

## ESSAY ROUNDTABLE

# LEGAL THEOLOGY

PROFESSOR MARK HILL QC

Centre for Law and Religion, Cardiff University, United Kingdom; Faculty of Theology, University of Pretoria, South Africa<sup>1</sup>

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Ecclesiology is the study of the church which explores the origins, nature, and purposes of the church universal.<sup>2</sup> Its method includes developing categories to indicate the attributes of the church, as e.g. one, holy, catholic, and apostolic; the people of God; and the fellowship of the spirit. One aim of ecclesiology is to teach and help us understand what may be authentic, required, permissible, or appropriate church structures, such as in ministry, government, discipleship, evangelism, worship, and teaching.<sup>3</sup> Legal theology might be considered to be a branch of ecclesiology. Many scholars refer to church law<sup>4</sup> as applied ecclesiology,<sup>5</sup> and in so doing they speak of a “theology of church law” and a “theology in church law.” The former is a doctrinal and perhaps more speculative exercise; the latter is more descriptive and scientific.

The development of a theology of church law is predicated on the idea that the law of the church has a theological basis and purpose:

1. Church law and theology have the same ends: to assist the church in its mission and witness to Christ.
2. They are the servants of the church.
3. Theological inquiry is intellectual (about belief), whereas law is practical (about action).
4. Law is connected to theology by virtue of its sources: the will of the church and the will of God.
5. The nature of the church is a theological study that molds our view of church law.
6. Church law is shaped by and shapes ecclesiology.

Theology in church law consists of those theological ideas that come to the surface in legal texts and practices.<sup>6</sup> Theology provides the reasons for law generally and for particular church laws.

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1 Also visiting professor, Dickson Poon School of Law, King’s College, London, and adjunct professor, School of Law, Notre Dame University, Sydney, Australia.

2 Purists seek to maintain a distinction between this term and *ecclesiality*, which covers the study of the origins, nature, and purposes of a particular institutional church. This essay uses *ecclesiology* in its broader common usage.

3 See generally Mark Hill, “The Regulation of Christian Churches: Ecclesiology, Law and Polity,” *HTS Theologesie Studies/Theological Studies* 72, no. 1 (2016).

4 The word *polity* or *order* is used interchangeably by several traditions. The term *law* in this essay is intended to include these synonymous expressions.

5 See Robert Ombres, “Why Then the Law?” *New Blackfriars* 55, no. 650 (1974): 296–304.

6 For an early forensic excursus into this emergent subject, see Norman Doe, “Towards a Critique of the Role of Theology in English Ecclesiastical and Canon Law,” *Ecclesiastical Law Journal* 2, no. 11 (1992): 328–46.

Legal theology is the investigation of theological ideas as used by legislators, administrators, and judges in their decision making, and in the legal texts they produce. Legal theology is the study of the translation of theology into law. Church law receives theological data as it concerns the nature and structure of the church and particularizes this in its system of regulation. Theology explores the will of Christ and church law prescribes how the will of Christ is to be fulfilled. Church law is the science of implementation. It is a constitutive unifying element of ecclesial community, and contributes to communion among the faithful.

Ecumenical theology takes the form of the systematic reflection on the principles, propositions, and practices of the ecumenical movement. Its methods include, for example, the principle of reconciled diversity. It seeks to find ways that lead beyond mere cooperation to a true unity that makes it clear to the whole world that, as there can only be one Body of Christ, so there is only one Body that is the church of the people of God. A key focus, therefore, is ecclesiology. At one extreme are theologians who believe there is strength in doctrinal divergence: for them the ecumenical movement should lead only to a federated cooperation among the churches, with no ambition to organic unity—vitality comes from church differences. At the other extreme are theologians for whom the unity of the church already exists and in fact is to be found within the exclusive limits of their own communion.<sup>7</sup>

Legal theology has much to contribute to ecumenical theology. The study of the legal systems of Christian churches has great potential.<sup>8</sup> While each tradition has its own approach to ecclesial regulation (and each institutional church has its own regulatory system), scholars are beginning to recognize principles of Christian law that may be induced from the profound similarities of these systems. While dogmas may divide the churches, similarities between their norms of conduct produce juridical convergence, and so unify. As laws converge, so actions converge. The study of church law ecumenically reveals opportunities and obstacles in the development of more visible communion.

