The Warburton Lecture

given in the chapel of the Honourable Society of Lincoln's Inn
at Morning Prayer on Sunday 22nd June 2025
by the Reverend Alexander McGregor

Deuteronomy 17.8-end
1 Peter 2.11-17

'The laws and usages of the realm do not include Christianity'

Thomas More was by profession a city lawyer who became a judge and, following Cardinal Wolsey's fall, achieved the pinnacle of the legal profession by becoming Lord Chancellor. More grew up in the law – it was the family business: a way of life that More believed in. But More grew up too within the bosom of the Church, spending two formative years at Lambeth Palace as a page to Cardinal Morton before going up to Oxford and later coming on here to Lincoln's Inn where he was called to the Bar in 1502.

Until the upheaval of the 1530s began, it would not, I think, have occurred to More (or to anyone else who thought about it) that holding office in the state and at the same time being a loyal son of the Church would result in any serious conflict of loyalty. The state was a Christian state; the King a Catholic Prince upon whom Pope Leo X had conferred the title "Defender of the Faith".

In his play, *A Man for All Seasons*, Robert Bolt reveals how More's understanding of his loyalty– to God and to the King – begins to fall apart and, as a result, how his whole view of the world – or at least *his* world of Church, Law and State – has to be demolished and rebuilt on a surer foundation.

When he is challenged by his son-in-law, William Roper, to say whether one must follow Man's law or God's law, the old, unreconstructed, More can say, "I know what's legal, not what's right. And I'll stick to what's legal." More, it becomes clear, is convinced that no serious harm can come to him, despite his refusal to support the King's divorce and re-marriage, because the law will protect him. The lawyer puts his faith in the law.

But, despite, More's confidence in the law, the law is turned on him. An Act of Parliament requires oaths to be taken in support of the King's title as head of the English church. More refuses and so faces life imprisonment and the loss of all his property. But he still clings to a belief that the law will save him: that he will not lose his life as long as he stays within the small area of the law that he thinks is still there to protect him. But he is wrong. And he is wrong because the law is not a force for good in and of itself. The law is a tool; and a tool can be manipulated. In the end it is manipulated to convict him of treason. It is not, after all, enough only to "know what's legal, not what's right". Insisting on his right to speak before sentence of death his pronounced on him, More condemns the law under which he himself has been condemned: "The indictment is grounded in an Act of Parliament which is directly repugnant to the Law of God."

Whether More was right about that depends, of course, on one's view of the Royal Supremacy. Although the question was at root a theological one, it was played out through legislation and judicial proceedings as much as in theological disputation. What neither side disputed was that the question was fundamentally one of Christian truth and that the law should reflect and uphold that truth. More believed in a king who would inhabit the role described in this morning's first lesson from Deuteronomy[1] a king who "when he sitteth upon the throne of his kingdom … shall write him a copy of this law in a book out of that which is before the priests and the Levites. And it shall be with him, and he shall read therein all the days of his life: that he may learn to fear the Lord his God, to keep all the words of this law and these statutes, to do them …". In other words a king who ruled and executed justice according to the law of God. Instead, More found himself in the position of the Christian communities addressed in the First Epistle of St Peter: communities who were facing oppression and persecution, who "for conscience toward God endure grief, suffering wrongfully". They were nevertheless exhorted to submit themselves to "every ordinance of man for the Lord's sake".

[1] Deuteronomy 17:18–19.

Leaping forward several centuries to 2011, Munby LJ, giving the judgment of the Administrative Court in *R (Johns) v Derby City Council*[2], stated, 'We are sworn (we quote the judicial oath) to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will"[3]. But the laws and usages of the realm do not include Christianity, in whatever form. The aphorism that "Christianity is part of the common law of England" is mere rhetoric …'. This was (at least in part) a response to what the court described as "various arguments, many of them couched in extravagant rhetoric, which, to speak plainly, are for the greater part, in our judgment, simply wrong as to the factual premises on which they are based and at best tendentious in their analysis of the issues"[4].

But the bald statement that "the laws and usages of the realm do not include Christianity" goes too far. The Sovereign – who is constitutionally the fountain of justice and, in Parliament, the source of legislative authority – is also "the highest power under God in this kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil" (as the Canons of the Church of England put it)[5]. The Royal Supremacy in relation to the Church is, constitutionally speaking, an inherent property of the Crown, in the same way that being the fountain of justice and the source of law are inherent properties of the Crown. This is acted out, of course, at the coronation in the oaths taken by the Sovereign and in other ways.

This is not just some fossilised relic of the constitution. The King in Parliament is active in making laws "concerning the Church of England"[6]. Already in the current reign four items of primary legislation specifically concerned with the Church of England have been enacted under the procedure contained in the Church of England Assembly (Powers) Act 1919. In the previous reign over 140 such Measures were enacted[7].

