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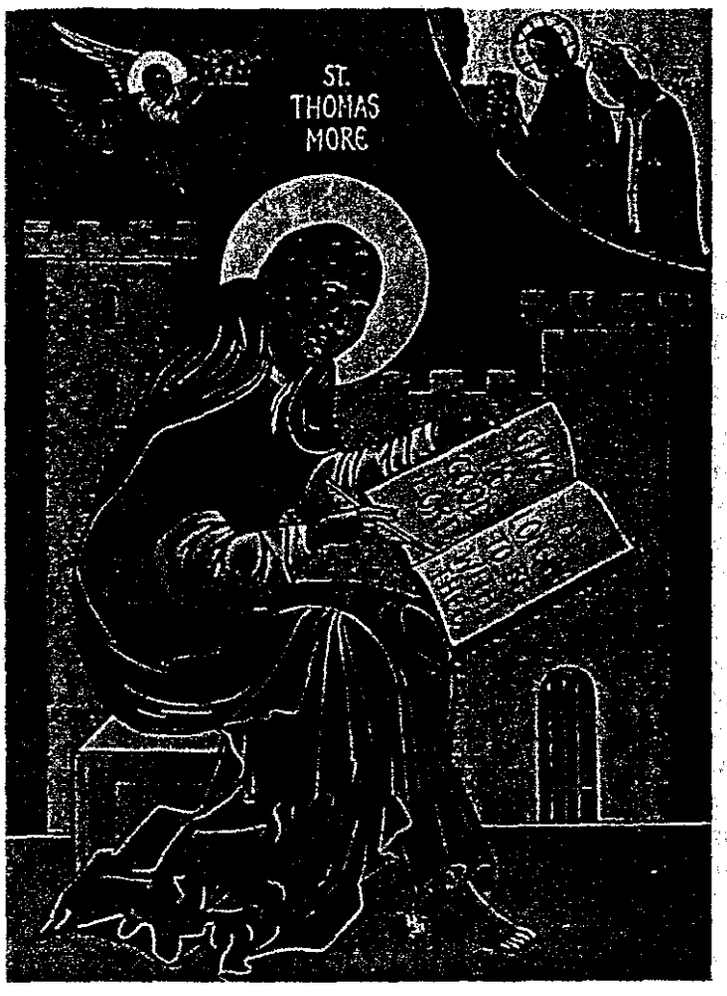

The icon of St Thomas More was painted by Marice Sariola, a noted iconographer of Busselton, Western Australia.

It differs from the classic depiction of St Thomas by Holbein, in that it shows More as martyr, imprisoned in the Tower, unshaven and in rags. The red background of the icon reflects More's fate as as martyr, while in the right-hand corner, More's fellow martyr, Cardinal John Fisher, accompanies the figure of Christ. The words, "Give me good Lord, a longing to be with Thee", are taken from a prayer written by More.

The icon was commissioned for the establishment of the College of Law, and was blessed at the opening of the College of Law by the Most Reverend Bishop Robert Healy on 2 August 1997. It is carried in procession by the students of the College to solemn mass on the Feast Day of St Thomas More on 22 June.

THOMAS MORE, MARTIN LUTHER and THE JUDICIARY TODAY†

The Hon Justice Michael Kirby AC CMG*

IMAGES FROM FAR AWAY

St Thomas More is an example to all lawyers. This is particularly so for those who are English-speaking and who daily work with those mighty gifts of England: the common law and the principles of equity. It is fashionable in some quarters to deny our debt to this heritage. But lawyers in Australia and New Zealand must resist that fashion. To embrace it would involve a denial of part of ourselves.

As a youth, I heard nothing about Thomas More. He was not one of the pantheon of heroes for a boy growing up in Sydney in the Anglican Diocese. Sydney is a very Protestant corner of the Anglican Communion. Although it includes a few churches which follow that path of Anglicanism known as 'the High Church', most of the ministry is performed in an evangelical and Protestant tradition. In that tradition, in the 1940s and 1950s, there was not much room for the brave Chancellor who stood out against the power of the King.

Whenever I feel a need for the comfort of quiet memories, I close my eyes and find myself back in the Parish Church of St Andrew, Strathfield in Sydney. A simple, plain, Protestant church. In the Sydney tradition, the altar was left completely bare, save for the empty cross of the risen Lord. The Union Jack and the Australian flag hung to left and right respectively in the chancel. When my awakening interest in Christianity and church governance took me into the marvellous language of the *Book of Common Prayer*, I would pass over the beauty of the liturgy and turn — in preparation for a lawyer's life — to the rather disputatious *Articles of Religion* found at the back. Those *Articles* were determined at a convocation held in London in 1562, only 27 years after More's execution. The language has all the certainty of conviction of a Bach Cantata. The Church of Rome, like the Church of Jerusalem, Alexandria

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† This article is a recension of an address to the St Thomas More Society at the Northern Club, Auckland, New Zealand, 9 July 1997.

