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# The Legal Framework of the Church of England: A Critical Study in a Comparative Context

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# Book Reviews

## Informative Surprises from the Law of the Church of England

THE LEGAL FRAMEWORK OF THE CHURCH OF ENGLAND: A CRITICAL STUDY IN A COMPARATIVE CONTEXT. By Norman Doe.<sup>†</sup> Oxford: Oxford University Press, 1996. Pp. lxxiv, 543. \$110.00.<sup>‡</sup>

Reviewed by R.H. Helmholz\*

Any reader accustomed to thinking of the Church of England as a somewhat ramshackle institution, burdened with an organizational structure inherited from the Middle Ages and a constitution fixed during the sixteenth century, will find Norman Doe's *The Legal Framework of the Church of England* an eye-opener. I did. A good many of the old forms do still exist. For most purposes, however, the developments of the twentieth century have superseded the inheritance of the past. And these developments seem to have overwhelmed the old forms by their wide scope and large number. *The Legal Framework of the Church of England* describes today's law, with only occasional bows to history. It also appropriately compares that modern law with the current canon law of the Roman Catholic Church in England. Written by an author who modestly describes himself as "an organist in the Church in Wales,"<sup>1</sup> but who is actually an accomplished scholar and a leader in the renewal of the study of ecclesiastical law in the English Church,<sup>2</sup> the book succeeds admirably.

This Review will take up three areas of the Church's law where the book's conclusions proved surprising to me. It will then assess the

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<sup>\*</sup> Hereinafter cited by page number only.

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1. P. v. Leadership coming from the Welsh in this area is not unprecedented. See Dafydd Jenkins, *From Wales to Weltenburg?*, in *VOM MITTELALTERLICHEN RECHT ZUR NEUZEITLICHEN RECHTSWISSENSCHAFT: BEDINGUNGEN, WEGE UND PROBLEME DER EUROPÄISCHEN RECHTSGESCHICHTE 75* (Norbert Brieskorn et al. eds., 1994) (discussing marginalia from the Lichfield Gospels and suggesting that "the use of sacred books for secular records could possibly have begun in Wales, and spread from Wales to England and across half of Europe").

2. He is director of the LL.M. Program in Canon Law in the Cardiff Law School, and he is also the author of an important historical work. See NORMAN DOE, *FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW* (1990).

readership the book should attract. A description of the book's coverage must, however, come first. American readers may be hard pressed to see why an account of the law of a Protestant church should require more than five hundred pages of text and over three thousand footnotes. It does though. The book is not too long. In fact, there is much more that could be said, and some of the footnotes, if followed up, will lead readers to some quite fascinating additional reading. The author's conclusion begins by noting that "[t]he legal framework of the Church of England is complex,"<sup>3</sup> and the contents of this work certainly bear out these words.

### I. The Book's Coverage

The opening chapters provide a jurisprudential background. Broadly speaking, the Church of England regards itself as being governed both by divine law and human law. The former comes principally from biblical sources, cannot be changed, and is the ultimate source of much of the latter. An easily accessible example is marriage. The institution of marriage is a part of divine law. Men and women have a right to marry. The right to be married in the parish church where they live, however, is a humanly enacted part of English ecclesiastical law.<sup>4</sup> This right is derived from divine law in one sense, but it would be no violation of ecclesiastical law to move marriage ceremonies elsewhere or even to restrict their celebration in church to those who adhere to the Church's teaching.

Enacted canon law has the responsibility of helping "to enable the church to fulfill its mission in the world."<sup>5</sup> This responsibility inevitably gives canon law a special character when compared with more familiar secular law, and in this instance the law's goal is complicated by the "establishment" of the English Church. The exact meaning of that term, strange to an American ear except as something the Constitution forbids,<sup>6</sup> proves elusive even for the book's author. He wrestles manfully with an exact definition without ever being able to pin it down. At the very least, however, establishment places some special duties on the Church. The Queen's consent, which remains requisite for some forms of ecclesiastical legislation,<sup>7</sup> stands as an appropriate symbol of that relationship.

Understanding the exact scope and nature of ecclesiastical law is further complicated by the existence of what the author calls "quasi-

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3. P. 501.

4. See pp. 357-68 (chronicling the statutory and case-law development of the duty imposed upon the English clergy to celebrate marriages).

5. P. 33.

6. See U.S. CONST. amend. I.

7. See p. 9.

legislation.”<sup>8</sup> By this he means the type of diocesan regulations and codes of practice that exist in profusion today. Lacking legislative or judicial sanction, are these ubiquitous regulations nevertheless “law”? Most of us would probably say that they are not. But if they are not, they nonetheless function very much as many laws do. They direct conduct. Some account of the “quasi-legislation” is therefore required even though it is difficult to fit it into a fully satisfactory jurisprudential system.

