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'Saving Our Order': Becket and the Law

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Archbishop of Canterbury, 2002–2012

The conflict between Henry II and Thomas Becket was often seen in the past as a collision between the first stirrings of real legal universalism (the same law for all) and claims to exemptions and immunities. Recent scholarship has seriously qualified this picture, recognising the degree to which Henry sought an unfettered authority for the Crown, overriding traditional patterns of obligation and mutuality. Becket's resistance to this was intelligible, but he was increasingly driven to oppose to it a controversial account of clerical immunity, in which the person of the cleric was sacrosanct and all punishment meted out to the cleric must be essentially reformatory in purpose. The origins of this are explored, and contemporary implications in regard to conscientious religious liberties and also to persisting high-risk cultures of clerical immunity are discussed.

Keywords: Thomas Becket, canon law, criminous clerks, immunity, papacy, penance, *reformatio*

HENRY AND BECKET: EQUALITY BEFORE THE LAW VERSUS ECCLESIASTICAL PRIVILEGE

Thomas Becket's life and death are still frequently read through the lens of a narrative about the consolidation of the rule of law. The dominant issue in this narrative is the fate of 'criminous clerks', the question of whether clergy were liable to punishment by the same legal system as applied to other citizens: Becket on this account is resisting the universality of civic identity under a single legal system applicable to all. In a Whiggish historical framework, he is on the wrong side in a story that extends from Henry II to Magna Carta and *habeas corpus*, the steady process of establishing the access of all citizens to legal redress for injury on an equitable and comprehensive basis.

It is a set of issues that still resonates in the imagination of some commentators when, for example, the question arises of the relation between the discipline of religious bodies and the law of the state. When the Church of England's Synod turned down a first attempt to provide for the ordination of women as

1 This is the text of a public lecture given by Lord Williams of Oystermouth on 10 December 2020 to mark the 850th anniversary of the martyrdom of Saint Thomas Becket. It was delivered to an international audience on the Ecclesiastical Law Society's Zoom platform in partnership with Villanova University, Notre Dame University and the Dean and Chapter of Canterbury Cathedral. The lecture is based on an article previously published in the *International Journal for the Study of the Christian Church* and is reproduced here with permission.

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bishops, there was talk in a few quarters of obliging the Church to comply with employment legislation about gender equality; and similar ideas were floated during the debates about the legalisation of same-sex marriage. Issues arose in the early 2000s about public financial support for Catholic adoption agencies which refused to place children with same-sex couples. Scandals about the sexual abuse of children in several Christian confessions have highlighted the risks of religious authority effectively creating immunity for gross offences by restricting punishment to the level of the discretionary and pastoral. And there is an ongoing discussion about the scope of sharia law in non-Muslim societies, and whether the observance of Islamic law is tantamount to removing certain citizens from both the duties and the protections of the law of the land. Seen from the perspective of these contemporary debates and anxieties, it is not difficult to read the Becket controversy much as earlier English historians did, as a struggle between a rational legal universalism and the claims of an alien presence within the real body politic.[2]

One of the great strengths of John Guy's 2012 biography of Becket is its resolute refusal of this simplified interpretation.[3] Guy is clear that the confrontation was not between a monarch aspiring to a universal codified charter of legal rights and liberties on the one hand and an obstinate defender of arbitrary privilege on the other; and he rightly places the 'criminous clerks' question in the context of a range of other problems less patient of a simple Whiggish reading. Earlier scholars had argued the details of this, though without making much impression on the old textbook version.[4] In this brief reflection on Becket's career and its reception and interpretation, my intention is not to add anything to the scholarly discussion among historians, which would be beyond my competence, but simply to draw out some of these complexities and to note how differing approaches to the very purpose of law and punishment need to be factored in to our understanding of the conflict.

