ought, for the reasons given in section 2 above, to be exposed in discussions of particular aspects of canon law. In Roman Catholic canon law, each of these forms is very often evident. As we have seen, the creation of the Code itself has been viewed as the product of a particular ecclesiology –it is the result of a specific way in which its framers conceived of the Church and its purposes; rules themselves are designed to express the Church's particular theological stance; and administrators and judges in the Church are obliged to appeal to ecclesiastical tradition, policy and learning in making their respective decisions.[45]

Our conclusion, from this section, is that often in English canon and ecclesiastical law, as is frequently suggested in Roman Catholic canonical literature, Church laws are created after theological debate, theological debate is part of the law-making process, there is often a deliberately designed coincidence between a canonical rule and theology, and often ecclesiastical judges apply rules, or fail to apply them, for theological (often pastoral) reasons, or with theological ideas in mind. But the idea is not without its problems. In interpreting a canon or measure the principle that canon law expresses a theological idea is difficult to execute. If the judge, for example, has to ask what is the theology which is supposed to have been contained in this or that rule, he must ask what was the theological intent, or the ecclesiological policy, in the mind of the legislator (Synod or judge) in creating this rule. Let alone the practical difficulties in ascertaining the theological intent behind a rule, in practice the lay ecclesiastical judge may feel ill at ease in going beyond a measure or canon to obtain that information, the subject-matter of the theological debate giving rise to that rule – and, more often than not, of course, he will never have to. When the theology to which he may have to turn is contained in the legally approved texts, there is less of a problem, but when it is contained in a debate of Synod, or in the report of a working party or a discussion paper, its status and meaning may be more problematic. But the suggestion here is that if the Church is to take seriously the principle that theology and canon law are related, he may be obliged to.

5. APPLYING THE METHODOLOGY: CRITICISM – THEOLOGY OUTSIDE CANON LAW

Theological data may be used by commentators on canon law, and by reformers of canon law, to criticise the substantive law of the Church. Here we

44. *Re St. Mary, Tyne Dock* [1954] 2 All E.R. 339.

45. The position in Roman Catholic canon law, and the possibility of appeal to factors outside the Code, is summed up in Canon 19: 'Unless it is a penal matter, 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 light of laws passed in similar circumstances, the general principles of law observed with canonical equity, the jurisprudence and praxis of the Roman Curia, and the common and constant opinion of learned persons'. For ideas about the relaxation of rules in Roman canon law, see J. J. Koury, 'Hard and soft canons continued: canonical institutes for legal flexibility and accommodation', (1991) 25 *Studia Canonica* 335.

are talking of an appeal to a theology *outside* canon law, a theology which has not yet been incorporated into the substance of the Church's law. This may occur on two obvious levels – where a theology exists, a theology which is reasonably identifiable and which requires action, and the law is silent about it; and where a theology exists and the law conflicts with it, where there is a dissonance between actual canonical rules and theological principles. Let us explore some simple occasions of these. This is what might be described as the critical function of theology in canon law, or, more accurately, the critical function of theology outside canon law. This accords with Urresti's idea that one task for theology is to deliver its judgment on the legal arrangements of the Church, to act as a yardstick against which Church law is tested and measured.