The special nature of the Church’s law is also illustrated, and is perhaps most evident, in its “criminal” side.<sup>9</sup> On the one hand, under canonical principles any sanctions that exist must not be primarily punitive in effect. Truly considered, the Church has only spiritual sanctions to impose upon violators of its laws—typically exclusion from spiritual ministrations. For non-adherents, exclusion will be no sanction at all. Even for adherents, sanctions must serve to bring willing obedience to the Church’s laws rather than simply to punish or to “set an example” for others. The notion of spiritual sanctions, therefore, seems distinctly unusual to observers outside the system, and perhaps it may seem wrong to talk about sanctions at all. On the other hand, something like them must exist if the goals of the Church are to be advanced. At a minimum, church services cannot be held without a modicum of order, and, in a broader sense, the Church will not be respected if its own life lacks discipline. The canon law’s task is to secure that measure of order and discipline, without trespassing upon the principle that the Church’s law is meant to serve medicinal, not punitive, purposes.

Part II of *The Legal Framework of the Church of England* moves from theory to the instruments by which the Church’s law is enacted and put into effect. The chief legislative body is the General Synod. It is the “Parliament of the Church,” consisting of three Houses: the bishops and representatives drawn both from the lower clergy and the laity.<sup>10</sup> Below it stand various executive and advisory bodies, ranging from the powerful Church Commissioners to lowly parochial church councils. It makes a long list. All have power to create and administer law in a lesser, but, in the author’s view, a nonetheless real sense.<sup>11</sup> Finally, diocesan and provincial courts exercise jurisdiction chiefly over clergy discipline and what are called faculty cases, matters that grow out of petitions to change the

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8. P. 19.

9. See generally John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433 (1993-1994) (focusing on the interaction of Anglo-American criminal law and Protestant theological doctrine).

10. P. 56 (quoting *Regina v. Ecclesiastical Committee of Both Houses of Parliament ex rel. The Church Society*, 6 Admin. L.R. 670 (1994)).

11. See pp. 78-79.

fabric of churches and the uses made of other consecrated property.<sup>12</sup> They do not, however, possess a general supervisory power over most of the administrative and legislative bodies.<sup>13</sup>

The three sections of Part III ("Ecclesiastical Ministry") take up the legal responsibilities assigned to the bishops, the lower clergy, and the laity. There are puzzles here. How, for example, should the ancient parochial system and the law of patronage that accompanies it be integrated with the regime of "church planting teams" now routinely appointed to establish new "worship centres"?<sup>14</sup> Or what is the true meaning and scope today of the "Oath of Canonical Obedience" taken by clergy about to be ordained?<sup>15</sup> The author says what he can about these and other recurrent problems, but sometimes he is obliged to conclude (as with the second question) that the present arrangements "are badly drafted and in need of revision."<sup>16</sup>

Part IV deals with faith and doctrine. Although it adopts an expansive definition of those terms, even including liturgical regulations, this section is the shortest (fifty-five pages) and least fully developed of *The Legal Framework of the Church of England*. Perhaps this brevity reflects current ambivalence about religious doctrine. What is one to make, for instance, of this statement about religious liberty?:

The law of the Church of England neither claims nor presents a compendium of fundamental human rights to practise the faith in secular society, although rights deriving from the canons, as rights under the law of the land, may be operative in the civil context as well as the ecclesiastical.<sup>17</sup>

The extent to which law controls liturgical observance also seemed a trifle opaque to me. Much is made in this connection of a "principle of liturgical subsidiarity,"<sup>18</sup> and the author's view is that in this context the rule of "uniformity has been replaced by that of conformity."<sup>19</sup> I confess I could not quite work out exactly what these expressions meant.

The sacraments and attendant rites are taken up in Part V. For example, the minimum requirements for valid baptism are clearly set forth,<sup>20</sup> and the ancient prohibition against re-baptism is restated in mod-

12. See generally pp. 142-45.

13. See pp. 84-87.

14. P. 410; see also p. 191.

15. P. 213.

16. P. 213.

17. P. 270.

18. E.g., pp. 288, 291, 308.

19. P. 308.

20. See pp. 321-22 (citing *Kemp v. Wickes*, 161 Eng. Rep. 1320, 1328 (Arches 1809) (holding that the essential components of baptism are "the use of water and the invocation of the Holy Trinity")

ern form. Thus, requests for baptism by adults troubled by their lack of response when baptized as infants "should always be refused."<sup>21</sup> Further, bringing up baptized children in a Christian household is declared to be a duty incumbent upon all parents and sponsors.<sup>22</sup> The author thus succinctly lays out the basic place of baptism in the life of the Church. The book continues apace through the Church's sacraments and rites until the reader reaches the burial of the dead. Along the way, the author struggles with the modern law of marriage and divorce—which he charitably describes as "untidy."<sup>23</sup> A lack of coherence in its marriage law may be inevitable. A certain amount of untidiness is one of the incidental characteristics shared with the Catholic marriage law. It is a by-product of the conflict between inherited ideals of marriage and twentieth-century notions about the centrality of freedom in personal relationships.