But a word of caution may be in order. To refuse the conventional picture of Henry II's legal agenda is not to accept an uncritical interpretation of what Becket was trying to defend, or to cast him as a modern martyr of conscience or even of the Church's liberties in a totalitarian – or simply 'totalising' – political order in which there is only one sovereign loyalty possible. The very concept of a

2 For some pertinent recent discussions, see, for example, the two collections of lectures given at the Temple Church in London: R Griffith-Jones (ed), *Islam and British Law* (Cambridge, 2013); R Griffith-Jones and M Hill (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge, 2015).

3 J Guy, *Thomas Becket: warrior, priest, rebel, victim: a 900-year-old story retold* (London and New York, 2012).

4 Adrian Lane Poole's discussion in *From Domesday Book to Magna Carta* (second edition, Oxford, 1997; first published 1951) sets out the basics (see eg p 199). J Alexander, 'The Becket controversy in recent historiography', (1970) 9:2 *Journal of British Studies* 1–26, and B Smalley, *The Becket Controversy and the Schools: a study of intellectuals in politics* (Oxford, 1973), are still significant and invaluable studies.

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civic identity governed by universally applicable law is not one that can be directly mapped on to mediaeval political thinking and practice. Mediaeval political theorists did indeed develop notions of universal 'right' which ultimately and indirectly fed into the modern discourse of rights;[5] but mediaeval political reality was always a site of contesting and sometimes overlapping jurisdictions, and there is no theory of a 'secular' legal authority, a *Rechtstaat*, to organise that reality. When clerics resisted the claims of royal jurisdiction, they were not necessarily affirming the freedom of the Church over against the 'State' but defending what will have seemed to them a clear and identifiable source of legal authority against a less well-grounded and more arbitrary one.

Guy's biography directs our attention to one important aspect of the controversy: the role of 'custom' in the arguments. Notoriously, Becket was wrongfooted at the Council of Clarendon in 1164 when, having agreed to a formula establishing the 'customs of the realm' as authoritative in respect of the immunity of clerical offenders, he was almost immediately confronted with a written summary of the alleged 'customs' which contained prescriptions that were certainly not established usage but represented a concerted attempt to reinforce – among other things – restraint of appeals to the Roman curia and close control over the relations of English clergy to the papacy. Given that the independence of clerical courts had been recognised in fairly straightforward terms by King Stephen's 'Charter of Liberties' in 1136,[6] it was not surprising that Becket, with – for once – most of his fellow bishops in agreement, had felt reasonable confidence that the concession to 'custom' was a risk they could afford to take. But, as Guy observes, the suspicious promptness with which a written register of customs was produced suggests very strongly that Henry had decided in advance what he wanted to press through on this occasion, and the very rapidity of the process indicates an awareness that this agenda was not uncontroversial.[7]

At the same time – as several modern historians have been at pains to note – the exact scope of the wording of Stephen's charter is not clear: it is certainly debatable whether Becket's repeated insistence that royal or local feudal courts had no jurisdiction over clerics accused of serious criminal activity (murder, for instance) was as solidly based as he assumed. He was in effect taking up a position that was still being argued over in Continental discussion of canon law as to the extent of clerical immunity, rather than – as he repeatedly claimed – defending a fixed canonical rule. The baseline for previous discussion seems to have been the provision in Justinian's Code that clerics convicted in a

5 See the groundbreaking work of B Tierney, *The Idea of Natural Rights: studies in natural rights, natural law and church law 1150–1625* (Atlanta, GA, 1997); and more recently R Ruston, *Human Rights and the Image of God* (London, 2004).
6 See Alexander, 'Becket controversy', pp 1–2.
7 Guy, *Thomas Becket*, p 189.

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lay magistrate's court of serious criminality should first be deposed from holy orders and then handed over again to the non-ecclesiastical courts; but what was increasingly being debated was whether this infringed the principle of avoiding double jeopardy. It might make sense to say that a deposed cleric could no longer claim immunity and that any future delinquency should be punished by the lay courts; but was that forfeited immunity (so to speak) retrospective, in a way that permitted the lay courts to impose a sentence on someone who had already received an ecclesiastical penalty?

