ROME, CANTERBURY AND THE LAW

CANON CHRISTOPHER HILL

1. It was over a late night glass of Scotch, a number of years ago, that Graham Routledge and I first talked of the issues I am asked to address this afternoon. Chancellor Routledge and I differed on a number of subjects, political and ecclesiastical, but we discovered common cause in the recognition of the importance of an impartial and unemotional examination of the doctrinal, ecclesiological and constitutional implications of any future Anglican- Roman Catholic unity. It was during one such conversation that Graham told me of his hopes for the establishment of this Society, which he saw as, amongst other things, the most appropriate forum for the bringing together of the necessary disciplines and professions for such scholarly and ecumenical discussion. Graham had been able to initiate some discussion of the question within the English Anglican Roman Catholic Committee (of which he was a distinguished member). But the complexities of both canon and constitutional law, and, problems concerning the interpretation of ecclesiastical history, reinforced his judgement that quiet and continuing consideration was required in a society such as ours as well as in ecumenical committees. It was with such thoughts in mind that I penned a letter to the Editor of the Ecclesiastical Law Journal calling for such discussion. I now pay the penalty for telling a judge what his Society ought to be doing. I do so, however, with a sense of reverence for our late Chairman, in whose St. Paul's residence house in Amen Court I now live. And it is to the memory of Graham Routledge that I dedicate this paper, in the knowledge that he too was convinced of the importance of its subject. Nevertheless my approach must be my own. I am neither a civilian nor a canon lawyer. Nor am I an ecclesiastical historian. Though I shall be trespassing on both law and history, I come to *Rome, Canterbury and the Law* as an ecumenical theologian whose privilege it has been to serve both the First and Second Anglican Roman Catholic International Commissions. I also come to my title with some living experience of all the major Churches. Further, in 15 years at Lambeth Palace I have become more acquainted than most with the inner workings of the family of Churches we call the Anglican Communion. Finally, I disclose that I am a deeply convinced European and Internationalist. Such prejudices, it will be obvious to this audience, are bound to affect my convictions on such a subject.

2. Let me begin with what the general public would probably see as the chief constitutional difficulty to unity with Rome. 'The Queen, not the Pope, is head of our Church.' I start in this simplistic way because I never cease to be amazed at the historical ignorance of public opinion and its organs. The Sunday Times front page headline sums it up, echoing Ian Paisley during the recent visit of the Archbishop of Canterbury to the Pope: 'Runcie drags Queen into row'.

In fact the title 'Supreme Governor' should not in itself be regarded as an insuperable barrier to unity. Queen Elizabeth's *Act of Supremacy* of 1559 deliberately avoided Henry's more extreme style 'Supreme Head'. Furthermore men of the calibre of St Thomas More and St John Fisher had eventually come to accept, with some compromise on both sides, the style Henry demanded for himself in 1531: 'Singular Protector, only and supreme Lord, and, as far as the law of Christ allows, even Supreme Head' of the Church of England. It was only when Henry, by the *Succession Act* of 1534, demanded an oath accepting his supremacy in the more absolute terms of the *Supreme Head Act* of the same year that More

and Fisher finally refused to acquiesce. In the latter Act there was no saving: 'as far as the law of Christ allows'.

Tudor historians suggest two factors behind Elizabeth's modification of her father's legislation. First, Elizabeth's known hope, at least at the beginning of her reign, of including the moderate men of both the 'Catholic' and 'Reformed' parties in her settlement. Another more subtle factor may have been the changing philosophical attitude towards the monarchy which was developing during Elizabeth's reign. This can be summarised as an 'Erasminian' view of monarchy from 'below' rather than 'above'. For whatever reason, Elizabeth herself clearly rejected the title 'Supreme Head' saying: 'This honour is due to Christ alone, and cannot belong to any human being soever'.

In its historical context, therefore, the present style of the monarch should not be regarded as a major difficulty.