Part VI deals with finance and ownership of property. Stresses and strains have long been characteristic of this area of ecclesiastical law. On one hand, bishops and other office holders in the Church have always been the fiduciaries of a sort. The common law's trust has an ecclesiastical parallel, if not indeed a canonical pedigree.<sup>24</sup> Bishops do not own the Church's property, and the canon law has long prohibited them from alienating it.<sup>25</sup> "Mortmain" laws, for example, had their origins in the vise-like grip churches and monastic houses were thought to have fixed on property that came under their control.<sup>26</sup> On the other hand, that prohibition is a difficult rule to enforce to the letter. Some possessions wear out. Some lose their appeal. It is impossible to administer an institution as large as the Church without being able to sell any of its property at all. The result in the Middle Ages was a series of what look very much like compromises.<sup>27</sup> Today, the situation remains similarly conflicted; it is "regulated by a tangle of church-made and state-made law."<sup>28</sup> It has also raised new problems. For instance, does the duty not to alienate property require insuring it?<sup>29</sup> And must the Church provide legal aid out of its patrimony when poor parishioners find their way into its courts or

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in order to declare that a minister of the Anglican Church could not refuse to bury the child of Calvinists)).

21. P. 325.

22. See pp. 325-27.

23. P. 384.

24. See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 238-39 (2d ed. Cambridge Univ. Press 1923) (1898).

25. See *De rebus ecclesiae alienandis, vel non*, X 3.13.1-12.

26. See, e.g., SANDRA RABAN, *MORTMAIN LEGISLATION AND THE ENGLISH CHURCH, 1279-1500*, at 3 (1982).

27. See, e.g., *Glossa ordinaria*, X 3.13.5, rubr. ("*Nota quod nullus debet alienare res ecclesiae immobiles, et est sententia generalis; fallit enim in casu utilitatis.*").

28. P. 439.

29. See pp. 487-89.

administrative tribunals?<sup>30</sup> One of the merits of this book is that it raises and addresses such questions honestly.

## II. The Book's Surprises

A number of my assumptions about the Church of England were overturned by reading this book. Several of my notions about its character turn out to have been, to put it mildly, very much out of date. Not that they were wholly mistaken. In each instance, there was something to be said for my earlier assumptions. Overall, however, they provided an entirely inadequate picture of the situation today. Because other readers may share my assumptions (and my ignorance), describing three of the surprises that awaited me in *The Legal Framework of the Church of England* may be something more than simply a penitential exercise.<sup>31</sup>

### A. *The Church's Antiquated Institutions*

One of my assumptions was that the largest part of the government of the English Church continued to move along the path laid out by its medieval inheritance. Apart from the abolition of papal jurisdiction, the Reformation had little immediate impact on the law and institutions of the English Church.<sup>32</sup> The bishoprics were left in place; the convocations of the provinces of Canterbury and York continued to exist; churchwardens remained as the superintendents of parish churches; and the ecclesiastical courts exercised a jurisdiction little changed from what it had been in 1500.<sup>33</sup> I thought that most of what had happened since then consisted of the gradual loss of many parts of this heritage, principally during the nineteenth century. Otherwise, I thought, the Church's institutions had remained pretty much the same.<sup>34</sup>

I might have been right in 1600. Not today. The provincial convocations do still exist, for example, but their legislative functions were largely

30. See p. 499.

31. I can claim some good company, at least in the general sense of not obstinately adhering to fixed ideas. See Thomas L. Shaffer, *How I Changed My Mind*, 10 J.L. & RELIGION 291, 301 (1993-1994).

32. See FELIX MAKOWER, *THE CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND* 48-68 (Burt Franklin 1971) (1895) (describing the deferential treatment given established constitutional and jurisdictional doctrines by reformers).

33. See ERIC JOSEF CARLSON, *MARRIAGE AND THE ENGLISH REFORMATION* 81 (1994); DOROTHY M. OWEN, *THE MEDIEVAL CANON LAW: TEACHING, LITERATURE AND TRANSMISSION* 43 (1990); Christopher Kitching, *The Prerogative Court of Canterbury from Warham to Whitgift*, in *CONTINUITY AND CHANGE: PERSONNEL AND ADMINISTRATION OF THE CHURCH IN ENGLAND 1500-1642*, at 191, 191-93 (Rosemary O'Day & Felicity Heal eds., 1976) ("[I]n this sphere of church administration one is struck rather by the continuity than by the change.")