* Justice of the High Court of Australia.

and Antioc before it, had, according to the *Articles*, erred 'not only in their living and manner of Ceremonies but also in matters of Faith.'[1] The 'Romish doctrine concerning purgatory, pardons, worshipping and adoration as well as images as of reliques' were 'a fond thing vainly invented and grounded upon no warrant of Scripture.'[2] It was 'plainly repugnant' to the Word of God to minister the sacraments in a tongue not understood of the people.[3] The Cup of the Lord was not to be denied to the lay people.[4] Priests were not required to abstain from marriage.[5] Above all, the Bishop of Rome 'hath no jurisdiction in this realm of England.'[6]

These *Articles* were the foundation for the tradition of my religious upbringing. To one brought up in them, they seemed entirely rational and just, even modern. Almost as timeless as the beautiful descant in which the choir sang the responses every Sunday. We were part of a continuity of faithful and much blessed people praying every week in public worship to God and with prayers of only slightly lesser fervour for the King's Majesty and all the members of the Royal Family. For this was the Church that Thomas More had failed to prevent.

On the *Book of Common Prayer* and the Thirty-nine *Articles* the mark of the great Protestant reformer Martin Luther is unmistakable. It was of Luther and that other Thomas, Cranmer, whom I heard often in my youth. To us, Christians of the Protestant tradition, it was the fearless Martin — who stood out against the whole world, including the power of organised Christendom that had lost its way — who captured our imagination. If we were looking for a medieval man of unshakeable principle in the field of religious activity in life, it was Martin Luther, not Thomas More that we admired.

In 1963, during the Pontificate of Pope John XXIII, I received a papal blessing, with head bowed, (but standing to Protestant attention) in a sea of kneeling faithful in St Peter's Square in Rome. Thanks to that holy man most of the old enmities between the separated branches of the Christian Church began to crumble. I have seen them eroding over the course of my lifetime. It is a long way from the religious intolerance of the Australia into which I was born to the world of today. Some might say that this tolerance is the product of religious indifference in Australian, as in most other Western societies. To some extent, that is doubtless true. But the blessed Pope John XXIII began the task of bridging the worlds of Thomas More

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1 Article xix.
2 Article xxii.
3 Article xxiv.
4 Article xxx.
5 Article xxxii.
6 Article xxxvii.

and Martin Luther so that each world would, by the century's end, appreciate the truths that each had to offer. Fortunate are we who have lived through the beginning of this process of reconciliation. May it continue. Yet in the time of More and of the Thirty-nine *Articles*, the differences were so acute that they were literally a matter of life and death.

More and Luther

I have sometimes jested with Catholic friends that by the turn of this century Martin Luther would commence the journey to beatification, in recognition of his contribution to the cleansing and renewal of the Catholic Church. My prediction now seems a trifle premature. The hurts of the Reformation are still felt. The errors and personal weaknesses of Luther are probably still taught to Catholic schoolchildren just as I, in Sunday School, learned the Thirty-nine *Articles* of Faith. But whether my prediction will come to pass or not, there are certain parallels between the lives of these two contemporaries that I wish to draw.

Both More and Luther must be seen as important children of the Roman Catholic Church. Both were recipients of its education and preparation for a life as a Christian man in a world of universal faith. Both were devout believers in the faith they learned as children of the Church. Both were men of great ambition — not other-worldly. They were men of affairs.[7] Men of power. Men used to wielding the decision of life and death over their follows. Both aspired to the religious life. Both had a streak of stubbornness which was flinty and obdurate even in the face of death. Both were learned scholars. Both stood up for what they believed against the enormous civil power that circled them about.

What lessons do More and Luther have for us — and particularly us lawyers — who follow, living and working in a very different world?

It was in October 1517 that Martin Luther drew up his 95 theses or propositions about the errors of Papal Indulgences to release souls from purgatory. Like Erasmus, he was an Augustinian monk. Unlike Erasmus, he was 'darkly preoccupied with the salvation of his soul and nearly crushed by the burden of his own sins.'[8] In a biography of Thomas More, Richard Marius observes:

> We have several times had occasion to note similarities between More and Luther. Both sprang from the same aspiring class: their fathers were city dwellers with high ambitions for their brilliant sons, ambitions they hoped to see fulfilled by putting those sons to the study of law. Luther

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7 F G Brennan, 'The Peace of Sir Thomas More' (1981) 8 *Queensland Lawyer* 51, 53.

