COMMENT

Response to '"Legalists and Moralists" in the Historic Portrayal of the Constitution of the Church of England'

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It is a great challenge to respond as a theologian to Professor Doe's magisterial survey in the article published in the previous pages of this *Journal*.[1] I was asked to respond to the paper upon which that article is based from a theological perspective as part of the Ecclesiastical Law Society's 2022 day conference. Professor Doe demonstrates how, in the years between Hooker and the Church Assembly, ecclesiastical lawyers had recourse to both ethical, natural law arguments and those purely from legal or even positivistic ones. It is significant to see how frequently the Anglican theorist, Richard Hooker, is invoked throughout the article. He dates, of course, from the Reformation period when, as Harold Berman points out, a pre-Enlightenment jurisprudence still obtained which combined all three dimensions of law–the political, the moral, and the historical.[2] In my view, what is important about Hooker is that he makes no separation between the legal and the ethical because law is divine in origin and even in God himself there is a law of his being: 'the being of God is a kind of law to his working' in giving his perfection to what he makes and 'God is a law both to himself and to all other things beside'.[3] Moreover, the ethical is only realised in what we decide to do and the laws we make. Law in Hooker is even Christological because, just as

1 N Doe, '"Legalists and Moralists" in the Historic Portrayal of the Constitution of the Church of England (2023) 25 Ecc LJ 330–354.
2 H Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: 1990), 12.
3 R Hooker, *The Laws of Ecclesiastical Polity, The Works of . . . Mr Richard Hooker with an Account of his Life and Death by Isaac Walton*, 2 vols (Oxford: 1845), vol 1, I, ii, 2 and I, ii, 4 (148, 150).

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the Father begets the *Logos* (the Son), so the law proceeds as his continuing work in creation and history.[4] To walk in God's ways and obey his laws is to be in union with Christ. Hooker was, of course, working out the meaning of the emerging Church of England in the Reformation Settlement, but even the pragmatic is itself participatory in the divine law and he appeals back to the natural law tradition for that reason.

In Hooker also, we see unified the secular and the sacred. The people are both the Church and Commonwealth and these double aspects 'lovingly dwell together in one subject', the sovereign, just as Christ's two natures coinhere in his person.[5] This communication of natures in Christ undergirds Hooker's view that episcopacy and monarchical government arise from human arrangements and human positive law can make a political order suitable for its context. This is possible through a communication of idioms akin to that of Christ's two natures in Chalcedonian orthodoxy, by which God gives them his authority and their ratification as providential institutions: a divine gifting.[6] So human law-making achieved through God-given rationality can be said to *participate* in God and enjoys an aesthetic fittingness – an idea Hooker owes to Aquinas's *convenientia*.[7] This makes Hooker's view of monarchy similar to medieval constitutionalism rather than Renaissance absolutism, since sovereignty here belongs to the whole people and their laws. Professor Doe urges us in his conclusion to return to Hooker and there we do indeed find what he calls legal and moral elements but I would stress the fact that Hooker's Christological conception of law finds a way to unite them.

It is here that I find it sad that constitution for legal purposes of the Church of England seems to have been so narrowly defined in terms of 'institutions, offices, territories'. By contrast, when going back to Aristotle, the constitution is the *politeia*, the shaping of the whole body politic: the people. The ecclesial body is kept in unity by its archbishops and other institutions and directed to its full flourishing, but theologically speaking it is the whole community participating in concord. Again, as with the legal/moral distinction, theologically the idea of a constitution is already freighted with ethical weight as a unity: a polity. Why would Halsbury and Hill 'eluicdate [...] the nature, sources or purposes of the constitution', asks Professor Doe? But historically, the word 'constitution' even when limited to a specific body such as a court has a teleological shaping and is not without the ethical. I really like the

4 This work is inherently Christological, so that the person encounters Christ as Wisdom in creation and governance, the natural and supernatural law. See Hooker, ibid, vol 1, II.
5 Hooker, ibid, vol 2, VIII, i, 5 (490).
6 Hooker, ibid, vol 2, VIII, iv, 6 (520–524).
7 This word is used extensively by St Thomas but is discussed in relation to the Incarnation at the beginning of the *tertia pars* of the *Summa Theologiae* (3, 1a, i), at <https://www.newadvent.org/summa/4001.htm>, accessed 19 August 2022.