34. A good guide to the nature of litigation heard by the London courts during the last years when they held to something like their earlier jurisdiction is provided by S.M. WADDAMS, *LAW, POLITICS AND THE CHURCH OF ENGLAND: THE CAREER OF STEPHEN LUSHINGTON 1782-1873*, at 160-93 (1992).

removed in 1919, and today they have been transferred to the General Synod.<sup>35</sup> Churchwardens, too, survive, but most local decisions once within their domain are now taken over by a newer institution, the parochial church council.<sup>36</sup> Many legal matters that once were left to the English consistory courts have similarly been moved elsewhere within the Church's administrative machinery.<sup>37</sup> Of the list just given, only the bishops have escaped formally untouched, although, of course, there have been many changes in their status and responsibilities. Indeed, their involvement with legal matters has in some sense intensified.<sup>38</sup>

Reminders of the past are to be found here and there in the pages of this book. It is apparently still the law, for instance, that a clergyman who actively farms an area larger than eighty acres without the permission of his bishop may be fined two pounds per annum.<sup>39</sup> But such provisions look more and more out of place in the law of today; many are simply charming reminders of the past. A few do remain significant, however. For instance, the ancient system of patronage still exists.<sup>40</sup> Unlike modern Catholic practice, under which most pastors are episcopal appointees, the Church of England retains a version of the medieval *ius patronatus*.<sup>41</sup> Patrons, who may be laymen or corporate bodies, possess the right to nominate a cleric to a particular ecclesiastical benefice or office. This right is called an advowson in common-law terminology. The bishop's role is a largely supervisory and administrative one; he may refuse to admit the person presented if there are canonical grounds for it, such as simony or insufficient learning. Otherwise, he must proceed.<sup>42</sup>

Although this ancient system has not been abolished, today it has come under the Pastoral Measure of 1983 and the Patronage (Benefices) Measure of 1986, which have overlaid the system with a variety of additions, some large, some small. For example, with the consent of the diocesan pastoral committee, the bishop may now suspend the right of patronage for up to five years.<sup>43</sup> There may also be problems of integration with the modern

35. See pp. 60-67, 72.

36. See pp. 106-07.

37. See, e.g., p. 143 (noting that the diocesan chancellor can bypass the consistory courts by delegating judicial powers to the archdeacon for unopposed faculty petitions (citing Care of Churches and Ecclesiastical Jurisdiction Measure, 1991, No. 1, § 14 (Eng.))).

38. See, e.g., p. 143 (noting that bishops may now hear faculty petition cases alone in certain qualified situations (citing Ecclesiastical Jurisdictional Measure, 1963, No. 1, § 46(1) (Eng.))).

39. See p. 201 & n.138 (citing Pluralities Act, 1838, 1 & 2 Vict., ch. 106, §§ 28, 117 (Eng.)).

40. See pp. 191-92.

41. The basic work on the canon law is PETER LANDAU, *JUS PATRONATUS: STUDIEN ZUR ENTWICKLUNG DES PATRONATS IM DEKRETALENRECHT UND DER KANONISTIK DES 12. UND 13. JAHRHUNDERTS* (1975).

42. See pp. 190-93.

43. See p. 192; Pastoral Measure, 1983, No. 1, § 67(1) (Eng.). The right of suspension was first made available to the bishop by passage of the Benefices (Suspension of Presentation) Measure, 1946, No. 3, § 1(1) (Eng.).



"team ministries," whereby several parishes are effectively combined for pastoral purposes. The parochial church council must advise and consent to the patron's choice in any case.<sup>44</sup> Although the old form has in this instance been retained, the reality looks new.

### B. *Secular Control of the Church*

It is not an altogether unnatural assumption that because it is established, the Church of England is under the thumb of the State. The English Reformation was imposed upon the Church by a strong-willed monarch, the argument runs, and it was carried through by an act of Parliament. The historical evolution of the English Church must have resulted in subservience to secular interests. True, some of the strongest statements of that assessment come from the pens of Catholic detractors of the Church of England.<sup>45</sup> But it had seemed to me that they were guilty only of exaggerating a valid point. There have, of course, always been English men and women ready to assert the rights of the spiritual against the temporal powers.<sup>46</sup> But the reality, in my view, was that a secular power, the Parliament, called the tune to which the English clergy danced.

*The Legal Framework of the Church of England* shows quite convincingly that this view does not do justice to the modern situation, especially as a matter of ordinary practice. Another author on the subject has recently entitled his own treatment of the Church's constitutional powers "Towards Autonomy,"<sup>47</sup> and *The Legal Framework of the Church of England's* account dovetails nicely with that characterization. Unlike the rules passed by the pre-1919 convocations, measures enacted by the General Synod ordinarily "enjoy the same authority as parliamentary statutes."<sup>48</sup> Because a good deal of the machinery used in regulating the clergy and administering the Church's patrimony rests upon Synodal enactment, most questions are insulated from judicial review. The process of enactment, however, is complicated. Synodal enactments are passed through a committee of the Houses of Parliament and then Parliament itself, and they ultimately receive the royal assent.<sup>49</sup> But Parliament has no power to amend, so that it is an assembly of the Church that

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44. See pp. 196-97.

