BY WHAT AUTHORITY?

IN May 1939 the Lower House of the Convocation of Canterbury humbly requested His Grace the President (in conjunction with the President of the Convocation of York) to appoint a Commission to consider the whole question of the revision and codification of the Canon Law. Later on in the summer of 1939 the Commission was appointed under the title "Canon Law Commission" by the Archbishop of Canterbury (Dr Lang) in conjunction with the Archbishop of York (Dr Temple) with the following terms of reference:

A—To consider and report on the questions:

(1) What is the present status of Canon Law in England (a) as regards canons in force before the Reformation; (b) as regards canons made and promulgated since the Reformation; and

(2) What method should be followed to determine which canons are to be regarded as obsolete and to provide the Church with a body of canons certainly operative and apart from which none would be operative or reasonably regarded as operative.

B—To prepare, if after such consideration this seems expedient, a revised body of canons based on the conclusions reached under A above, for submission to Convocation.

'In order to make its conclusions intelligible to the ordinary reader the Commission has written much of its report in the form of a short history of Canon Law, dealing with its origins and the part which it has played in the life of the Church of England. The report is divided into seven chapters. Chapter I deals with the place of law in the Christian Church. Chapters II-V are a history of Canon Law in its relation particularly to the Church of England. In Chapters IV and V, which deal with the history of Canon Law in the Church of England since the Reformation, the Commission gives its answer to Question 1 in Section A of the terms of reference. Chapter VI represents the Commission's answer to Question 2 in Section A, and Chapter VII describes in some detail the revised body of canons which the Commission has prepared for submission to the Convocations under Section B of the terms of reference. There follows the revised code or body of canons.'[1]

'What is the present status of Canon Law in England (a) as regards canons in force before the Reformation?'

The Commission has found itself obliged, in the face of historical and legal evidence to the contrary, to abandon the theory of Stubbs (clung to more recently by some few others), in favour of

1 *The Canon Law of the Church of England*, Introduction. (S.P.C.K., 15s.)

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Maitland's position, followed by many others such as Holdsworth and the late Professor Z. N. Brooke, who concludes with the statement: 'The English Church recognized the same law as the rest of the Church; it possessed and used the same collections of Church law that were employed in the rest of the Church. There is no shred of evidence to show that the English Church in the eleventh and twelfth centuries was governed by laws selected by itself'.[2]

The English canonist Lyndwood has in recent years come into his own among students of history and of legal institutions. But the Canon Law Commission must have found his gloss somewhat irksome for its purposes, and has been constrained to manoeuvre itself into another position in order to maintain its theory of continuity between the pre-Reformation and the post-Reformation Canon Law. How this is done may appear in the sequel. It goes without saying that the Commission loyally supports the Reformation, but is not so willing to take the consequences. The result is that the Commission has been obliged to go into contortions, with a genius that only the Church of England can display.

Henry VIII also acknowledged the value of Lyndwood when in 1534 he saw to the first translation, but he made sure that it was carefully purged of the gloss. This was part of the king's preparations for substituting the royal for papal supremacy, which has been so carefully conserved by the Commission in Canon X: 'We acknowledge that the King's Most Excellent Majesty, acting according to the laws of the realm, is the highest power under God in this kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil'.

It may here be well to recall the noteworthy words of the late Professor Holdsworth: 'The Tudor settlement of the relations of Church and State was a characteristically skilful instance of the Tudor genius for creating a modern institution with a medieval form. But, in order to create the illusion that the new Anglican Church was indeed the same institution as the medieval Church, it was necessary to prove the historical continuity of these two very different institutions; and obviously this could only be done by an historical argument. When this argument had been put forward in a statutory form it became a good statutory root of title for the continuity and catholicity of this essentially modern institution. But a merely statutory title gave an obvious handle to its opponents, and could hardly be expected to satisfy its supporters. It is not therefore surprising that lawyers, theologians and ecclesiastical historians soon

2 *The English Church and the Papacy*, p. 113.