The World Council of Churches' Faith and Order Commission paper, *The Church: Towards a Common Vision* (2013), which took twenty years to prepare, represents "an extraordinary ecumenical achievement" in ecclesiology.<sup>9</sup> However, it does not explicitly consider church law in its ecclesiology or in ecumenism generally (as help or hindrance). The thrust of *Common Vision* is convergence in belief (the primary stimulus for law) and action (the primary focus of law) and its language is often normative (the primary character of law). The church on earth, manifested in different institutional churches, has no single humanly created system of Christian law. Rather, each institutional church has its own regulatory system of law dealing typically with ministry, governance, doctrine, worship, ritual, property, and finance. A comparison of these norm systems contributes greatly to ecumenism. From revealed similarities it is possible to induce shared juridical principles.<sup>10</sup> Their existence may be factually established by observation and comparison. These principles have a living force and potential for further development and refinement, above

7 For a perceptive analysis from a distinguished Anglican ecumenist, see Nicholas Sagovsky, "The Contribution of Canon Law to Anglican-Roman Catholic Ecumenism," *Ecclesiastical Law Journal* 13, no. 1 (2011): 4–14.

8 See, by way of example, Leo J. Koffeman, *In Order to Serve: An Ecumenical Introduction to Church Polity* (Zürich: Lit, 2014).

9 World Council of Churches, Faith and Order Commission, *The Church: Towards a Common Vision* (Geneva: World Council of Churches Publications, 2013), viii.

10 For a full consideration, see Norman Doe, *Christian Law: Contemporary Principles* (Cambridge: Cambridge University Press, 2013).

all, they demonstrate unity between the churches and should feed into the global ecumenical enterprise to enhance fuller visible unity.<sup>11</sup>

When compared, there are profound similarities between the basic elements of the normative regimes of the churches across Christian traditions.<sup>12</sup> This is not surprising: juridical unity is often based on the practice of churches' using a common source in shaping their laws (chiefly that of holy scripture) and their adoption or adaptation of norms of the mother church, in the case of those churches within a single tradition, or at least elements of them in the case of churches that have broken away from that tradition.<sup>13</sup> Comparing systems of church law (themselves forms of applied ecclesiology)

1. enables the articulation of principles of law common to Christian churches generally;
2. allows the reconciliation of juridical difference in the form of underlying principles of law;
3. provides a stable ecumenical methodology through its focus on concrete textual data;
4. offers a practical guide for Christian life; and
5. defines the degree of achieved (although largely unrecognized) communion as well as opportunities for and limits on future progress.

An examination of the regulatory instruments of institutional churches of different Christian traditions reveals that the Bible today is understood legally as the inspired Word of God and is used by church lawmakers as

1. a defining element of the juridical identity of a church;
2. a material source for the creation of particular ecclesial norms;
3. a normative standard in church life in terms of faith and order;
4. the basis of responsibilities and rights for the faithful in general;
5. the foundation of norms applicable to ordained ministry (and sometimes the process of ordination itself), sometimes as the basis for the grades of ordained minister, and often as the basis of the functions of ordained ministers;
6. justifying the character of the polity of a church (typically as episcopal, presbyterian, or congregational);
7. the basis of ecclesiastical disciplinary processes, offenses, and sanctions;
8. a determinant in the formulation of church doctrine;

11 These were the findings of the Christian Law Panel of Experts that met in Rome in November 2013 at the Christian Law Symposium. The panel, chaired by the author, consisted of lawyers and theologians from eight Christian traditions; see Mark Hill, "Christian Law: An Ecumenical Initiative," *Ecclesiastical Law Journal* 16, no. 2 (2014): 215–16. The panel met again in 2014, 2015, and 2016, producing a formal response to *Common Vision*, which was submitted to the Faith and Order Commission of the World Council of Churches in December 2015. A PDF version is available at <https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVsdGRvbWFpbncjaHJpc3RpYW5sYXdnem91cHxneDoyZGQ1N2J5ZTRiNjg3YmU3>.

12 The work of the Christian Law Panel of Experts continues, taking areas of church life thematically and finding high levels of convergent practice in such matters as discipline, property, internal regulation, membership, initiation, liturgy, and sacraments.

13 And, indeed, within the same tradition: see Anglican Communion Legal Advisers Network, *The Principles of Canon Law Common to the Churches of the Anglican Communion* (London: Anglican Communion Office, 2008), which was the fruit of a similar exercise, comparing the constitutive foundational legal documents of each of the autonomous provinces of the Anglican Church. It was not an exercise in comparative law, but one that extracted the principles which animate the various national laws. Unsurprising, a large measure of similarity was discovered.