45. See, e.g., J.J. SCARISBRICK, *THE REFORMATION AND THE ENGLISH PEOPLE* 61-62 (1984).

46. See, e.g., WILLIAM WAKE, *THE STATE OF THE CHURCH AND CLERGY OF ENGLAND* 86 (London, R. Sarer 1703) (stating that in cases of "extremity" the "bishops and other pastors" had the responsibility to "run any danger" to assert the rights of the Church against the secular powers). Wake was the archbishop of Canterbury from 1716 until his death in 1737.

47. MARK HILL, *ECCLESIASTICAL LAW* 19 (1995).

48. P. 73.

49. See pp. 63-66.

legislates.<sup>50</sup> The legislative output has indeed been considerable. The result is that, like many of the modern changes, this one has the look of a half-way station. Parliament still has a role, but now a more minor one, in the ordinary process of legislation for the Church.

Most writers on the subject, including the author, seem to have assumed that this move towards autonomy is a healthy development.<sup>51</sup> Surprisingly, it is a thoughtful Roman Catholic observer, Robert Rodes, who has his doubts.<sup>52</sup> Autonomy for the Church in the modern world inevitably means the privatization of religion, and the established character of the English Church has been a bulwark against the exclusion of religion from the life of a nation. “[A]ll Christendom,” Rodes wrote, “has much to learn from the experience of the English nation and the English national church.”<sup>53</sup> Inclusion of the laity in the making of ecclesiastical legislation, permitted under the new measures and one of the clearest points of contrast with the tenets of Catholic canon law,<sup>54</sup> thus expresses a valuable part of the English heritage. In this view, it is not equivalent to secular control over the Church.

### C. *The Eclipse of Ecclesiastical Law*

Although the existence of several other recent books dealing with English ecclesiastical law might have given me pause,<sup>55</sup> I was of the opinion that law had come to play a much diminished role in the Church of England. The ecclesiastical courts continue to sit, but a series of nineteenth-century changes greatly depleted their subject-matter competence. Jurisdiction over marriage and divorce and testamentary matters was taken away from them at that time. Doctors’ Commons, the center of civilian learning in London, was wound up in 1865; its library was dispersed soon afterwards.<sup>56</sup> Apart from jurisdiction over facul-

50. See p. 65.

51. See p. 505 (“Ecclesiastical autonomy involves the ability of the church to fulfil its mission . . . .”); see also David Say, *Towards 2000: Church and State Relations*, 2 ECCLESIASTICAL L.J. 152, 153-54 (1991) (discussing the Enahling Act of 1919, which instilled in the Church a large measure of self-government).

52. See ROBERT E. RODES, JR., *LAW AND MODERNIZATION IN THE CHURCH OF ENGLAND: CHARLES II TO THE WELFARE STATE* 373 (1991). Another Catholic observer takes much the same position. See ADRIAN HASTINGS, *CHURCH AND STATE: THE ENGLISH EXPERIENCE* 63 (1991).

53. RODES, *supra* note 52, at 373.

54. See p. 57. Compare Synodical Government Measure, 1969, No. 2, sched. 2, art. 1 (Eng.) (denoting the House of Laity as one of the entities composing the General Synod), with 1983 CODE c.129 (providing no power of jurisdiction to lay members of the Roman Catholic faithful).

55. See TIMOTHY BRIDEN & BRIAN HANSON, *MOORE’S INTRODUCTION TO ENGLISH CANON LAW* (3d ed. 1992); RUPERT D.H. BURSELL, *LITURGY, ORDER AND THE LAW* (1996); WILLIAM DALE, *THE LAW OF THE PARISH CHURCH* (6th ed. 1989); HILL, *supra* note 47.

56. See G.D. SQUIBB, *DOCTORS’ COMMONS* 102-09 (1977) (describing the process of closing down the institution).

ties,<sup>57</sup> not much seemed left. Given the widespread modern sentiment that coercive regulation is incompatible with the Gospels, a sentiment that is bound to diminish the place of the traditional courts, the conclusion that law had somehow been eclipsed seemed inescapable.

This conclusion proves to be much too "court-centered" a view of the matter. In the first place, there is more legislation and "quasi-legislation" than ever. And although it is true that the consistory courts themselves have been "marginalized" for most purposes,<sup>58</sup> this has not caused any lessening in the amount of law, or even the number of legal disputes. It has simply caused their transfer either to what the author calls "new model adjudicative tribunals," or to other administrative bodies.<sup>59</sup> Proponents of alternative dispute resolution in the United States will note with pleasure that something like the same discontent they feel towards formal legal process exists in the Church of England. It has led to a shift towards informality in the settlement of disputes and a greater need for consultation with interested parties at every turn.<sup>60</sup> It has not meant less law.