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began, from their different points of view, to amplify and illustrate this basis of historic truth. Two great professions thus have had and still have a direct professional interest in maintaining this thesis. The lawyers are tied to it by their statutes and cases; the ecclesiastics by their tradition and the authoritative declarations of their Church'.[3]

This statement shows sufficiently why the major part of this report takes the form of a short history of Canon Law. In order to show that the Church of England is indeed the same institution as the medieval Church, it has become necessary to prove the historical continuity of the Canon Law which is to rule her. This cannot be done merely by showing relatively few instances where institutions of the pre-Reformation canons have been carried over into the new dispensation. The reader is not easily made aware that the inadequacy of such elements of Canon Law as have remained in the Church of England is due to the fact that whole masses of the Law have been discarded and not replaced by any other.

In answer to the question regarding the status of canons in force before the Reformation the Commission replies with a nice distinction. If the statute merely re-enacts the old law, the effect is to give added temporal authority and sanction to the Canon Law. In this case the Canon Law is in the happy state of binding in conscience as both canon and statutory law. This would appear to be an entirely new conception.

When, however, the Canon Law is substantially modified or negatived by a statute, the immediate effect is to create two different laws on the same subject. If the statute is accepted and acted upon by ecclesiastical authorities a contrary custom is established which overthrows the old Canon Law. It may be mentioned in passing that nobody knows who are the 'ecclesiastical authorities'. And the notion that a custom can be induced in a matter which is already binding by law is an utterly false conception of custom. It is of the very essence of custom to be a *lex non scripta*. Moreover the conclusion is based on a false conception that canons are only laws of the realm 'if people have taken them at their free liberty, by their own consent to be used among them, and have bound themselves by long use and custom to their observance' (p. 46).[4]

Such parts of Canon Law which have not been touched by subsequent legislation are either still fully operative, or have fallen into

3 *A History of English Law*. W. S. Holdsworth, vol. 1, p. 591.

4 The theory at one time held by a few, is both authoritatively condemned and scientifically unsound.

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desuetude, as when the law still exists 'though it may have been suffered to sleep'.[5]

As regards the binding force of canons made and promulgated since the Reformation, that is a matter of more purely domestic interest to the Church of England alone, displaying no longer even any apparent continuity with the papal *ius commune*.

This historical summary in the report of the pre-Reformation Canon Law is mainly good, though free from much originality. The chief writings that have been drawn on appear to be those of Maitland, Fournier and Le Bras, and Z. N. Brooke. But on the whole the works of recent Catholic canonists do not appear to have been consulted, non-Catholics being given the preference. The whole book, biased as it is, and heavily coated with erudition, presents itself as a plausible piece of special-pleading on the well-worn Protestant lines. But in so many words it is admitted that the fettering of the Church by the State and the substitution of the Archbishop and the King for the Pope, creates an unfortunate situation from which the Church of England cannot extricate herself by any formulation of her own Canon Law. The effort to maintain a continuity between past and present only tends to reveal more clearly the anomalies and the inconsistencies that are inherent in the Reformation settlement.

The effort to show continuity of legislation is lamentably unsuccessful. There can be no continuity where the main body of the *ius commune* as well as synodal law of the Church has been rejected along with the doctrines upon which it is based. Moreover the great bulk of the law of the Church of England is post-Reformation in origin. When there is no continuity in Orders, doctrine, or jurisdiction, it is futile to look for any continuity in legislation. The shattered fragments that remain of what was once an organic system of Canon Law are no more than a hang-over. Indeed the whole theory of the law, from start to finish, is changed, and its centre of gravity dislocated, becoming devoid of authority and aim.

Canon VIII tells us, as it were out of its own mouth, what the Canon Law of the Church of England is. In actual fact it is not Canon Law any longer, but a branch of civil law dealing with ecclesiastical matters. The parallelisms which have been suffered to survive are but borrowings from a system of law alien both in texture and spirit. This is not entirely remarkable, since the Church of England is a state department, and its bishops and clergy government officials drawing their revenues from the state.