First, some theological questions persist in their attack on canonical arrangements, not least those about the acceptability of the Church possessing a legal system. As we have seen, comprehensive attempts have been made to justify the place of law in the life of the Church on ecclesiological as well as scriptural grounds. The Protestant theologian Rudolf Sohm (and the briefest account only is possible here), however, may be cited as an example of a writer who deployed theological ideas in a most radical fashion to challenge the use of law by the Church. In his principal work *Kirchenrecht* (1892) Sohm argued that the fundamental nature of the Church stands in antithesis to the use of law.[46] Sohm started from a view of the Church as an absolute spiritual reality, the invisible body of Christ held together by common faith and *charismata*. For Sohm the Church receives its leadership and government immediately from God by the Spirit who makes his will known to persons appointed to those ends. As ecclesiastical life is dependent on the immediate influence of the Spirit, there can be no question of a legal order instituted by the Church. Sohm's work has since been met with much criticism, not least by Adolf Harnack who, at the beginning of this century, argued that there are so much direct and indirect data which clearly point to an institutional organisation in the early Church that the place of law in the Church today is at least understandable, at most necessary.[47] As Ridderbos, commenting on the debate, puts it: 'Harnack especially has thrown light on the untenableness of Sohm's extreme spiritualism. In so doing he contended that the Church as a sociological entity simply requires an organisational formation, which becomes church-law as soon as it is applied to ecclesiastical affairs'.[48]

The controversy typified in the Sohm/Harnack debate (and Sohm's thesis may still have a part to play in the Church of England concerning the legitimate scope of canon law outside the public field, in the private spiritual lives of Church members) persists today as a challenge to Church law in its fidelity to basic Christian doctrines. As such, theology has a continuing part to play in that canon law is constantly subject to challenge against the central Christian theological doctrines. And large areas of Church law and practice, such as some legal aspects of Church constitutional arrangements, may be subjected to a theological critique from without. One theological principle which has been brought to bear recently on the institutional arrangements of the Church is that of reconciliation. Antony Lewis, for example, has been critical recently of the formal adoption of what he sees as a cumbersome court system in the Church in Wales, a system which, he

46. For a general review of Sohm's position, see A. V. Dulles, *Models of the Church* (Dublin, 1976).
47. A. Harnack, *The Constitution and Law of the Church in the First Two Centuries,* Translated by F. L. Pogson (London, 1910).
48. H. Ridderbos, *Paul: An Outline of His Theology* (SPCK, London, 1977) 438-439.

argues, ought to be replaced by structures for reconciliation and the informal settling of ecclesiastical disputes.[49]

The judicial process of the Church of England is one based upon the employment of sixteen different courts: though the purpose of the Ecclesiastical Jurisdiction Measure 1963 was to reform and rationalise the ecclesiastical court system, the present courts combine to form a very complex structure for the resolution of disputes within the Church. Though there are legitimate constitutional principles at work in English ecclesiastical and canon law, whose purpose it is to limit the use of power by ecclesiastial judges, and to prevent an arbitrary use of judicial power (such as the doctrines of precedent, appeals procedures and the principle that the courts may not – usually – reject the legislation of Synod), little work has been done on the theology of the Church possessing a court system and on the theology of a system that allows for the imposition of sanctions for violations of aspects of Church law, particularly when exercising the so-called criminal jurisdiction over ecclesiastical offences. The theological principle which appears in scripture, though in very rudimentary form, seems to place reconciliation and an amicable and informal resolution of disputes as the starting point for the Church, and this is certainly the interpretation placed by theologians on passages such as Matthew 18:15-17 (where Jesus lays down rules/guidelines for the friendly resolution of conflict – the injunction to face confrontation, to settle amicably, to use the tesimony of witnesses and persuasion, and, if these fail, to bring the matter before the Church).[50] Again, Paul teaches that at best the faithful are to suffer injury but at least when disputes arise they are to be taken not to the civil courts but to the community of the faithful (1 Cor. 6:1-11) – which must not prejudge the issue but act with strict impartiality (1 Tim 5:19).