At least to an outsider, the resulting situation appears to leave something to be desired. In discarding the possibility of litigation for most purposes, the English Church has put into place an extensive system of required consultation.<sup>61</sup> Throughout the book's descriptions, one reads of a "duty to consult,"<sup>62</sup> a "duty to consider,"<sup>63</sup> or some variant of these phrases.<sup>64</sup> In order to take any action regarding a cathedral, for example, there must first be a "draft scheme" prepared by the Cathedral Statutes Commission, and the Commission must submit it not only to the bishop and the Church commissioners, but also "so far as is practicable, [to] every other person who appears to the Commission to be affected."<sup>65</sup> Even then, there is additional room for appeal and argument by those who dislike the results of this consultation, although along what precise lines is not

57. This is, of course, a continuing source of cases brought before the consistory courts. See generally G.H. NEWSOM & G.L. NEWSOM, *FACULTY JURISDICTION OF THE CHURCH OF ENGLAND* (2d ed. 1993).

58. P. 130.

59. P. 140.

60. See, e.g., pp. 135-39 (discussing the procedure for reconciling serious breakdowns in the pastoral relationship by recourse to preliminary hearings, interviews, and appointments of conciliators, among other measures).

61. See p. 78 (describing the system as "The Consultation Model").

62. E.g., pp. 43, 79, 305.

63. P. 448.

64. See, e.g., p. 116 (describing the diocesan synod's duty to keep informed of parish activity when delegating diocese functions to a deanery synod); pp. 319, 318-19 (describing a minister's "duty to seek the goodwill" of a parent's home minister when baptizing a child from the home minister's parish); p. 467 (detailing the Board of Governors's duty to report on finances to the Church Commissioners).

65. P. 80 (quoting *Cathedrals Measure*, 1976, No. 1, § 2(2)(c) (Eng.)).

wholly clear.<sup>66</sup> Like the National Environmental Policy Act in the United States,<sup>67</sup> more faith seems to have been placed in reasoned consultation than the process will reasonably bear.<sup>68</sup> I could not help imagining that cathedral commissioners, anxious to get on with their plans, must yearn for the days of Barchester Towers, and on some days perhaps even for those of Thomas Becket.

### III. Potential Readers

The principal readership of *The Legal Framework of the Church of England* will undoubtedly be lawyers and administrators within the Church of England. It will provide them with food for thought, as well as useful information about the legal problems they encounter. Here and there it may provoke disagreement. But is there anyone else to whom the book should appeal? Particularly for American readers, the answer to that question is not obvious. I think, however, there are at least four kinds of readers who will profit from perusing parts, if not all, of the book.

#### A. *Students of Comparative Law and Jurisprudence*

Understanding the nature of different legal systems and coming to grips with the different possibilities inherent in all legal structures are two reasons for comparative lawyers to have a look at *The Legal Framework of the Church of England*. The rules and concepts described in the book are not so far removed from contemporary secular law as to be unrecognizable, but neither are they identical. For this reason alone, they are well worth comparing. The process may even be fruitful. For instance, the kinds of sanctions available to the canon law are well worth understanding for the light they shed on the possibilities available to all legal systems. Indeed, something like this body of sanctions seems to be enjoying a certain vogue in American law today.<sup>69</sup> Discontent with money damages in civil suits and with imprisonment in criminal matters has caused observers to look further afield. They will find plenty in this book worth exploring.

The concept of "public scandal" and the consequences that follow from it under the law of the Church will also make particularly interesting

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66. A similar example is provided by "church planting," that is, the creation of a new church or parish. It requires "full consultation" with the archdeacon, the rural dean, several pastoral committees, the archdeaconry's ecumenical officer, the diocesan adviser on evangelism, leaders of other denominations, representatives of other local parishes, and "civic, local, and community leaders and groups." P. 410. Would a generous benefactor not find this process of endless consultation discouraging?

67. See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1994).

68. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549-55 (1978) (rejecting the contention that the National Environmental Policy Act requires hearings on every alternative before the grant of a nuclear power operating license).

69. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631 (1996) (advocating the use of shaming practices as criminal sanctions).

reading for many. To what extent do legal systems treat the same acts differently when they do (or do not) cause adverse reaction among those who are subject to the law? Most legal systems face this question. The law of nuisance is full of examples.<sup>70</sup> The most topical (and controversial) example found in these pages concerns the ordination of women, which has recently become the rule.<sup>71</sup> In the Church of England, however, any parochial church council can prevent an ordained woman from celebrating the Holy Communion in their parish church.<sup>72</sup> The bishop has no right to veto their resolution to that effect.<sup>73</sup> How long this "opt-out" provision will last is anyone's guess, but presumably it will not exist any longer than the possibility that "public scandal" should be generated by the presence of women in holy orders continues to exist.

### B. *Students of Legal History*

Among legal historians, the past fifteen years have witnessed a growing attention to the law of the Church. Part of this ascendance is doubtless attributable to the appearance and success of Harold Berman's *Law and Revolution*.<sup>74</sup> Berman located the start of the Western legal tradition in the "papal revolution" of the eleventh and twelfth centuries, and he described the law of the Church as the first modern legal system.<sup>75</sup> The canon law's influence over the course of historical development has been considerable.<sup>76</sup> It seems entirely natural that legal historians who have shared in this increased interest in the subject will wish to know how things have worked out.