3. Along with the popular conception of the Crown as the head of the Church of England there is also a frequent Roman Catholic misconception that the Crown or Parliament can define the doctrine of the Church of England. Elizabeth's constitutional settlement did not include such powers. It is true that the medieval common lawyers coined the maxim that the king was not a mere layman *(rex est mixta persona una cum sacerdote)* nevertheless the 39 Articles agree with both the Hilderbrandine Papacy and with our own bishop Grossteste's response to Henry III: 'we give not to our Princes the ministering either of God's Word or of the Sacraments' (Article 37). In the 17th century Archbishop William Laud – who certainly had a high view of kings – was to put it this way: 'the supremacy which the King of England hath in causes ecclesiastical reaches not to the giving of him power to determine points of faith, either in Parliament or out, or to the acknowledgement of any such power residing in him . . . or, to do anything which is purely spiritual'.

This is not to say that Parliamentarians have always concurred, then or now. But Elizabeth consistently used her power to protect the Church from the meddling of Parliament. She twice insisted that ecclesiastical matters must first be debated in the Convocations (1572 and 1593). And to Article 20 she added in her own hand the clause: 'the Church hath . . . authority in controversies of faith'. The 16th and 17th century relationship between Church and Crown in England was consciously modelled upon what was perceived to be the relationship between the Church and the Byzantine Empire or the Holy Roman Empire of Charlemagne and his successors. This is explicitly stated in the Elizabethan Injunctions of 1559 and in Canon 2 of 1604: the latter declaims that the King's Majesty has the same authority in ecclesiastical causes as the 'Christian Emperors in the primitive Church'. This conception was not of itself new in England. The ceremonial and investiture at the anointing and coronation of the sovereign, derived indirectly from the Byzantine and Carolingian Courts, had ritually embodied such a view from King Edgar's coronation of 973.

4. So much for headship and the role of the Crown within the life of the Church. But, as Judge Quentin Edwards remarked in his paper published in the July 1988 edition of this Journal, 'in the field of ecclesiastical law the Sovereign is also a human soul and as such is required, by law, to be in communion with the Church of England'. Moreover, and even more to the point for our discussion, the Sovereign may not, by statute law, be reconciled or hold communion with the See of Rome. Nor may the Sovereign marry a 'Papist'. Both Judge Edwards and Mr Brian Hanson, the Legal Adviser to the General Synod of the Church of England, have catalogued the complex battery of 17th century and later statutes which

remain in force. They begin with the Coronation Oath Act of 1688. This speaks of 'defending the protestant and reformed religion'. It replaced the earlier oath to govern the land 'according to the laws of King St Edward and the common people' and to protect and maintain the privileges of the Church. In spite of the 1688 oath the Archbishop still delivers the ring to the Sovereign speaking of the 'defence of the Catholic faith'. Thus, to speculate, a revised oath might not be inconsistent if it spoke of the catholic and reformed heritage of the Church of England. There is indeed some precedent for the revision of the oath in the abolition of the declaration against tran-substantiation of 1910.

More weighty questions to do with the Protestant Succession arise with the Bill of Rights of 1688 and the Act of Settlement of 1701. But I will not deal with these here, nor with later legislation related to the union with Scotland and the eventual union with Ireland. Nor will I speak of still further problems in connection with the Royal succession in relation to the independent monarchies of the Commonwealth and of the Statute of Westminster of 1931. These issues are admirably set out in Judge Quentin Edwards' paper. I simply note the irony of working for any kind of Anglican-Roman Catholic unity in the light of the stern legal prohibitions upon the Sovereign being reconciled to communion with Rome. Such irony is made more personal for me by my membership of the Royal Household in virtue of being one of the College of Chaplains to The Queen! But no subject of Canon Law can escape this irony, for immediately following Canon A7 'of the Royal Supremacy' comes A8 'of Schisms' which declares 'it is the duty of clergy and people to do their utmost not only to avoid occasions of strife but also to seek in penitence and charity to heal such divisions'.