Indeed, the idea that the judicial and administrative system must be used as only the last resort in resolving disputes has made its formal mark in the Roman Catholic Code of Canon Law 1983. In Roman canon law complaints of wrongdoing in the Church are prosecuted in two ways. When the wrong complained of arises from an administrative act of a Church authority, then the recourse is not to the ecclesiastical courts, but to the superior of the person (or body) who committed the wrong: this is the principle of hierarchical recourse.[51] However, when a complaint is made about the consequences of an administrative act, the starting point is not recourse to the superior but conciliation: Canon 1733 prescribes that when a party is injured by an administrative act, before appealing to the wrongdoer's superior every effort ought to be made to mediate with the wrong-doer and come to an amicable solution. The rules which give the courts jurisdiction in the Roman Catholic Church are complicated (and their jurisdiction is very limited),[52] but, once again, the judicial process is treated very much as a last resort. According to Canon 1446 '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'. Indeed, once litigation has begun, 'the judge is not to neglect to encourage and assist the parties to collaborate in working out an equitable solution to the controversy'. The Code makes provision for the appointment of arbiters (Canon 1713) and by Canon 1733 the conference

49. A. T. Lewis, 'The case for constitutional renewal in the Church in Wales', in N. Doe (ed.), *Essays in Canon Law,* 175 at 187.
50. See K. Matthews, 'The development of procedures for the resolution of conflict in the early Church', (1984) 18 *Studia Canonica* 15-54.
51. For the difficulties in identifying when an act is an administrative act, and the principle of hierarchical recourse, see M. R. Moodie, 'The administrator and the law: authority and its exercise in the Code', in Hite and Ward (eds.), *Canon Law,* 444, and J. A. Coriden, *Introduction to Canon Law,* 185.
52. Coriden, Green and Heintschel, *Commentary,* 35, 36, 1029, 1030.

of bishops is encouraged to create permanent offices in every diocese whose function it is to resolve disputes without going to trial. These rules have a clear theological integrity. However, in the Church of England the opportunity for reconciliation and the informal resolution of disputes is rather less conspicuous: the formal rules do not publicly operate a systematic arrangement for reconciliation. Though in faculty cases there is ample room for consultation and informal agreement, in some instances a formal hearing is required by law.[53] It is therefore encouraging that the General Synod's new Incumbents (Vacation of Benefices) Measure employs a conciliation process before the full legal procedures of the measure are invoked.[54] In point of fact, a more widespread and formal adoption of the principle of conciliation (well established in Europe and America) has made its mark in modern English secular arrangements, in the context of labour relations, divorce matters and even as an alternative to the criminal process – Quakers and Methodists have been involved in Britain in schemes imported from America.[55]

Secondly, theology may be used to challenge specific rules and practices in Church law in less obviously doctrinal contexts. Though the doctrine of precedent has made its mark in English ecclesiastical law, some are critical of a lack of refinement in its use and there seems to be some confusion over the status of the principle that one ecclesiastical court is bound to follow its own decisions or those of a superior ecclesiastical court.[56] The doctrine is of course justifiable on mundane grounds of certainty and predictability (essentially civil law values), and it may indeed express a general theological principle that ecclesiastical citizens, so to speak, have a right to know with reasonable certainty the way in which ecclesiastical judges are likely to decide cases.[57] However, one area of the doctrine raises some theological problems – whether one consistory court is obliged to follow the decisions of another consistory court. Certainly chancellors are bound by earlier decisions of their own diocesan court,[58] and often they appeal to decisions of other consistory courts as persuasive authorities, but they are not bound 'in strict law' (as Garth Moore put it in *Bishopwearmouth v Adey* (1958)) by earlier decisions of consistory courts in other dioceses.[59] Again, the theological principle of communion may be used to challenge this arrangement. The consistory court, of course, is treated as the bishop's court – this is spelt out in s.1(1) of the Ecclesiastical Jurisdiction Measure 1963; and the bishop, indeed (as in Roman Catholic canon law), has the right to reserve some cases to be heard by himself.[60] The full implications of doctrines on communion and *koinonia* have to be