Not that *The Legal Framework of the Church of England* is about history. Its gaze is fixed steadily on the present. Still, legal historians will find echoes of the past here, such as a modern example of the medieval principle that the ecclesiastical courts had the right to "invoke the secular

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70. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (defining nuisance as "a right thing in the wrong place,—like a pig in the parlor").

71. See pp. 188-90.

72. See p. 337 (citing *Priests (Ordination of Women) Measure, 1993*; No. 2, § 3(1) (Eng.) (allowing parochial church councils to pass a resolution preventing women from presiding at Communion or pronouncing Absolution)).

73. See p. 337; *Priests (Ordination of Women) Measure, 1993*, No. 2, § 5(b) (Eng.) (declaring any act by a bishop, priest, or deacon in contravention of a resolution passed pursuant to § 3(1) to be a violation of ecclesiastical law).

74. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983). The success of REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* (1990), must also have contributed to this change, although its primary focus is not placed on the law of the Church.

75. BERMAN, *supra* note 74, at 2.

76. See FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE 47-54* (Tony Weir trans., 1995).

arm” in order to enforce their sentences,<sup>77</sup> or the modern equivalent to the ancient requirement that any person be ordained to a specific “title” in the Church.<sup>78</sup> It may even be true that historians have something to contribute. The question of the extent to which custom remains a source of law, as it was in earlier centuries, presents one such tantalizing possibility. The book raises this question, but necessarily somewhat inconclusively.<sup>79</sup> More thought about the subject seems appropriate, for there are several areas of the law where it might usefully come into play—as in, for example, defining the status of assistant bishops.<sup>80</sup> The connected principle of the desuetude of law,<sup>81</sup> mentioned here pointedly in connection with the duty of candidates for confirmation to recite the Ten Commandments,<sup>82</sup> might also usefully be addressed by ecclesiastical historians with some knowledge of the history of the subject.

### C. *Modern Catholic Canonists*

The book’s comparison of the law of the Church of England with the canon law of the Roman Catholic Church, although pursued with energy and consistency, struck me as only occasionally illuminating. There was not enough space at the author’s disposal to go into the subject in any depth, and I was not convinced that the necessarily superficial treatment added real value.<sup>83</sup> It seemed particularly doubtful that Catholic canon law could be understood without examining practice at the Roman curia. The author justified the decision to make the comparison in part by saying that both systems ultimately derive from the same source.<sup>84</sup> That is true in a sense, of course, but in fact the two systems have pretty much gone

77. *See, e.g.*, pp. 457-58 (describing a bishop’s right to call upon the county court to secure delivery of registers or records to the diocesan records office in the event the bishop’s order to deposit such records was not complied with). The theory of the medieval canon law that supported the right to invoke secular aid is described in R.H. HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW* 350-57 (1996); its effect in practice is described in F. DONALD LOGAN, *EXCOMMUNICATION AND THE SECULAR ARM IN MEDIEVAL ENGLAND* (1968).

78. *See* p. 490 (noting that in ordinary circumstances a bishop cannot ordain someone unless that person has a post which entitles him to remuneration); D.70 c.2 (“*Irrita sit ordinatio sine titulo facta.*”).

79. *See* pp. 86-87.

80. *See* p. 162 (stating that “[a]n ecclesiastical practice has developed” to define the role of assistant bishops in helping the diocesan bishop).

81. *See* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 16-30 (1982) (discussing the principle of desuetude).

82. *See* p. 330 (listing the ability to recite the Ten Commandments as one of the prerequisites for confirmation that is no longer observed in practice).

83. My view may not be widely shared, however. *See, e.g.*, Jobe Abbass, *Offices in the Church: A Comparative Study of the Eastern and Latin Codes of Canon Law*, in *LIBER AMICORUM MONS. BIFFI: SCRITTI IN ONORE DI MONS. FRANCO BIFFI* 211 (J. Andrés Gutiérrez ed., 1994).

84. *See* p. 501 (“The [canon law] is in more ways than one the parent of the [law of the Church of England]”).

their own ways. Both have moved away from the medieval *ius commune*. The Roman Church's model (since 1918) is the Continental code. English ecclesiastical law, by contrast, is to be discovered from a "sea of single instances."<sup>85</sup> It is "scattered . . . throughout the canons, synodical and parliamentary legislation, and judicial decisions."<sup>86</sup> Neither seems connected organically with the medieval law.<sup>87</sup>

I do not mean, however, that Catholic canonists will find little of interest in *The Legal Framework of the Church of England*. To the contrary, it should whet their appetites. The English Church's approach to the law of marriage and divorce, which furnishes the largest component of the business of Catholic tribunals, should interest them if only for its resolute refusal to treat the subject as one appropriate for litigation.<sup>88</sup> They will be intrigued to read that their own Church is "established in a loose sense" in England.<sup>89</sup> And "liturgical ecumenism," the holding of joint or shared religious services, may indeed require them to take some account of the Church of England's rules.<sup>90</sup> If there is to be broader progress in ecumenism, some "growing together" in law is probably required. This book will facilitate that process.