8 Richard Marius, *Thomas More - A Biography* (1984), 264; for a discussion of Erasmus, see William Manchester, *A World Lit Only By Fire: The Medieval Mind and the Renaissance: Portrait of an Age* (1992).

> gave up the law and, much against his father's wishes, entered the monastery. More was powerfully drawn to a clerical career but decided to marry, and acquiesced to his father's wishes and became a man of the law. Both More and Luther had intense sexual drives that troubled their piety. Both felt their own sins as an almost impossible weight of guilt, and both longed passionately for heaven and feared the judgment of God.
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> In each of them burned an intensity that was often comic but could become fury at the slightest provocation, and each did battle for principle against an uncompromising and ruthless foe. Neither of them could believe that an opponent was honest or free of malice; each assumed that enemies were inspired by the most depraved wickedness. Each found it impossible to compromise doctrinal positions, and each disputed so passionately and at times so viciously for his own version of faith that in the cool detachment of our own religious nonchalance, we may wonder if each might have been driven by the horrifying suspicion that Christianity might be a myth.
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> The last point is an important one, usually evaded or simply denied by modern scholars who in a commendable desire to make distinctions between the mentalities of present and past argue that radical religious scepticism is a modern affliction and that atheists in the Renaissance were few or non-existent. They see the Reformation of the 16th century as beginning in a reaction to the intolerant corruption of the Catholic Church, a reaction Luther shared with More and Erasmus and the great mass of Christian humanists. But as we have said earlier ... corruption was probably no greater than it had ever been, and a good case can be made that the church in the 15th century was far purer and more lively than it had been a century before.[9]

According to Marius, More and Luther were both apocalyptic souls. They did not think that the Day of Reckoning could be far away. The author suggests that More's mighty calm at the end, and his conviction that Christians must yield themselves to God's purposes in hope and trust, represented an almost exact parallel of Luther's pronouncements about pre-destination:

> The world is dark and confused, and the righteous suffer; there has to be a reason for these tribulations; that reason is to be found in the grand design that God is working out for the world.[10]

When I arrived at Sydney University in 1956 and actually met Catholic friends for the first time, I was struck by the overwhelming commonality of our shared beliefs. Also by the little things that divided us. These included, in those days, small social matters. The raising of a hat on passing a Church. The sign of the Cross during prayer. Fish on Fridays. Close and different alliances, professional and commercial, which were made to fend off the power of a still largely Protestant hegemony. Of course, I had a sure conviction that the Thirty-nine *Articles* spoke the

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9 Ibid 264–5.
10 Ibid 272–3.

truth. The Church of England was not simply the creature of the King's Great Matter. It was the inevitable outgrowth of the Protestant movement with all the rationality that appealed to the English faithful.

I also discovered the English heroes of Catholic friends: including the Saxon Thomas à Becket, the Victorian Cardinal Henry Newman and the Tudor Chancellor Thomas More. These were three men who had not figured significantly in my instruction upon English history. Yet they were definitely part of my tradition.[11] They represented a feature of it which I was yet to discover. I tell you these things so that you will understand that for most (although not all) lawyers brought up in a Protestant tradition of Christianity, St Thomas More — or Sir Thomas More as we are irritatingly given to titling him — was not well known. When his tale was told, it seemed that he was a flawed character. In that sense, he was rather similar to our own Protestant hero Martin Luther. The Church, like rival football teams, was divided. Each side had its heroes. But neither hero was without blemish.

Would we say, with the wisdom of today, that both Luther and More demonstrated an uncompromising attitude to religious belief which was inconsistent with the universal human right of freedom of religion and freedom from religion which we recognise today? Are both of them to be seen as essentially intolerant fundamentalists of a kind now associated with non-Christian faiths rather than the modern Church of Jesus Christ?

Each in their own way was a failure. More failed to find a way through the King's Great Matter which the King felt had to be solved if England was to be spared a reversion to the Wars of the Roses. Luther failed because he subjected Europe to the 30 Years War with all of its death, division and destruction. A pragmatic lawyer might ask, can the world afford men of such conscience?