53. G. H. Newsom, *Faculty Jurisdiction,* 52f. Hearings are required by law, for example, in connection with the demolition of a church (Faculty Jurisdiction Measure 1964, s. 2) and in some cases of treasure sales (Faculty Jurisdiction Measure 1967, s.6(7)): see Newsom, op cit., 53, n.2.
54. B. J. T. Hanson, 'Recent legislative developments', (1992) 2 Ecc. L. J. 315.
55. R. Matthews (ed.), *Informal Justice* (London, 1988) 150-153; see also J. Folberg and A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco, 1984).
56. Halsbury, *Laws of England,* Vol. 14, *Ecclesiastical Law* (4th ed., London, 1975) para. 1271. Except where the doctrine is recognised by legislation, the judicial statements of it are mainly *obiter.*
57. For justification and role of precedent in civil law, see for example, W. Twining and D. Miers, *How to Do Things with Rules* (2nd ed., London, 1982) 165-188, 218-291 and R. Cross, *Precedent in English Law* (3rd ed., Oxford, 1977). These ideas tie up with Roman canonical ideas that canon law 'is to afford stability to the society . . . to provide good order, reliable procedures, and predictable outcomes': J. A. Coriden, *Introduction to Canon Law,* 6.
58. *Grosvenor Chapel, South Audley Street* (1913) 29 T.L.R. 286 (*per* Chancellor Kempe).
59. *per* Ch. Moore in *Adey* [1958] 3 All E.R. 441 at 445. See also *per* Ch. Moore in *Re Rector and Churchwardens of St. Nicholas, Plumstead* [1961] 1 All E.R. 298.
60. G. H. Newsom, *Faculty Jurisdiction,* 7; Halsbury, *Ecclesiastical Law,* para. 1278. For Roman canon law, see the Code, Canon 1419.

unravelled before we are able to make a theological judgment of these arrangements. And in so doing we may have to look to the more contentious area of Anglican theology to which appeal might be made, and outside the legally recognised and approved doctrinal documents – again we might see the richness of a theological critique for specific legal arrangements. The basic ideas which are expressed in the theological principles of communion and *koinonia,* flowing from eucharistic communion, are unity of faith and unity of life and action in the Church (not least between bishops), and these suggest that there be unity between decisions of diocesan courts in the Church of England. On the other hand, however, before we are able to develop a full critique of these judicial arrangements we have to be clear about the relation of bishop to bishop in the Church of England (and here analysis of the preoccupation of the Lambeth Conference with communion and unity may prove instructive, where the tension between unity and the desire for local independence in ecclesiastical affairs is frequently discussed).[61]

Once more, it is to be stressed that if we are to take seriously the proposition that theology and canon law are intimately connected, then we must not neglect the challenge of legal arrangements, which on the face of it are not obviously theological, by appealing to theological doctrines. The doctrine of precedent is *par excellence* a legal doctrine, and it is one of the achievements of the common law, and yet such legal doctrines ought not to escape a theological investigation.

Thirdly, sometimes theological principle will be irrelevant in the discussion of canonical arrangements. This is certainly the case when we consider law created by the State on matters concerning the Church. Though we may sensibly talk of the theology behind the enactment of a law by the Church itself, the theology underlying or expressed in canon law, it may often be the case, of course, that State legislative bodies, Parliament or the judges, will possess no theology in the creation of law for the Church. The political motives behind the Reformation legislation, of course, are well documented and, indeed, many contemporary historians have exposed the political and proprietorial motives behind the enactment of the Welsh Church Act 1914, as well as the need to redress grievances felt by Nonconformists in Wales rather than the desire to create law for the good of the Anglican Church in Wales.[62] The same applies to the idea, shared by many theologians, that the use of sanctions offends the theological principle of forgiveness.[63] Here, a synthesis between a theological doctrine and a legal arrangement may be possible in order to convey the legitimacy of the latter. Certainly, Roman Catholic (and some Anglican) canonists justify the use of penalties in the Church by reference to theological doctrines of order, reconciliation, deterrence and the idea that sanctions are medicinal.[64] The idea, however, that the imposition of sanctions offends the principle, and duty, of forgiveness is misleading. Though it raises complex questions, in contemporary theology the principle of forgiveness imposes the duty upon the injured party to eradicate resentment felt against a wrong-doer, a duty which arises conditionally upon the wrong-doer being