Those who have most closely examined the history agree that in practice the handing over of convicted clerics after deposition to lay courts for further punishment in the case of serious offences was not *in itself* an insoluble problem – though a series of particularly scandalous cases in the years before Clarendon had sharpened concerns somewhat. The papacy was not averse to compromise on this, as later twelfth-century practice shows, and Becket at the beginning of his primacy had been pragmatic about it.[8] But the intellectual heavyweights in his circle, including John of Salisbury, were in favour of a more thoroughgoing approach, based on the double jeopardy argument, and Becket came to adopt an inflexible stance on the question. He was himself on shaky ground in claiming that his radical version of immunity was 'customary'. But in a sense this is the heart of the argument as it unfolded at Clarendon and afterwards: Henry was not in fact committing himself to observing a definable deposit of precedent, a benign tradition of common law; he was claiming the authority to *create* a tradition.

Part of what Becket and his colleagues were resisting was the implied freedom of the sovereign to determine not only what was and was not relevant precedent but what was to count as 'custom'. The underlying issue was what the sovereign power was actually accountable to: ultimately, whether the sovereign is in any sense bound by a law not made by that sovereign. Equally, Becket's radicalism about clerical immunity could be seen by a hostile critic as a comparable strategy – claiming the sovereign right to impose a contested reading of the past. It is certainly true that the problem of immunity was not the only or the most intractable issue between Henry and his archbishop; but its importance is less to do with questions about equality before the law than with the problem of *arbitrary* sovereignty. As sometimes happens, Becket was unfortunate in the specific issue he chose to fight but not without justification in the principle

8 The history of earlier theory and practice on this is anything but clear. E Zabiski, 'Thomas Becket and Clerical Immunity', MA thesis, University of St Thomas, Minnesota (2015), available at <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1011&context=sod_mat>, accessed 17 February 2021, contains a helpful summary of the conflicting enactments on the subject in late antiquity. See especially pp 3–4, in particular the reference to Justinian's civil law code, mentioned above, in which a clerical offender would be tried in the ordinary courts, referred to the church courts for deposition and returned to a lay court for sentence.

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he discerned behind the conflict. And, ironically enough, his own arguments opened up some of the same problems about the continuity of legal practice and the accountability of positive authority to law that was more than the enactment of that authority's current goals.

It was, of course, an era in which the codification of law and custom was a pervasive concern in the Church. Between 1050 and 1150, the codification of canon law made notable advances, and Gratian, whose work was to become definitive in this process, was roughly contemporary with Becket. The ideal of a uniform set of established protocols and practices focused on the supreme magistracy of the Pope and the curia was establishing itself firmly in Western Christendom. In the wake of earlier (eleventh- and early twelfth-century) controversies in continental Europe about the rights of investiture of bishops, a far greater theoretical clarity was emerging about the notion that the Catholic Church was a kind of *municipalitas*–a self-contained system of jurisdiction and legal claim. If Henry II was eager to have a written version of the 'customs of the realm', he was exhibiting a concern that his clerical contemporaries would have understood–although the latter would have been working primarily with existing texts rather than the nebulous group memory of 'custom'.

But canon law as the definition of the law of a self-contained polity of course implied the legitimacy of that polity wherever it might be instantiated: hence the anxiety about appeals beyond the jurisdiction of the local monarch. Rather as in the modern case of sharia law, as popularly understood, the claims of the Church as a polity, a 'municipality' with its own magistrates, was perceived as a threat to the ultimate claim of loyalty to a local sovereign. But in this period that claim rested partly on the role of a mediaeval sovereign as the focal point of a system of land tenure and patronage. The holding of land required a profession of allegiance and commitment to certain obligations of 'rental' duty, including the duty of supplying subsidy to an overlord in pursuit of military defence–subsidy in money or in men or both.