More the Jurist

With advancing years and a growing realisation of the folly of the separated teams, I have come to know the story of Thomas More and to admire the Saint's great courage and love of the Church to which he was so loyal. He is almost an extreme example to us of the judge and lawyer sticking to principle although the heavens may fall. It was not the heavens that fell on More but something weightier and more deadly. It was the fact that More knew that this would occur, yet stood his ground, that gives us who follow him an example — albeit one most extreme —

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11 I could add Oliver Plunkett (1625–1681), Archbishop of Armagh, Ireland, who was hanged at Tyburn after the 'Popish Plot.' He was beatified in 1920 and canonised in 1975.

of the judge and lawyer adhering bravely and independently to a position, however unpopular it is with the clamour of the crowd.

A recent Canadian examination of More suggests that, paradoxically, his adherence to what he understood the law to require demonstrates that sometimes we must do this even if the result is recognisably unpalatable, perhaps even morally incorrect or, at least, socially unwise. We adhere in such circumstances to law because we fear arbitrary state power. We fear it because experience teaches that it can perpetrate terrible injustices.[12]

More's resignation as Lord Chancellor demonstrates also a recognition of the fact that, so long as he held office, he was obliged to conform to the King's law. It is often the fact that judges and lawyers must perform acts which they do not particularly like. In *Utopia*, for example, More had written that he believed capital punishment to be immoral, reprehensible and unjustifiable. Yet as Lord Chancellor and as councillor to the King, he certainly participated in sending hundreds of people to their death,[13] a troubling thought. Doubtless he saw himself, as many judges before and since have done, as a mere instrument of the legal power of the State.

What ethic caused More to baulk when the State power obliged him to submit to the Oath of Supremacy? Could he not have retained a mental reservation: dividing his duties to Church and State as we might do today?[14] Whether for the greater good of retaining his influence on the King? For lessening the risk of, and later repairing, the split from Rome? Perhaps More ought to have submitted to the Oath. But his conscience would not let him. His action teaches that a point may be reached, even in the life of a secular society, when a judge can tolerate no more the offence to his or her conscience in applying a plainly unjust law. Few indeed of the German judges offered their resignations in the 1930s as the Nazi laws were introduced. Fortunate are we that we are rarely, if ever, pressed to such a point. Lord Cooke of Thorndon has suggested that, were ever such a point to be reached — not just a bad law but a plainly wicked one — a question might arise whether the

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12 I Scott, 'Sir Thomas More and the Rule of Law' (1986) 20 *Law Society of Upper Canada Gazette* 209, 214.

13 Ibid 215. Cf P Quirk, 'Suicide, Utopia and Saint Thomas More' (1997) 71 *Australian Law Journal* 221.

14 John Kennedy, during the 1960 American Presidential Campaign, said, 'I believe in a President whose views on religion are his own private affair ... I will make my decision in accordance with what my conscience tells me to be in the national interest and without regard to outside religious pressure or dictate ... But if the time should ever come ... when my office would require me to either violate my conscience or violate the national interest, then I would resign the office and I hope any other conscientious public servant would do likewise': cited by I Scott, 'Sir Thomas More and the Rule of Law' (1986) 20 *Law Society of Upper Canada Gazette* 209, 216.

judges would enforce a law so offensive.[15] However that may be, none of us faces a crisis of life and death such as More had to wrestle with.

More and the Rule of Law

The great legacy of Thomas More for the English legal tradition lies not only in his adherence, unto death, to his conception of the rule of law. It also lies in his great skills as Lord Chancellor. History teaches that Cardinal Wolsey, as Lord Chancellor, had created huge backlogs in the cases by reason of his determination to administer personal justice. More, the son of a judge of the King's Bench, trained as a common lawyer, exhibited great restraint in the granting of injunctions. By his great energy and scrupulous honesty, he cleared the backlogs.[16] He began the tradition which saw equity develop in the hands of secular Chancellors, into the coherent body of principle we know today. He began the process of reconciling the relationship between the common law and equitable principle. To settle the objections of the common law judges, he invited them to dine with him in the Council Chamber at Westminster. After dinner, he heard their complaints about injunctions directed at their courts. He showed them the causes of every one of them. According to Roper, '[t]hey were all forced to confess that they, in like case, could have done no otherwise themselves.'[17]

More promoted the idea that the judges of the common law must model their own consciences upon that of the Chancellor. In this, he gave a beneficial reminder to lawyers of every generation that the law must be obeyed. But the law should not depart too far from conscience and the common perception of justice and fairness held in the community. More helped revive the common law by making it answer to conscience.[18] The process of working out the relationship of law and equity continues to this day.[19] In a striking way international human

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15 *Fraser v State Services Commission* [1984] 1 NZLR 116, 121; *L v M* [1979] 2 NZLR 519; *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; This subject is discussed in M D Kirby, 'Lord Cooke and Fundamental Rights' in P Rishworth (ed), *The Struggle for Simplicity* (1997).