61. See G. R. Evans and J. R. Wright, *The Anglican Tradition,* 91, 306, 328f., 341, 382, 383.
62. D. Walker (ed.), *A History of the Church in Wales* (Penarth, 1976, re-issued, 1990). T. G. Watkin, 'Disestablishment, self-determination and the constitutional development of the Church in Wales', in N. Doe (ed.), *Essays in Canon Law,* 25 at 26.
63. For the idea that punishment and forgiveness are incompatible, see (1986) 184 *Concilium* ix, and C. Duquoc, 'The forgiveness of God', ibid., 35; P. Lehmann, 'Forgiveness', in J. Macquarrie and J. Childress, *A New Dictionary of Christian Ethics* (SCM Press, London, 1986) 233.
64. For Roman justifications for sanctions, see P. Huizing, 'Crime and punishment in the Church', (1967) 8 *Concilium* (3) 57, and Coriden, Green and Heintschel, *Commentary,* 893f.; for Anglican ideas, see the Archbishops' Commission *Report,* 4.

repentant.[65] When sanctions are imposed (for example upon clerics for ecclesiastical offences) there may be no conflict with forgiveness when the imposition comes from motives other than resentment, and when its object is reconciliation, the healing of wounds in the Church – the end of forgiveness. Sanctions may be associated with theological principles of justice or mercy, but not with forgiveness. However, on the other hand, if forgiveness forbids a sanction, a synthesis is necessary to reconcile the apparent incompatibility between sanctions and forgiveness.[66] An attempt at a synthesis appears, for example, in the constitution of the Anglican Church in the Province of South Africa: Canon 19 prescribes that if a cleric abandons his ordained ministry, without the bishop's consent, he shall not be allowed to resume the exercise of any ministerial office 'until he shall have given to the proper authority evidence of the sincerity of his repentance for the fault which he has committed'.

Lastly, theology may be discarded by legislators as inapplicable or unfounded in the process of creating canon law, as opposed to the application of law discussed above. This has surfaced as part of the debate in the General Synod of the Church of England over the ordination of women as priests. A common opinion amongst canonists is that the Church's law is inferior to the divine law: Garth Moore himself wrote that as the Church possesses a subordinate legislative authority, delegated by Christ, so law 'has validity only within the framework of its principal parent, the divine law'.[67] As was stated in the 1947 Report of the Archbishops' Commission on Canon Law, 'The Church has no authority from our Lord to alter the way of faith and the way of life and the sacraments which He has entrusted to its care. It cannot make a rule that Christians need no longer believe in our Lord's bodily resurrection or come to the Holy Communion'.[68] The supremacy of the divine law over humanly-created canon law is a view shared by Roman Catholic and Orthodox canonists.[69] However, the constitutional arrangements of the Church of England suggest otherwise. The legislative competence which General Synod possesses (subject to parliamentary approval) in enacting measures is analogous to that of the Queen in Parliament. According to the principle of parliamentary sovereignty, the secular judges are forbidden to question the validity of parliamentary statutes, and (under the Church of England Assembly (Powers) Act 1919 as confirmed in the Synodical Government Measure 1969), a synodical measure has the same force and effect as a parliamentary statute. The ecclesiastical judges could not, therefore fail to apply a measure on the grounds of its substance being in conflict with a theological principle, nor, indeed, on the basis of an argument that the measure conflicts with the requirements of divine law.[70] Ultimately, therefore, if there is a dissonance between a synodical measure and a theological principle, in practice the ecclesiastical (and the civil) judges are obliged to enforce the measure (though this may not be the same for, for example, judicial decisions, being an inferior species of Church law, from which judges may depart if there is an acceptable ecclesiological reason for so doing) regardless of its theological content. The assumption would be, presumably, that the theological grounds are properly considered by the Synod and not to be re-opened by the court.