[2] [2011] EWHC 375 (Admin).
[3] At paragraph [29].
[4] At paragraph [32].
[5] Canon A 7, Canons of the Church of England.
[6] Church of England Assembly (Powers) Act 1919, section 3(6).
[7] Data available at https://www.legislation.gov.uk/ukcm.

In those spheres where the Church makes law for itself without the involvement of Parliament, it is constrained by the Submission of the Clergy Act 1533 not to make or put in execution any Canons that are "contraryaunt or repugnant to the Kynges prerogatyve Royall or the customes lawes or statutes of this Realme"[8] and to obtain the King's assent and licence before making canons[9]. Not only are these provisions of the 1533 Act in force; they in full operation. Any draft canon approved by the General Synod is sent to the Ministry of Justice and closely examined to ensure compliance with the 1533 Act before a recommendation is made to His Majesty that the Royal Assent and Licence for the Canon be granted. Once Letters Patent are made to that effect, and the Canon is enacted and promulgated in the General Synod, it becomes part of the body of English law.

In those two cases – Measures and Canons – we are really talking about ecclesiastical law. But ecclesiastical law – the law relating to the Church of England – is not wholly statutory, and the Canons are not a comprehensive code. Much ecclesiastical law is common law – either because it concerns property rights over which the common law courts exercise jurisdiction, or because it was part of the pre-Reformation canon law that has been continued, recognised and acted upon since the Reformation.[10]

The role played by Christianity in the development of English law goes much wider, of course, than purely ecclesiastical law. That murder and theft are wrong; that agreements should be kept; these are elements we should expect to find in the laws of any society that deserves to be considered civilised. As St Augustine says, 'For who but God has written the law of nature in the hearts of men? that law concerning which the apostle says: "For when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves: which show the work of the law written in their hearts, their conscience also bearing them witness and their thoughts the meanwhile

[8] Submission of the Clergy Act 1533, section 3 as applied to the General Synod by the Synodical Government Measure 1969, section 1(3).
[9] Submission of the Clergy Act 1533, section 1.
[10] *In re St Peter's, Draycott* [2009] Fam 93, at paragraphs 43 – 46.

accusing or else excusing one another, in the day when the Lord shall judge the secrets of men."'[11]

But Christianity itself – its precepts and its ethos – have very significantly formed our laws. That should not be surprising: the foundations of our laws and our legal system were laid and built on during the long centuries when Christendom and Europe were largely coterminous. Any suggestion that the laws and usages of the realm did not include Christianity would have left people puzzled, if not incredulous, until very recently. In the opinion he delivered in 1932 in *Donoughue v Stevenson*[12] Lord Atkin said, "I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong."[13] We would not be surprised if a judge were to express matters in that way even today. But for Lord Atkin, that was not the starting point. Having described the legal conundrum facing their Lordships, he went on to set out a "general conception of relations giving rise to a duty of care" that was "based upon a general public sentiment of moral wrongdoing for which the offender must pay".[14]

The next step in Lord Atkin's reasoning is likely to surprise (and indeed be lost on) many of those who read his opinion in the Appeal Cases today. "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour …".[15] The leaping-off point is the Christian precept of loving one's neighbour, derived directly from St Luke's gospel and the parable of the Good Samaritan. What Lord Atkin was doing was nothing so crude as seeking to turn a Christian precept into a legal rule. When it comes to the law, said Lord Atkin, "the lawyer's question, Who is my neighbour? Receives a restricted reply." The common law does not aim at the enforcement of Christian precepts: "acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief,"[16] he explained. But

[11] Augustine *De Serm. Dom. in Mont.*, 2.9.32, quoting Romans 2.14-16.
[12] [1932] AC 562 (HL).
[13] Ibid. p. 583.
[14] Ibid. p. 580.
[15] Ibid.
[16] ibid.

the underlying assumption – the underlying "moral code" which the law imperfectly and incompletely seeks to uphold – is Christianity: "Love your neighbour as yourself." Lord Atkin then went on to demonstrate by reference to relevant legal authority how the principle he had enunciated was a doctrine of the common law.