5 Quoted from Sir Hebert Jenner-Fust, p. 68.

The annotations in the margins of the Canons are a subtle piece of work in support of the claim to continuity. Frequently they are singularly inappropriate. Oftentimes the matter that is legislated for by the new Canon is so radically different from what was contemplated in the original source, that only a stretch of the imagination can detect any affinity between them. The inappropriateness of these annotations is instanced in Canon LV, section 3, which lays down: 'No person shall be admitted into Holy Orders who has remarried according to the secular law but who has a former wife still living; or who is married according to that law to a person who has previously been married to a husband who is still alive'. The reference is to Gratian D.XXXIV, c.8, which says, 'A man who has been married and has relations with another woman shall not be admitted to the clerical state'. Apart from the fact that Gratian knew of no remarriage according to the secular law, he explains that the reason behind the law is that such a one would experience special difficulty in observing celibacy. An argument which carries no weight where a married clergy and episcopate are the rule.

The Canon Law Commission has come to the conclusion that 'it is quite out of the question to include in a complete code of canons all the Common Law and Statute Law affecting the Church' (p. 81). An outsider finds it difficult to sympathize or agree with all the reasons given for this conclusion. One would have thought that it would have been possible to produce something less straggly and more logical in arrangement than the 134 Constitutions and Canons Ecclesiastical here presented. A more liberal use of rubrics of a comprehensive character would have helped to classify the mass of canons. It would not have been unreasonable to have granted some enlargement of dispensing powers, which are at present very limited, and the absence of which leaves the law in an inflexible and rigid state. Some guiding rules on the computation of time would eliminate the possibility of misinterpretations and even litigation. And whilst the existence of religious communities of men and women is recognised, there is no proper legislation to determine their status, which tends to leave them in an anomalous and unjust position.

Obviously the Commission was confronted with the thankless and impossible task of sorting out the mixed medley of secular and ecclesiastical laws which had become inextricably intertwined. It must not be forgotten that the new order which Henry VIII inaugurated, and which persists until our own day, involved not only a new law but a theory about the old law.[6] Henry not only abolished

[6] F. W. Maitland, *Roman Canon Law in the Church of England*, p. 91.

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papal authority and made the king the supreme head of the Church, but prohibited the academic study of Canon Law, and closed the Canon Law schools. Accordingly the libraries in the kingdom were wrecked by being purged 'of all superstitious books'. As Maitland has remarked, the significance of the change is sometimes overlooked, as it is very largely by the Canon Law Commission.

In 1604 canons were published which had received the sanction of Convocation and the king, though they were never confirmed by Parliament. These were state-made laws. It is these which have formed the basis for the drafting of the new canons. But the Commission considers that 'it would be premature and unwise to ask for the abrogation of all pre-Reformation law not included in the proposed new canons, for later experience might show that we had inadvertently jettisoned canons which are still of value along with many which are admittedly obsolete'. The uncertainty regarding lawful authority and the meaning and origin of jurisdiction can only result in conflict and compromise.

AMBROSE FARRELL, O.P.

CANON LAW IN THE CHURCH OF ENGLAND

THE newspapers, some months ago, announced and commented on the proposal to revise the canon law of the Church of England, and a handsome volume was produced by the Commission appointed in 1939 by the Archbishops of Canterbury and York. It was published by the S.P.C.K. in 1947, and contains, together with a number of very scholarly introductory articles, the draft of a proposed scheme of 'The constitutions and canons ecclesiastical of the Church of England, 194—, with annotations'.

This publication is of the greatest interest, not only to members of the Church of England, but to all students of canon law, who cannot but welcome the perfecting of ecclesiastical discipline, wherever it may be, and the reading of these proposed canons will most certainly evoke in every canonist's breast sentiments of sincere admiration, of puzzled wonder, or of charitable disapproval, as the case may be. Therefore, it should cause no offence if, in a review like BLACKFRIARS, we take the liberty of putting on paper some observations which it has occurred to us to make when running through this interesting document. This we do in no spirit of carping criticism, but with the sincere desire of contributing something objective, and possibly constructive, to this important undertaking.

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