9. a focus for worship (particularly in the ministry of the Word), and as the basis for exposition in preaching) and study by all the faithful (including the instruction of the young in Sunday schools); and
10. the basis for the principle of stewardship in the regulation of church finance and property (including the payment of contributions to the church by the faithful).

There is also evidence of the protection of the Bible from defamation of religion through blasphemy and similar laws.

Law should reflect the revealed will of God. Theological enquiry determines the will of God and law implements that determination in the form of norms of conduct. Church law has a theological foundation, rationale, and end. Church law is intended to express publicly the theological self-understanding and practical policies of a church.<sup>14</sup> Church laws should reflect, but cannot change, Christian theological truths.

How do legislators use theology to create norms? It is sometimes difficult to identify which theology is used. The substance or content of a rule of church law may be theological: the law may represent a theological idea, but this is rarely expressed. Church law as applied theology (the juridification of doctrine) implies that theology itself may be presented in the forms of precepts, prohibitions, and permissions. This is less apparent when rules of church law have no obvious theological dimension. Theology may be seen as irrelevant in the study and practice of church law. Church tribunals rarely justify decisions by reference to theology but, instead, to law, albeit legal provisions that are rooted in theology. The law of exhumation, for example, is interpreted and enforced by reference to the doctrine of the permanence of Christian burial.<sup>15</sup>

Theology is also a subject for church law, which regulates its study such as prescribing the syllabus, the methods to be used, and the standards required.<sup>16</sup> There is a theological dimension to legal reasoning in the church. The theologian should be a lawyer (in the sense of knowing the basics of church law); and the church lawyer should be a theologian (with a firm grounding in doctrine).<sup>17</sup> Legal theology, though still nascent in terms of formal scholarship, is assuredly a branch of applied ecclesiology.<sup>18</sup>

14 For an informative and revisionist assessment of Richard Hooker's magisterial work, *The Lawes of Ecclesiastical Polity*, viewed through the prism of jurisprudence, see Norman Doe, "Richard Hooker: Priest and Jurist," in *Great Christian Jurists in English History*, ed. Mark Hill and R. H. Helmholz (Cambridge: Cambridge University Press, 2017), 115–37. The volume, Doe contends, "provides a 'theology of law' and a practical statement of principles of English church law."

15 See *Re Blagdon Cemetery* [2002] Fam 299, in which the court sought a written opinion from a serving bishop, and the numerous cases that have been subsequently decided by chancellors' discussion regarding whether an exception might be made to the doctrinal principle.

16 See Mark Hill, "Canon Law: The Discipline of Teaching and the Teaching of the Discipline," in *Studies in Canon Law and Common Law in Honor of R. H. Helmholz*, ed. Troy L. Harris (Berkeley: Robbins Collection Publications, 2015): 337–53.

17 These assertions are aspirational, for the Church of England at least. The teaching of canon and ecclesiastical law currently has no part in clerical formation, and the cadre of lawyers who serve the church rarely have any grounding in theology. The Ecclesiastical Law Society, which the author chairs, is beginning to take small steps to rectify the matter.

18 See the various essays in Frank Cranmer et al., *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe* (Cambridge: Cambridge University Press, 2016); see especially John Witte, Jr., "The Interdisciplinary Growth of Law and Religion," *ibid.*, 247–61; Celia Kenny, "New Directions in the Confluence of Law and Religion," *ibid.*, 262–74. See also Norman Doe and Russell Sandberg, eds., *Law and Religion: New Horizons* (Leuven: Peeters, 2010).

Laws cannot encompass all facets or prescribe the fullness of ecclesial life, but theology can. Theology as found in scripture, reason, and tradition is an authoritative source of church laws. If the meaning of a law is in doubt, recourse should be had to theology. Law should be interpreted in the light of theology. An interdisciplinary convergence is long overdue. It will provide mutual enrichment to theologians who seek to explore and explain the nature of belief, and lawyers who order institutional churches to reveal and enhance such belief. As Witte observes, “Law and religion are distinct spheres and sciences of human life, but they exist in dialectical interaction, constantly crossing over and cross-fertilizing each other.”<sup>19</sup> Thinking about legal theology remains in its infancy. But once its importance has been fully recognized, a robust and engaging body of scholarship becomes inevitable.

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<sup>19</sup> John Witte, Jr., “The Interdisciplinary Growth of Law and Religion,” 247.