It is hard to imagine any judge today taking Jesus' teaching as his jurisprudential starting point. British society has changed and approaches to the law have changed alongside that. "The laws and usages of the realm do not include Christianity" is an overstatement and an over-simplification. But one can see how a court – presented with arguments "couched in extravagant rhetoric" – might be led to make a statement like that. In a posthumously published essay, the late Sir John Laws wrote how, when he had to consider an application for permission to appeal in the case of *McFarlane v Relate Avon Ltd*[17], "was particularly troubled by a witness statement made in support of the application by Lord Carey of Clifton, the former Archbishop of Canterbury."[18] Lord Carey's witness statement included an "appeal to the Lord Chief Justice to establish a specialist Panel of Judges designated to hear cases engaging religious rights."[19] He also proposed that "[t]he Judges engaged in the cases listed [in his witness statement] should recuse themselves from further adjudication on such matters as they have made clear their lack of knowledge about the Christian faith." Laws LJ considered such a proposal for what would, in effect, be a special court to deal with cases that involved "religious rights", to be "deeply inimical to the public interest".[20]

It is hard to disagree. In his essay John Laws commented that this was in fact an understatement and that what was being pursued was "in reality a plea for a biased court, or at least a distinctly sympathetic one. Such a suggestion is not merely inimical to the public interest. It is contemptuous of the Rule of Law." He went on to explain that he was not concerned to dispute religious claims. But he considered that free speech and the Rule

[17] [2010] EWCA Civ 880.
[18] Sir John Laws, 'Human Rights, Free Thought and Expression' in *The Constititional Balance* (Hart Publishing 2021) pp 136-138.
[19] [2010] EWCA Civ 880, at paragraph [17].
[20] ibid. at paragraph [24].

of Law are "especially vulnerable to zealotry in general and religious zealotry in particular." I think the Rule of Law is in fact able to stand up for itself and is not really so vulnerable as John Laws feared. But he was surely right when he said, "If you think you own a monopoly of the truth, you are liable to lose patience with those who disagree with you; liable, even, to suppose that they should not be allowed to disagree with you. … a ruler who claims a monopoly of wisdom necessarily aspires to tyranny, because by definition he or she is always right."[21]

The National Institutions of the Church of England were not involved in the *McFarlane* case (and gave no support to Lord Carey's pleas for a special panel of judges). But there remains the question of what role Christianity – and in particular the Church of England – has in the formation and development of the law. Bishops and others in the Church have spoken out recently on assisted suicide and the decriminalisation of abortion. They will continue to do so and it remains to be seen in what form, if any, the relevant legislation in each case will be finally enacted. But, by way of conclusion, there is – I would like to suggest – another, complementary, role for the Church in the legal environment.

The Archbishops' Council is the central, co-ordinating body of the Church of England at the national level. In 2023 and 2024 the Council was given permission to intervene in appeal proceedings in the Employment Appeal Tribunal, and subsequently in the Court of Appeal, in the case of *Higgs v Farmor's School*[22]. The issue concerned the protection afforded by the Equality Act 2010 to religion or belief in circumstances where an employer took action against an employee not because of the particular belief expressed by the employee, but because of the allegedly objectionable manner in which it was expressed. The Archbishops' Council adopted a neutral position, expressing no view on the merits of the case or on the outcome. The Council's reason for intervening was explained by the EAT in the following way:

> Recognising that public debate has become increasingly strident, and reconciliation of opposing views harder to achieve, the [Church

[21] Laws, 'Human Rights, Free Thought and Expression' (above) p. 138.
[22] [2023] EAT 89; [2025] EWCA Civ 109.

> of England] has sought to promulgate a framework (set out in "*Pastoral Principles*") to help its members engage in difficult discussions, including the manner in which a strongly held conviction is expressed; seeking to create space for difference, the Church of England considers people should be free to express their views in an environment of mutual respect and tolerance.[23]

It was the Archbishops' Council's position that the application of the articles of the European Convention of Human rights concerned with freedom of religion and belief and freedom of expression required a strict proportionality assessment, with that assessment being undertaken with the need to encourage pluralism, tolerance and dialogue firmly in mind.[24] The Council submitted that it would be of assistance to many employers and others if the EAT were to provide some general guidance on the approach to such cases. The Tribunal agreed: "within the context of a relationship of employment, the considerations identified by the intervenor are likely to be relevant" in assessing whether any limitation or restriction imposed by an employer on an employee's freedom to manifest a religious belief, or their freedom of speech, was a proportionate means of achieving a legitimate aim. The Tribunal then set out those considerations in nine numbered points.[25] The Court of Appeal subsequently endorsed what the EAT had said in that regard as "a summary of the underlying principles".[26]

If Church of England bodies and office holders continue – sparingly and judiciously – to intervene and raise issues where the Church has something particular to contribute, they will be performing a role that is to the benefit of the law and of the public interest more generally. The Rule of Law relies on the law having a sound moral basis that is broadly accepted as being worthy of respect. Even if Munby LJ was right that the laws and usages of the realm do not include Christianity, it seems likely that Christianity will continue to be involved in the development of those laws and usages for some time to come.

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[23] [2023] EAT 89 at paragraph [76].
[24] ibid. at paragraph [78].
[25] ibid. at paragraph [94] (5).
[26] [2025] EWCA Civ 109 at paragraph [113].