One of the most important aspects of modern ecumenical conversation has been the discovery of what we already share. Christians are already in a high degree of communion. Our one baptism, the sharing of the Holy Scriptures and the catholic creeds, an increasingly common liturgical and sacramental tradition, convergent paths of spirituality; all these point to the communion in holy things we already share with Roman Catholic and other Christians. The Pope and the Archbishop of Canterbury spoke jointly in Rome of the '*certain yet imperfect communion we already share*'. Of course the law speaks of the Sovereign in relation to a juridical communion with Rome expressed in sacramental *communicatio in sacris*. But *communicatio in sacris* is only the visible sacramental expression of the fullness of an ecclesial communion of faith and life at many levels. And, in spite of setbacks, this broader communion of faith and life is steadily increasing. Sacramental communion is like the tip of an iceberg. It was because Graham Routledge knew what was under the water that he saw the need for reflection upon the law as it bears on any future sacramental communion between Rome and Canterbury.

5. I want to devote the remainder of this paper to questions even harder than those so far mentioned. In the public debate about Anglican-Roman Catholic unity it seems currently fashionable to concentrate upon the extent to which the ordination of women has damaged immediate prospects for unity. One of the helpful clarifications of the discussion between the Pope and the Archbishop of Canterbury last September was their statement that the debate about the ordination of women reflects important ecclesiological differences. Namely, how our two churches make decisions in relation to matters relating to the faith and order of the church. Whatever the present pressures concerning the ordination of women, the real issue, both amongst Anglicans and between Anglicans and Roman Catholics, surely concerns authority.

Now the Final Report of ARCIC-I speaks of both primacy and councils (duly balanced) at the level of the universal Church as a visible focus of unity and communion. Not every Anglican is enamoured of these proposals. But they have not been rejected. Indeed they have received a degree of qualified approval as a basis for further discussion with the Roman Catholic Church by the General Synod and the Lambeth Conference. Of course ARCIC is not speaking of Rome as it now is. It was that great champion of the traditional Church of England, Gordon Dunstan, who observed, on the first publication of *Authority in the Church*, that the position envisaged for the Bishop of Rome 'is one of primacy, that is of being first among equals, not one of supremacy, that is of sovereignty over the uniting Churches'. Moreover, we cannot ignore the sharp debate within the Roman Catholic Church at the present time over the balance between central authority and the proper subsidiarity of the regional and local Church. However much some in Rome would like to put the clock back – and whatever transient victories may be won – the ultimate direction seems certain enough. The sheer impossibility of controlling a world empire through a monolithic centralised structure has been amply demonstrated in the past twelve months in Eastern Europe. The Papal Monarchy cannot but become more constitutional.

But having said this there remains the hard legal fact that the Church of England has no recourse to any authority outside England. The Papal Supremacy became the Royal Supremacy in the first phase of the English Reformation and he who thinks of the Tudor ecclesiastical settlement solely in political, theological, liturgical or economic terms misreads it. The English Reformation can just as well be read as the decisive settlement of a debate which had been running for centuries between common lawyers and canon lawyers. This fact makes this Society ecumenical by definition.

It was the canon lawyers who originally spoke of the monstrous horror of an organ with two heads, *organum anceps monstrum horrendum*. The canonists coined this phrase during the medieval disputes between reforming Popes and the Holy Roman Emperors who had a propensity for treating lay patronage as a saleable commodity the right to which was to be defended. But by the 16th century the argument about the monstrous horror of more than one jurisdiction was being turned against the Papacy in favour of national sovereigns. And nowhere more effectively than in England. Not only does the 'bishop of Rome hath no jurisdiction in the realm of England' but by the Royal Supremacy the Sovereign is the source of all jurisdiction whether civil or ecclesiastical. This is set out clearly enough in Article 37 and Canon A7. It is embodied in the Act of Supremacy of 1558 and has to be acknowledged unambiguously and unecumenically by diocesan bishops as they pay homage. The 16th century legislation may indeed embody very few entirely new constitutional restraints upon the Church. Most of the machinery for the Sovereign's role in the choice of bishops, or in the restraint of doctrinal appeals to Rome, was already in place well before the Tudors. But the theory was new. From thenceforward there was to be only one source of jurisdiction. The Henrician organ had only one head. The effect in law has again been summarised by Judge Edwards: 'It follows that there can be no acknowledgement of general councils or appeals from England to the wider Church without a change in the law.'