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quotation from Gibson in 1713 where the 'Ecclesiastical body' 'sometimes needs medicines in the form of assistance from the state' because we have here the idea of the Church as a physical body reminding us of a time when all polities were physical entities. This stops us from being over clerical in that the bishops and clergy are *part* of the shaping power of the body as are its laws but they are not the *whole* body. Hooker stresses this physicality when writing about the need for assent to law and authority, albeit one given by our ancestors: 'so the act of a public society of men done 500 years sithence standeth as theirs who presently are of the same societies, because corporations are immortal; we were then alive in our predecessors, and they, in their successors, do live still'.[8] The need for assent, an equivalent of the liturgical assent of the congregation in the eucharist, demonstrates that we are all involved in the constitution.

Professor Doe discusses the constitution of the Church and presents us with its sources: law and morals. I think it interesting that there is not quite the separation of powers in the ecclesiastical as in the secular constitution, given that we have episcopal government. I would argue that too great a separation between the executive and the judicial and legislative leads to that loss of the common good, that teleology or aim to the divine, which modern political government suffers from in the secular realm, where politicians see themselves as managers rather than true leaders. If law is based in divine reason, it always seeks justice and the common good rather than pure efficiency and control.

In the past, Church laws were made by Parliament and given royal assent so that this should enable their direction to 'the Good', expressing their ethical and teleological character. Anglicans are, as Grey, another of Professor Doe's jurists stated 'in subordination to the royal supremacy' but the Church is not an agent of the state. His article does not move beyond the Enabling Act 1919 into the times of ecclesial independence and the Synods, but we still have Church legislation given royal assent and passed into the law of the land. While we still have an anointed monarch,[9] this ensures that such legislation is directed to 'the Good', for the sovereign stands as an image of the divine rule over us, as Hooker expressed it, showing that there is something beyond us which calls us to account.

I am unable from the quotations given here to discern how thoroughly positivistic jurists such as Godolphin, Gibbons and Rogers truly were, or rather how materialist. The Welsh Church Act 1914 certainly acted in a secular manner by the way it redistributed the endowments of that body among secular institutions.[10] And yet this same tradition of ecclesiastical lawyers

8 Hooker (note 3), vol 1, I, x, 9 (191). One could perhaps apply this maxim to those working *in* the law too.
9 See further M Nazir-Ali, 'The Sacramental Significance of the Coronation' (2013) 15 Ecc LJ 71–74.
10 See T G Watkin, 'Vestiges of Establishment: the Ecclesiastical and Canon Law of the Church in Wales' (1990) 2 Ecc LJ 110–115.

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holds to a strong belief in divine law. Generally, it appears that they combine a theory of divine law with an inferior human law to continue Hooker's historical approach in which societies make their own positive laws but without his theory of the participation of the human in the divine. This would mirror the way in which during the Enlightenment period natural and revealed theology become utterly separated, which allows law to float free from its teleological moorings. Ecclesiastical jurists were probably trying to hold law and the divine together as best they could.

One of the most interesting sections of Professor Doe's article is on canon law because there we find that the Convocations could make law and have the royal assent, at least so long as what was promulgated did not go against statute, common law or custom. This seems to give the clergy an equal footing with the lay Parliament and increase the sense that the whole realm and the whole Church have sovereign authority.

How far, I wonder, does our governance today maintain this sovereign authority of the whole people in the Church now that Parliament is no longer the lay house of the Church of England? This is to stray into my response to Bishop Pete Broadbent's recent analysis of the synodical system, a debate which can be found in an earlier issue of this *Journal*.[11] In Iremonger's biography of William Temple, with which Professor Doe began, the legalists are not so much positivist lawyers as those for whom administration and finance are central. Iremonger ends his discussion thus: 'power in the Church remains exactly where it was before, but at least it has a constitutional sanction in the hands of the bishops, archdeacons and "elder statesmen" who now direct the procedure and control the policy of the national assembly of the Church of England'.[12] Those of us at parish level feel that constitutional sanction is pretty shaky. Our ability to assent is ever more eroded and our authority lost, when our hierarchical participation through the incumbent holding the cure of souls is becoming remote and our participation in the constitution of the Church is no longer through MPs who can promote our causes, but a relatively few members of what are still what Iremonger calls 'the more or less leisured classes' with their own agenda.[13] How can the constitution work towards what Hooker calls 'inherent copulation' and participation?[14]

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11 cf. P Broabent, 'Reflections on the Workings of General Synod' (2023) 25 Ecc LJ 19–31 and A Milbank, 'Response to "Reflections on the Workings of General Synod"' (2023) 25 Ecc LJ 32–37.
12 F A Iremonger, *William Temple Archbishop of Canterbury: His Life and Letters* (London: 1948), 281.
13 Iremonger (note 12), 281.
14 Hooker (note 3), vol 1, V, lvi, 2 (622).