This was also to be an issue in the Becket controversy–less obviously a headline question than clerical immunity but in fact equally neuralgic. Becket was able to appeal to the example of his great predecessor Anselm, who had strenuously resisted royal demands for subsidy, on the grounds that the Church's property was not to be alienated to lay interests. Although he had done homage to William Rufus for the lands of the See of Canterbury, Anselm refused to repeat this with Henry I, ostensibly on the grounds that there was no need to repeat the action, but also because of the bitter dispute over subsidies demanded by the king in which he had become involved. There were clear echoes of these confrontations at the Council of Northampton in the autumn of 1164, where Becket was accused of mismanaging a dispute about landholding, which had been referred to the king for adjudication by the unsuccessful claimant, who had received a negative judgment in the archbishop's court. Becket was

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persuaded to submit to a fine, although he had claimed that he was not answerable in the king's court for his actions as archbishop. The problem was – as the other bishops pointed out – that a cleric's standing as a feudal landholder was something that implicitly placed him alongside other landholders. Although on the detail of this case there was widespread lay sympathy with Becket (landowning magnates were not over-eager to allow the royal court to decide disputes for them),[9] the basic point was that a bishop was in a significant sense a baron among other barons as far as the laws of land tenure were concerned; there was a clear case for his accountability on the same terms.

During Becket's last period of exile, many of his manorial holdings in Kent (and those of his family and associates) were confiscated by the king and handed over to administration by rapacious local magnates. This, of course, meant that revenues on which the Church relied for maintaining the clergy and more generally the institutional life of the diocese disappeared; and this was exactly what Becket had wanted at all costs to prevent when he protested at being called to answer as a landowner in the king's court. The 'customs' of Clarendon had laid down the king's right to utilise as he pleased the revenues of dioceses and abbeys in vacancy – a common usage, which Becket as chancellor had administered. This might be taken to imply that the normal application of Church revenues to Church purposes that obtained when a bishop was in office was merely a concession, and that in a vacancy things reverted to a legal norm. Against this, Becket and others had to argue that, while the Church's revenues might derive from the same system of tenure as any lay magnate's, their use must be determined by ecclesiastical priorities and ecclesiastical law.[10]

Anselm had protested to William Rufus that he was bound to keep the revenues of his see intact for the sake of the poor, who were dependent on the Church and who would suffer most directly if new burdens were imposed. This is itself a traditional trope, associated with St Alphege's recorded refusal, a century and a half before Becket, to use the wealth of the see to secure a ransom for the Danes who held him captive, a refusal which contributed to his violent death. (Becket invoked Alphege both in his final Christmas sermon and in his last prayers as he was killed.) To read this as no more than a self-interested fiction is to do less than justice to the ideas underlying it: the Church might derive its income from a system shared with lay landholders but its obligations were not simply those of feudal relations. Education, liturgy, the monastic life and indeed a fair amount of basic poor relief and emergency capacity were built in to the budget of clerical bodies; and the protection of those who did not have claims

9 Guy, *Thomas Becket*, pp 200–1; the barons were unhappy with the complainant's appeal to the king over the head of his direct feudal superior.

10 It is worth remembering that the insistence on clerical celibacy in the reforms of Western Christendom in the eleventh and twelfth centuries had a good deal to do with anxieties about the alienation of Church property to clerical families.

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within the lay system was taken seriously by most churchmen. It is the sort of thing for which exemplary bishops are routinely praised by their biographers.

CLERICAL PENALTIES: THE PRIORITY OF 'REFORMATION'

This brings us close to the central question behind the various specific controversies. Clergy are immune from the lay courts because they are answerable to different requirements, the requirements set out in the increasingly systematised body of ecclesiastical law but also embodied in the custom of the Church – that is, in the various routine practices of clerical maintenance and charitable subsidy. But there is a further significant implication. The issues around clerics guilty of serious criminality raised the question of appropriate punishment: most such offences carried severe penalties in the lay courts, including death. As Guy puts it, 'for Becket the type of punishment meted out was not the point'.[11] Becket and his allies (who on this issue included some of his most consistent opponents, such as Gilbert Foliot) were not critics of capital punishment as such, but worked on the assumption that punishment for clergy was always supposed to be *reformatory*, even where serious offences were at issue. Hence, even for the gravest crimes, penalties were typically extended pilgrimage or confinement in a monastery, with deposition from orders as the ultimate sanction.