It has long been held within the counsels of ARCIC that the ultimate problem in relation to a possible ecumenical Primacy is *not* the claim to Papal

infallibility (which no two Roman Catholic theologians explain in exactly the same way) but rather, the claim to universal, ordinary jurisdiction. Papal infallibility – that is the final decision of the final court of appeal – is but one aspect of the claimed jurisdiction of the bishops of Rome. So we come eventually but inexorably to the heart of the matter between Anglicans and Roman Catholics: could there ever be, should there ever be, a restoration of a jurisdictional relationship between Rome and Canterbury?

In opening up this difficult question I would like to begin by attempting some historical clarifications. I have already said that an ARCIC or ecumenical primacy would be very different from the present Curia Romana. It is worth recalling that the centralised administration of the Roman Catholic Church by the Roman Curia only goes back to the 16th century and the definitive establishment of the various Roman Congregations. (It is also worth remarking that much of the more detailed Vatican supervision of a world-wide Church did not develop until the 19th century and the invention of railways, postal systems and the telegraph.) What existed before the 16th century was in essence an *appellate* jurisdiction, not a court of first instance. This is very ancient indeed. This is the primatial jurisdiction which the Orthodox recognise in Rome, while rejecting the 'ordinary and immediate' jurisdiction for the Pope claimed by the first Vatican Council.

What of Roman appellate jurisdiction and the Church of England? In 1532 and 1534 Henry VIII cajoled Parliament into passing the *Act in Restraint of Appeals* and the *Act in Submission of the Clergy and Restraint of Appeals*. The Roman appellate jurisdiction was regarded as an usurpation. The same argument was used at the same time, perhaps with stronger historical justification, to abolish the payment of annates to Rome, that is the first year's income of a see, and the Papal appointment of bishops. Was appellate jurisdiction an usurpation?

The English Reformation theory seems to have been first articulated in 1518 by Henry Standish, the Provincial of Greyfriars: the Roman Canon Law had authority in England by reason of its being freely accepted, of its longstanding usage, and so long as it was not contrary to the royal perogative. The actual language of Henry Standish is found in the later Acts forbidding Papal Dispensations, Peter's Pence and in the Restraint of Appeals Acts. The Middle Temple common lawyer, Christopher St Germain, also argued in a similar way in his dialogue between Canon and Common Law entitled *Doctor and Student* of 1523. He highlights the legal problem of the conflict of co-existing jurisdictions of which I have already spoken. His words also appear to have had a direct influence upon the Henrician statutes.

It will be obvious that I cannot now avoid some reference to the 'Stubbs – Maitland controversy'. You will recall that Canon Stubbs, aided and abetted by Sir Robert Philimore, the Dean of the Arches, attempted to argue in the Historical Appendix to the Royal Commission on Ecclesiastical Jurisdiction that the ancient Ecclesia Anglicana was canonically autonomous. The Papal canon law was, so it was said, 'of great authority' but not 'of binding force'. Frederick Maitland, in the 90ies, attempted to refute this by looking at the medieval legal handbooks and commentaries. He found the Roman Canon law binding and Provincial constitutions mere applications and glosses. Stubbs eventually recanted in 1900. The learned Introduction to the 1947 Report, *The Canon Law of the Church of England,* endorsed the Maitland view. Since then however the argument seems to have turned back to some extent in favour of Stubbs. J. W. Gray has argued that an accurate historical account of the reality of Papal jurisdiction in pre-reformation England must do more than refute Stubbs on the theory of the universality of the Canon Law. He argues from cases before the medieval ecclesiastical courts