#### D. Protestant Clergy

I cannot say what the reaction of most of the clergy of mainstream Protestant denominations will be if they choose to peruse the pages of *The Legal Framework of the Church of England*. Perhaps it may be horror at the detail. An effort might nonetheless be made by some of them with profit. At the very least, it will require them to think about an important question. A common view holds that there is a fundamental opposition between ecclesiastical law and the true nature of religious life.<sup>91</sup> It is the spirit, not the letter of the law, that gives life. This view is strong enough that it sometimes seems to be accepted today as a matter of course.<sup>92</sup>

85. P. 504.

86. P. 172.

87. See MANLIO BELLOMO, *THE COMMON LEGAL PAST OF EUROPE* 74 (Lydia G. Cochrane trans., 1995) (finding the "new constitutional structure of the Holy Roman Empire" to have little in common with the Justinian roots of the *ius commune*).

88. See p. 357.

89. P. 11 (describing the "loose" establishment of the Catholic Church in England as a result of its recognition by both common law and parliamentary statute).

90. See pp. 302-06 (discussing the right of bishops of the Church of England to authorize non-Anglicans to use Church facilities or to conduct shared services).

91. See p. 33 & nn.2-3 (quoting 298 PARL. DEB., H.L. (5th ser.) 1295, 1297 (1969) (statement of Lord Brooke of Cumnor) ("[S]ometimes laymen like myself are appalled at the extent to which the original work of Christianity has become overlaid with legal structure.") and citing RUDOLPH SOHM, *KIRCHENRECHT* (1892), for Sohm's view that law and the idea of "the church as a community bound together by love" are antithetical).

92. See pp. 33-34.

Moreover, the perception that most American ministers of the Gospel bring to the table is that law consists of a series of commands forbidding certain conduct and punishing those who commit it.<sup>93</sup> The law of the Western Church seems at first sight to fit that perception perfectly. Its heritage is the rack and the *auto da fé*.<sup>94</sup>

This book challenges this widespread view. It presents ecclesiastical law not simply (or even mainly) as a means to forbid and punish. The law's true role is rather to facilitate the ends for which the Church exists. For instance, the ministry of bishops is one that is "ordered and facilitated by law."<sup>95</sup> The law exists to enable bishops to carry out their functions properly, not to tie their hands or to require them to turn their backs on the Gospels. In the author's view, the ready invocation of equity, the possibility of dispensation, and the special nature of ecclesiastical sanctions are all recognitions of this special character of ecclesiastical law.

There does seem to be something to this argument. Pastors need guides to right action. We all do. It is not always easy to be sure how to act, and it is often tempting to follow a private vision and sometimes a private interest. We make mistakes thereby. The problem is particularly acute for the clergy when someone else is seeking advice or permission to do something which, although desired, will hurt that person in the end. Following the law can provide support for taking the tougher road. It may even be useful to know that sanctions exist if the law is flouted. I think this is something like what the author means when he speaks of the law as "facilitating" the purposes for which the Church exists. Within its sphere, such "facilitation" is what the law, which *The Legal Framework of the Church of England* so painstakingly describes, seeks actually to achieve.

#### IV. Conclusion

For several kinds of readers, therefore, *The Legal Framework of the Church of England* is well worth consulting. It is more than a sign of the renewal of interest in ecclesiastical law in England, though it is surely also that. The book is a "thought inducing" work. Perusing it may upset long-held and apparently self-evident views, as it has upset some of mine. That

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93. See, for example, the section devoted to law in a comprehensive guide to American religion, 2 A CRITICAL BIBLIOGRAPHY OF RELIGION IN AMERICA 582-600 (Nelson Burr ed., 1961) (mentioning law only in the sense of the constitutional separation of church and state). See also Harold J. Berman, *Law and Theology*, in THE WESTMINSTER DICTIONARY OF CHRISTIAN THEOLOGY 322, 323 (Alan Richardson & John Bowden eds., 1983) ("Thus far, social theology . . . has had little that is constructive to say about the processes of law.").

94. See R.I. MOORE, THE FORMATION OF A PERSECUTING SOCIETY: POWER AND DEVIANCE IN WESTERN EUROPE, 950-1250, at 132 (1987); EDWARD PETERS, TORTURE 49, 54-62 (1985); 2 POLLOCK & MAITLAND, *supra* note 24, at 657-58.

95. P. 161.



is one of its values. The process leads on to further questions, again not limited to matters of a strictly ecclesiastical nature. For this, I am grateful to the author's efforts in writing this excellent account. The book (and the law it describes) contain many informative surprises.