A recent article by Rosamond McKitterick examines an earlier controversy which turned on this question, involving an eighth-century pope: a cleric convicted of organising the murder of two other clergy, members of the papal household, was handed over by the Archbishop of Ravenna to the lay governor of the city for execution; the pope protested that he had intended to impose a penance in order to save the offender's soul, and that the archbishop had acted *ultra vires*.[12] There are several intriguing questions about the actual conduct of investigations and trials in both Rome and Ravenna in relation to this case, but the point raised by McKitterick that is most pertinent for this discussion is the language used to describe the petition in Rome urging the Pope to exact 'vengeance and *emendatio*'.[13] The latter term definitely implies punishment aimed at reformation, and McKitterick notes how the practice and language of the papal courts from the late sixth century onwards increasingly concerns itself with the redemption of the sinner: by the time of the case mentioned, 'the two ideas of "reform" of an offender, first by punishment and secondly by penance, were entwined in notions of justice in eighth-century Rome'.[14]

11 Guy, *Thomas Becket*, p 161.
12 R McKitterick, 'The Church and the law in the early Middle Ages', in R McKitterick, C Methuen and A Spicer (eds), *The Church and the Law, Studies in Church History* 56 (Cambridge, 2020), pp 7–35.
13 Ibid, p 21.
14 Ibid.

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The conflict is not in fact over who has the right to try 'criminous clerks' but about the purpose of punishment.[15]

It is not a very long step from this concern, though, to a concern about the right of trial. McKitterick provides a very full and lucid discussion of the hybrid character of 'canonical' collections during the early mediaeval period, which shows how both 'secular' and ecclesiastical sources were drawn upon in providing what were essentially handbooks of precedent to help bishops make decisions in their courts.[16] We cannot trace a continuous conflict over 'immunity' because the exercise of both lay and clerical jurisdiction was enormously diverse in different localities, and any independent 'theory' of secular jurisdiction is not to be found. The compilation of legal sources was often a matter of quarrying what were believed to be 'Roman' authorities, imperial and ecclesiastical, to give some framework to a variety of enactments by bishops and rulers; and behind McKitterick's treatment of the detail of this, there is the fact that 'Roman' sources – above all the Theodosian Code and the Novellae of Justinian – belonged in a setting where the emperor's jurisdiction was the longstop guarantee for 'canonical' decisions.

Clerical and lay courts were not, that is to say, 'parallel' jurisdictions. The history of the early mediaeval West comes to reflect a different set of concerns and constraints, where the increasingly pressing need was to defend clerical autonomy from being swallowed up in the 'custom' of emergent feudal societies, with their complex interweavings of obligation. What was at risk, from the clerical point of view, was the Church's liberty to dispose of its property. And for this liberty to be secured, the representative of the Church must be defined as outside the lay system and bound by the laws of the ecclesiastical *municipalitas* (increasingly elaborated as a would-be coherent code, administered by a hierarchical pyramid of clerical courts, at the summit of which stood the papal curia). Independence in respect of the administration of ecclesiastical property – that is, the refusal of any external claim on this, as in Anselm's quarrel with William Rufus – and the freedom of appeal to Rome (and by implication freedom to travel outside the realm to wherever the curia was resident) for clerics within any royal jurisdiction were intrinsic to this model: hence the alarm created by the 'customs' put forward at Clarendon in 1164, which explicitly sought to limit any such clerical liberty. Becket saw more clearly than many of his colleagues that the blanket denial of any clerical liability before lay courts was a simpler and safer policy for ruling out the dangers of a restraint of appeals – just as, conversely, the English Crown's successful bid to secure its own interest and independence in ecclesiastical affairs in the 1530s began precisely with a Statute in Restraint of Appeals in 1533. The hard line taken by Becket on clerical immunity was bound up with this broader agenda; and it enabled him (as we

15 Ibid, p 23.
16 Ibid, pp 26–35.

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have seen) to deploy the somewhat novel argument from double jeopardy to deny clerical liability outside the clerical courts and thus also to conserve the model of reformatory punishment as the distinctive practice of the Church.