65. J. G. Murphy and J. Hampton, *Forgiveness and Mercy* (Cambridge, 1988).
66. For a discussion of this problem, see N. Doe, 'A facilitative canon law', op cit.
67. Moore, op cit., 2-3.
68. *Report*, 3.
69. C. J. Peter, 'Dimensions of *Ius Divinum* in Roman Catholic theology', (1973) 34 *Theological Studies* 227; S. S. Harakas, 'The natural law tradition of the Eastern Orthodox Church', (1963-4) 9 *Greek Orthodox Theological Review* (2) 215.
70. For the inability of the civil judges to question parliamentary legislation on moral grounds, see N. Doe, 'The problem of abhorrent law and the judicial idea of legislative supremacy', (1988) 10 *Liverpool Law Review* (2) 113.

The competence of the General Synod to create law for the Church of England, which might conflict with canonical practices purportedly germane to the universal Church, has been an idea used in the debate concerning the ordination of women – alleged theological principles have been treated as simply not applicable. It was suggested in July 1988 in debate on the draft Priests (Ordination of Women) Measure that 'There is absolutely no doubt that we have the right in terms of the constitution of the Synod, the canon law of the Church, constitutional law and the common law of England – and, for that matter, the law of the European Community' to make the proposed change. 'But some appeal to a supposed theological principle that requires this particular change to have the consent of all Christian Churches or of those which have the three-fold ministry, or say, even . . . that it is something that the universal Church simply can never do'. Many felt, of course, that this 'supposed principle has no validity'.[71] Leaving aside the question whether such a principle exists, and what its authority is, this is a fairly typical statement of the proposition that a particular theological principle may be rejected or have no applicability in the discussion and formation of a canonical rule.

6. CONCLUSION

This article is a rudimentary attempt to describe the implications, for English ecclesiastical and canon law, of the proposition that canon law has a theological basis. It is an attempt to draw out, very tentatively, some instances which make sense of this proposition. The legal mind of the modern Anglican canonist is in a state of experiment and development. The growing methodology of canonists quite rightly appeals to history, past canonical practices, to ecumenism, to comparisons with other canonical systems and with civil law, in the expositions of English Church law. However, the Anglican canonist ought with good reason to be keen to overcome traditional barriers between specialised legal subjects to academic and practical study in the exposition of ecclesiastical law. The appeal to theology has been part of the canonical tradition, a tradition that might with benefit be reconstructed given the ecclesiological setting of canon law.

In so far as a rule or cluster of rules or principle of canon law may be an expression of a theological idea, any discussion of that law must be accompanied by a discussion of the relevant theological subject. The presumption must be that a statement of canon law has a theological root, and that theological root must be explored, and its uncertainties must be conceded. But this presumption is rebuttable when there is no evidence of a theological basis for any given rule or principle. The guiding questions that might be asked are: what was the theological intent of the makers of a canonical rule? was that intent clear? how do we identify it? what theology is expressed in a given rule? does a rule accurately express a particular theology? what happens if a canonical rule conflicts with a theological doctrine? These are difficult questions but they must be addressed rigorously if we are to give credence to the notion that canon law has a theological basis. It may be, as with civil law on Church matters, that there is sometimes no theological basis, for one reason or another. Then a discussion of the canon law may proceed without discussion of theology. But one fundamental query is whether there are any canonical rules, principles or practices that can be expounded without an attendant theological discussion. This paper is an invitation to Anglican canonists to a more reflective consideration of the principle that canon law has a theological basis and to question rigorously whether theological investigation should accompany canonical analysis given the essentially theological, and ecclesiological, nature, purposes and setting of canon law.

71. See minutes of the debate in Synod on Tuesday, 5 July 1988, and the opinion of Professor David McClean, 514 and 515; compare the remarks of the Bishop of Winchester at 522, 523.