16 T Endicott, 'The Conscience of the King: Christopher St German and Thomas More and the Development of English Equity' (1989) 47 *University of Toronto Faculty of Law Review* 549, 565.

17 Roper cited in J A Guy, *St German on Chancery and Statute* (1985) 64.

18 This is the view of T Endicott, 'The Conscience of the King: Christopher St German and Thomas More and the Development of English Equity' (1989) 47 *University of Toronto Faculty of Law Review* 549.

19 For a recent example, see *Maguire and Tansey v Makaronis* (1997) 188 CLR 449, 489, referring to *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 924; *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, 584 and 588; *Day v Mead* [1987] 2 NZLR 443, 451; and *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

rights law increasingly provides an external stimulus to justice, just as the Chancellor's writs gave in More's time.[20] One author suggests that, as Lord Chancellor, More is vindicated: 'Only to the extent that judges really do bind themselves in conscience to "reform the rigour of the law themselves."'[21]

More and Us

It is a truism to say that the judges of today, in New Zealand and Australia, live in times of rapid social and legal change. They do not face the dangers which à Becket, Wolsey and More faced as Lord Chancellor of England. To find the equivalents of such dangers we have to go to other countries where judges uphold universal values at the peril of their own careers, sometimes endangering even their own lives. In Cambodia, for the United Nations, I saw the great difficulties faced by the judges striving to perform their duties in circumstances of great peril. They have no tradition of the rule of law or of unbending conscience to guide them and to inspire them. It is in countries of that kind — in Congo, in Rwanda, in Sudan, or in the Russia of Stalin or the Germany of Hitler — that we must look to find occasional brave parallels to the stand of Thomas More.

Yet judges in Australia and New Zealand have their own challenges. The personal attacks of politicians. Challenges and belittlement of our courts in some sections of society. The diminution of available resources for the work of law and of justice. The decline in funds for public legal aid which imposes heavier duties upon judges to protect the rights of unrepresented litigants, whilst not losing that impartiality that is essential to any court. The constant flood of new laws to be learned and applied. The never-ending problems of costs and delay that keep too many worthy cases from the seat of justice. The increasing toll in personal stress for judges and lawyers. The failure of commentators and parliamentarians to understand the inescapable function of a judge of our tradition: to be Judges, like Thomas More, developing the law and its procedures in harmony with contemporary notions of justice and conscience. The poverty of most of the public debate about the role of judges. The inflexibility of our own procedures and self-conception notwithstanding the demise of the declaratory theory of the judicial

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20 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42; *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, 657-61; *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722, 765-6.

21 T Endicott, 'The Conscience of the King: Christopher St German and Thomas More and the Development of English Equity' (1989) 47 *University of Toronto Faculty of Law Review* 549, 567.

function. The silence of our traditional defenders when the judges are unjustly assailed. The general erosion of community respect for institutions : Church, Sovereign and Courts operating in a graceless time. These are the features of judicial life today — in Australia and New Zealand — which demand a new ethical principle. What the noisy critics call 'judicial activism' may be no more than the time-honoured work of judges solving new problems and seeking solutions which accord, as far as possible, with conscience and notions of justice: just as St Thomas More taught. What the vociferous detractors may call 'judicial opportunism' may be nothing but the honesty of judges today — admitting publicly and humbly that they have choices to make. That their task is not mechanical. And that they need professional and public reflection upon the role of the judiciary as it is: reality not myth. Honesty in the judicial vocation — just as Martin Luther taught. The new ethic for the judiciary in a time of new problems in law and society will recognise the legitimacy and limits of judicial rule-making which critics call judicial activism. The ***limits*** are fixed by adherence to the rule of law which St Thomas More exemplified. The legitimate ***creativity*** finds reflection in the quest for conscience and just outcomes which Thomas More took as his guiding star.

It is in circumstances such as we face today, as never before, that we need reminders of the leaders of principle who went before us. Brave people — braver than we are usually called upon to be. Reminders of the vivid image of Martin Luther nailing his propositions to the church door. Or of Thomas More offering the return of the great seal of the Kingdom to King Henry VIII. Leaders who stood by principle as they understood it whilst the world about them was in turmoil. Their steady example should inspire us, even today, nearly half a millennium later. Martin Luther inspiring Catholic lawyers for his honesty and courage and love of principle. Thomas More inspiring Protestant lawyers for his conscience and lesson in the independence of mind that is essential to the office of a judge. All of us reaching out to serve every person, Christian and non-Christian alike, in a living reflection of these two remarkable contemporaries of long ago who showed what a powerful thing is conscience when allied to law.