This is what 'saving our order' meant – the qualifying clause which so exasperated Henry II when added to oaths of episcopal compliance. Whether, as John Guy implies, Henry was consciously trying to create a different sort of Church wholly subordinate to the royal mandate – anticipating his eighth namesake – is not clear. It is perhaps more likely that he was opportunistically picking off a series of situations in which episcopal liberty would conflict with royal control, while still making conciliatory noises about customary freedoms being preserved, even if they had to be argued case by case, as Clarendon suggests, with no standing permissions for, say, visits to the curia. Becket's reluctance to compromise in any way about immunity reflects a canonical/theological position in which the cleric's *person* is defined as sacrosanct, in a way that makes case-by-case adjudications virtually impossible. Whatever the merits or demerits of a specific plea, and whatever the seriousness of a specific offence, the ordained person is to be granted the presumption of an independent ecclesiastical trial and the grace of reformatory punishment. Only this absolutist position is seen as securing the crucial twin liberties of appeal and of freedom in disposing of property. And the difficulty for a lay legislator lies in the definition of certain subjects as *persons who in virtue of their office or order* are, as it were, separated from any particular acts for which they may be responsible: their actions are not 'available' to be judged like those of others.

A CONTINUING LEGACY: THE BALANCE BETWEEN RELIGIOUS LIBERTIES AND CULTURES OF IMPUNITY

The legal stalemate between Henry and Becket is of abiding interest because it brings to light some fundamental issues around law and actual sovereignty on one side and the very nature of criminal offence on the other – issues which are still of more than academic concern. As Guy's biography repeatedly notes, Henry's legal agenda was not that of a modern constitutional lawyer or a defender of popular rights and liberties. He was in practice claiming a right to create law by defining what counted as 'custom'. On the other side, Becket's claim effectively removed the cleric from routine civic obligation: the liberty of the Church was not simply a freedom to be judged on the performance of specifically clerical duties by specifically clerical authority, but a fencing-off of *any* activity performed by a cleric from adjudication by lay authority, whatever the gravity of an offence or the seriousness of a tort. It was not a charter of impunity exactly, but because of its individualistic focus on the reform of the sinner, it took no account of what might be needed to satisfy the right of a victim. The pressure to secure the freedom of the Church as a corporate body

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with responsibilities wholly distinct from those of the feudal networks surrounding it paradoxically produced a picture of moral and spiritual accountability which was not individualistic in the modern sense but was oddly divorced from the imperative to model mutual nurture and accountability in the Christian community. The price of 'clerical immunity' is an idea of clerical accountability which ignores the 'lateral' dimension: the cleric is answerable to God and to canonical superiors, but it is not clear what their answerability is to an injured neighbour or community.

The parallels with some aspects of the abuse scandals in several churches, especially the Roman Catholic and Anglican communities, are not hard to see. The nature of the cleric's 'person' is the determinative factor: all their actions are to be weighed in the context of who they – institutionally and sacramentally – are, not as members of the Body of Christ but as office-holders within a canonical polity. And this means not simply that they are to be judged on the performance of the duties distinctive to their office, a perfectly defensible position, but according to the canonical status of their person. As we know with painful clarity after the revelations of the last decade and more, there has long prevailed a sense that the ecclesiastical superior's first duty is to the spiritual welfare, the *emendatio*, of the individual office-holder. Penalties are conceived as penances: moving to a new area, retreat and isolation for a period. It is as if what has been broken is not the bond of trust between members of a single community (or rather both religious and 'secular' communities in the modern setting) but the obligations for which a cleric is responsible to a superior; and so what has to be restored is not a wrecked and destructive relationship but a pattern of conformity to duties required.