that there was a considerable gap between the 'formal acceptance' and the 'actual reception' of Papal decrees. Precisely because the Papacy was an appellate jurisdiction there was no great machinery for enforcement. Even the Papal Legates failed to promulge or enforce unacceptable legislation. The working structure of the Medieval Church was not centralised, even if it possessed an universal law. These conclusions seem to be confirmed in the recent book *Canon Law and the Law of England* by R. H. Helmholz, reviewed by our President in the January 1989 edition of the Journal. This work is also based upon an examination of the actual administration of the law.

Central to Anglican-Roman Catholic debate today are the questions of doctrinal jurisdiction and the appointment of bishops: consider recent controversy about the Roman disciplining of 'radical' theologians and the appointment of 'conservative' bishops. It seems clear that the medieval English bishops were successful in resisting doctrinal appeals to Rome. Nor was the Inquisition allowed to practise in England. Lay opposition and jurisdictional rivalry between the bishops and the inquisitors happily prevented it. Thus by the middle of the 14th century in the *Statutes of Praemunire,* a pragmatic road had been taken in law and in practice in relations between England and Rome. The primacy of Rome and its appellate doctrinal jurisdiction was acknowledged, but no appeal might be made from the Church courts to Rome without royal permission; Papal Legates needed royal consent before landing in England, and English bishops could only act as Legates with the King's sanction.

So the drafters of the *Act in Restraint of Appeals* were only partially writing historical fiction when they declared that: 'the spirituality, now being usually called the English Church, always hath been reputed sufficient and meet of itself, without the inter meddling of any exterior person or persons, to declare and determine all such doubts and to administer all such offices and duties as to their rooms spiritual doth appertain'.

I hope you will forgive my rather lengthy Stubbs-Maitland digression. But in the matter of jurisdiction it is essential to know as accurately as we are able the historical context from which our present ecclesiastical law derives. In theory the Church had an universal law and there was a transnational appellate jurisdiction. In practice there was considerable adaptation and modification to local circumstances. Perhaps history furnishes us with a useful model for the ecumenical future.

6. At the beginning of my reflections on jurisdiction I posed the question whether there could ever, or should ever, be a restoration of a jurisdictional relationship between Roman and Canterbury.

I now turn to whether this is desirable in the ecumenical future.

Not everybody is convinced by an argument from Tradition. It is indisputable historically that among the great apostolic and metropolitan sees of the Early Church, Rome was described as – 'presiding in love' and was recognised as a sure test and final arbiter in disputed matters of faith, short of an ecumenical council. Moreover, it was the decrees of the councils together with the early appellate Roman decisions which formed the basis of the *Jus Antiquum*. And we see something of Roman solicitude for the communion of all the Churches even as early as the close of the first century when Clement of Rome responds to a request for guidance from the Church of Corinth. It would be anachronistic to call this jurisdiction but it is clear evidence of the presidency of love Rome was later described as exercising. But where does history take us? The Primacy of Rome was abused and Anglicans have rejected it. Why should we consider it again? We sometimes hear similar arguments from our Free Church friends against

episcopacy. It is hard to argue solely from history if the strands of history have been broken in schism.

I do not want to argue here for the historical revival of some acceptable patristic primacy derived from the time of the undivided Church. I want to begin with the present need of the Anglican Church.