I am not arguing that the systemic failures of hierarchical churches in dealing with sexual abuse by clergy are 'explained' by twelfth-century debates. But understanding something of how clerical culture in the Western Church has developed through historic arguments about the nature of law and punishment can illuminate the present landscape. What I have suggested is that a set of genuinely urgent and intelligible concerns about defending the Church's liberty in disposing of its property featured strongly in the emergence of a more intense focus on the clerical 'person' as subject to a distinct kind of jurisdiction. The concentration on the penitential and reformatory purpose of punishment was not so much a general theory about penal ethics (it was not generalised beyond the clerical estate, after all) as a way of indicating the need to hold clerics to a distinctive set of rules, so that their own lives could be models of that *reformatio* in the divine image that was the purpose of sacramental grace.[17] The impulses of Alphege, Anselm and Becket himself cannot be

17 In addition to McKitterick's treatment, Gerhard Ladner's celebrated monograph on *The Idea of Reform: its impact on Christian thought and action in the age of the Fathers* (Cambridge, MA, 1959),

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written off as entirely to do with institutional self-interest; the standing especially of Alphege and Becket in the popular memory suggests that their professed concern to preserve the Church's freedom to do what it could in the relief of the needy was not seen as a fiction. The difficulties entered in when Becket and his intellectual allies concluded that the only watertight security for this aim lay in the blanket exemption of clergy from lay courts. And it could be argued that the drawing of this conclusion reflects that increasingly dominant Western mediaeval habit of seeing the Church as primarily the body of those under clerical discipline, the 'polity' of the ordained rather than the community of the baptised.

The other side of the coin is the role of the Church as a body whose existence is not 'franchised' by monarchical power in a society of diverse conviction and differentiated obligation. We might conclude that Becket was dangerously wrong in his absolutism about clerical immunity and that behind this lies a theological deficit in the understanding of the Church itself which was emerging in the eleventh- and twelfth-century movements of ecclesiastical reform; but – as I have noted more than once – the agenda of Henry II was not an innocent legal universalism. The Clarendon 'customs' aimed to deliver into the king's hands the final say in ecclesiastical elections, canonical appeals, excommunications of any of the king's subjects and the control of Church finances, as well as requiring the consent of a feudal superior for the ordination of a candidate from a bonded tenant ('villein') family. In other words, all other obligations were to be trumped not only by feudal duties but by feudal duties as adjudicated by the royal courts. The goal of the king was not so much a system of equal legal redress for every subject of the Crown but a system in which the sovereign's definition of legal obligation was the context within which every other account of duty or responsibility had to be adjudicated. A unitary and absolutist concept of sovereignty, only doubtfully qualified by precedent, was to prevail. The Church's objection that certain duties were owed unequivocally to God and the ecclesiastical authorities who controlled the penitential system was overruled.

Twelfth-century England was not a society of religious or communal diversity in anything remotely like the modern sense. But the issue raised by the model of sovereignty just outlined casts a long shadow. It is easy to assume that, if there is a single set of universal legal guarantees, protections and obligations, this must extend into every area not only of individual but of collective life – as if the only identity that ultimately matters is the identity of the legal subject. In reality, human agents are involved in various kinds of obligation and mutual 'guaranteeing': in families, in informal membership of voluntary bodies, in religious communities. A sovereignty which aimed to draw all those networks of obligation

is still worth consulting on the process whereby the ordained celibate becomes the paradigm for restored/reformed humanity.