At the residential conference of this Society in Nottingham we heard our episcopal President deliver a characteristically magisterial exposition on the legal implications of Lambeth. This too is printed in our Journal. The Bishop of Chichester devoted considerable space to the origins of the first Lambeth Conference and the question of unity and jurisdiction outside England. Throughout the Anglican Communion today similar questions are beginning to be asked about how Anglican unity and identity can be maintained without some minimum structures external to the hitherto juridically independent Provinces. The language being used is cautious. Interdependence is being spoken of as preferable to independence. At a recent meeting of the Archbishop of Canterbury's Commission on Communion and Women in the Episcopate heartening news was heard of the avoidance of schism in the USA. The two American representatives (both in favour of the ordination of women) said that positions had become so polarised in the Episcopal Church that schism had become inevitable without reference to some external body or person. The so-called Eames Commission, with the authority (such as it is) of the Lambeth Conference and the Archbishop of Canterbury, has become an external arbitrator of some significance. Its advice has (so far) been followed by both 'traditionalists' and 'liberals' in the USA. The Eames Commission has no appellate authority. It has no jurisdiction at all. It cannot enforce compulsory arbitration. Yet as the Churches of the Anglican Communion move further away from each other as a proper consequence of their developing indigenous ecclesiastical cultures, and as they rightly rely less on English culture and language for their unity and identity, so the more the need will arise for some minimum norms of faith and order, and some reference point beyond the individual Province.

Moreover, on the wider ecumenical front the Faith and Order Commission of the World Council of Churches has for some years been conducting discussion on the question of common decision making. So from an Anglican and ecumenical perspective, quite separate from Rome, I believe the decades of the next century are likely to see questions arising about *international* Christian unity and authority. Supposing there could be another genuinely ecumenical Council? Supposing there could be some strengthened Synod of the Anglican Communion? The Henrician Statutes would stand in their way, just as much as they do for any universal or Roman primacy.

I will end on a rather different note. In the last few months we have seen the most remarkable transformation of Europe. Transfiguration might be the better word. But we see the potential for bane as well as blessing. Along with the renewal of the democratic process we also see alarming signs of conflicting nationalisms. This should not surprise us. Here is the usual consequence of the demise of empire. But still it saddens and perplexes. Sometimes extreme nationalism goes hand in hand with a particular Christian culture and we see the spectre of religious as well as ethnic conflict, as for example between Russian Orthodox and Ukrainian Catholic Uniates. Paradoxically, this is taking place just as we are discovering not only that claustrophobic and monolithic empires don't work, but also that there is, nevertheless an inescapable economic interconnectedness in the modern world which makes the renaissance nation-state finally

and irretrievably redundant as a solely sufficient unit. In Britain we are part of Europe, Eastern as well as Western, and Europe is itself part of the wider world. We have begun to take steps away from the nation-state as far as Western Europe is concerned. We are, in fact, already subject to jurisdictions outside England. And they will increase after 1992. They will not diminish as we seek for wider international relationships both economic and political. We live in one world.

Nor should the Christian Churches stand aside from this process. The original meaning of the word ecumenical has to do with global household management. The modern ecumenical movement also challenges the Churches to think in more international terms than the ecclesiastical equivalent of the nation-state. What form any eventual international Christian unity will take no one yet knows. No doubt it will be wider and richer than we can imagine; certainly more ecumenically and culturally inclusive than contemporary Anglicanism and Roman Catholicism. Unity must certainly be accompanied by diversity. Perhaps Christians may discover ways of maintaining an international unity while nurturing local diversity. This might require new forms of episcopacy, new forms of international councils and perhaps, a new form of universal primacy, all to focus unity at local, national, regional and global levels. And here there might be a cross-fertilisation between secular and ecclesial structures – as there always has been. What does the world more urgently require but a politics which can foster both *local* identity and *international* co-operation? The Church and the world find they have the same agenda. What seems more and more certain to me is this: that the more we explore a wider unity at the international level – whether within the Anglican Communion or ecumenically – the more certainly we shall eventually have to look again at the particular form of the jurisdictional settlement taken in English law in our dispute with Rome four hundred years ago.

If it is any consolation this must surely keep ecumenists and lawyers in full employment for at least a century.

I must acknowledge a number of sources for the historical elements in this paper, while implicating no one but myself in its speculative opinions. In particular:
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Q. Edwards, The Canon Law of the Church of England; its implications for Unity (incorporating material from an unpublished monograph by B. T. Hanson) Ecclesiastical Law Journal, 1988.