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and protection into a single civic contract governed in every respect by public law would be both claiming more than is achievable and treating human agents as less than they concretely are in the various 'intermediate' communities that have arisen not because of a public mandate but because of natural associational processes. To secure for every agent the promise of equal redress and protection is not the same as regulating by one code the actual relations within non-public bodies – which may well be governed by a code of obligation broader than that enforced by public authority.[18] We might think here of the obligations around Islamic finance or of religiously based opposition to abortion. A religious community does not have the liberty of restricting the behaviour of those who are not its members and cannot take away even from its own members the individual liberty to act as they desire within the law. But there is no inconsistency in saying that the community has the corresponding freedom to define its own specific obligations without the coercion of public authority.

This is in no way to claim any kind of immunity: any action offending against the law of the land or purporting to limit liberties that are secured by law is punishable by that law, irrespective of the status of the perpetrator within any non-public body. The tacit immunity that has so often been granted to sexual abusers or perpetrators of familial violence by some religious communities is toxic and wholly indefensible. But there is a genuine issue about the diverse levels of accountability that may be recognised by an individual. Too comprehensive an account of sovereign public authority leaves no room for whatever critical perspectives on a current situation may be provided by a culture of duty and mutuality that does not derive simply from the law of the land – a 'thick' account of social obligation, as we might call it.

It is true that most of the familiar areas where appeals for allowance or exemption are made by religious bodies have tended to be connected with sexual discipline or gender-related questions; such appeals are construed as slanted in a socially conservative, not to say repressive, direction. But, to preserve some balance here, it helps to remember that a stance such as religiously motivated conscientious objection in wartime, or the refusal to operate educational establishments on the basis of state-mandated racial discrimination (the choice taken by Anglicans in South Africa in the 1950s), would be jeopardised by a simple doctrine of unitary obligation to a sovereign authority. The counter-appeal to the state to resolve conflict between 'left' and 'right' within religious communities is fraught with a range of unintended consequences.[19] The precedent of encouraging the solution of internal problems by direct legal adjudication,

18 I recognise the awkwardness of the language of 'non-public bodies'; it is a way of avoiding a too-general use of the category of 'state' activities or agencies.

19 The discussion in J Figgis, *Churches in the Modern State* (London, 1913), especially the account in chap 1 of the Free Church of Scotland appeals, provides a broad theoretical perspective that is certainly not inflected by any politically conservative agenda.

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however passionately a religious reformer may be committed in this respect, effectively denies the potentially critical distance between the community of direct religious or moral obligation and the authority that secures basic legal access and equity for all. What may be lost is that 'thick' sense of obligation which presses people to action beyond the required minimum, a sense likely to derive from affiliations and convictions beyond any abstract vision of minimal social cohesion.

In short, Becket's resistance to Henry II is still capable of being understood as a significant defence of a theological principle about the difference between the mutual bonds of the Body of Christ (and the moral commitments these entail) and the obligations of a legal system. We should not simply demote the 'holy blissful martyr' from his position to the level of a 'traitor to his prince', in the style of Henry VIII's propaganda. Yet the harder we look at the precise issues of the controversy, the more we can see the deep ambivalence – to put it no more strongly – of the particular tools used by Becket and his theological advisers to consolidate their resistance. If churches are to justify resistance to 'secular' authority, or to make a credible claim for public recognition of individual and collective religious conscience, they need to work at an ecclesiology less problematic than that which was advanced by Becket, or indeed most of the canonists who constructed the practice of the mediaeval ecclesiastical system. And if some are worried about the sanction that this appears to give in contemporary situations to what many believers regard as regressive habits or disciplines, it may even be that clarifying the basic ecclesiology of resistance, with an eye to purging it of the residue of the complex clerical self-definitions of the mediaeval debates, can itself become part of that internal self-criticism which moves the Church to change – not by compulsion but by conversion.[20]

20 Dietrich Bonhoeffer's treatment of some of these matters in the fragments of his *Ethics*, trans R Krauss, C West, and D Stott (Minneapolis, MN, 2005), especially his analysis of 'responsibility' (pp 246–299) and of the Church's self-positioning in the world (pp 339–408), bears on the wider theological questions.

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