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REDISCOVERING ANGLICAN PRIEST JURISTS: IV

Robert Sanderson (1587-1663)

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Over the course of the reigns of the last two Tudors and first three Stuarts – just in excess of 100 years - the national established Church of England was disestablished twice and re-established twice. Following the return to Rome under Mary, Elizabeth's settlement re-established the English Church under the royal supremacy, set down church doctrine and liturgy, embarked on a reform of canon law, and so consolidated an ecclesial polity which many today see as an Anglican *via media* between Papal Rome and Calvinist Geneva. However, as a compromise, the settlement contained in itself seeds of discord: it outlawed Roman reconciliation and recusancy; it extended lay and clerical discipline by the use of ecclesiastical commissioners; and it drove Puritans to agitate for reform on Presbyterian lines. While James I continued Elizabeth's policy, disappointing both Puritans and Papists, Charles I married a Roman Catholic, sought to impose a prayer book on Calvinist Scotland, asserted divine-right monarchy, engaged in an eleven-year personal rule without Parliament, and favoured Arminian clergy. With these and other disputes between Crown and Parliament, civil war ensued, a directory of worship replaced the prayer book, episcopacy and monarchy were abolished, and a Puritan-style Republic was instituted. The Republic failed, and in 1660 monarchy was restored, the Church of England was re-established, and a limited form of religious toleration was introduced under the Clarendon Code. In all these upheavals, understandings of the nature, source, and authority of human law, civil and ecclesiastical, were the subject of claim and counter-claim. Enter Robert Sanderson – a life begun under Elizabeth and ended under Charles II, a protagonist who felt the burdens and benefits of the age, Professor of Divinity at Oxford and later Bishop of Lincoln, and a clerical-jurist who thought deeply on the nature of human law and its place in a cosmic legal order – so much so, he may be compared with three of his great contemporaries: the lawyer Matthew Hale (1609-76), the cleric Jeremy Taylor (1613-67), and the philosopher Thomas Hobbes (1588-1678).¹

THE LIFE AND CAREER OF ROBERT SANDERSON

Robert Sanderson was born in Yorkshire, at Rotherham or Sheffield, on 19 September 1587, and baptised the next day. The second son of Robert Sanderson and Elizabeth *née* Carr, he attended the grammar school at Rotherham. According to his contemporary and biographer, Izaak Walton (1593-1683), his father had considered sending Robert for a year to Eton or Westminster, but a friend thought him 'so perfect a Grammarian' that he should proceed directly to Oxford.² So he did, aged fifteen, matriculating from Lincoln College on 1 July 1603, and graduating BA on 23 January 1605. He became a fellow at the college (1606-19), graduated MA on 20 October 1607, and was the incorporated MA at Cambridge University 1609, and ordained 1611. In 1616 he was a proctor at Oxford, and in 1617 obtained a BD (19 May) and a licence to preach (1 July). On resigning his fellowship, he married Ann Nelson, a Lincolnshire cleric's daughter, and their first son, Thomas, was born in either 1622 or 1623.³

¹ I thank Mari James, at the Library of St Davids Cathedral, Wales, for bringing my attention to Sanderson.

² I. Walton, *The Life of Dr. Sanderson* (1681) 3. Walton says he was born at Rotherham, but it is Sheffield in J. Foster, ed., *Alumni Oxonienses* (Oxford, 1891): this also records that he was the son of a cleric.

³ J.S. McGee, 'Sanderson, Robert (1587-1663)', *New Dictionary of National Biography* (Oxford: Oxford University Press, 2004).

After serving as chaplain to the Bishop of London (Arminian cleric George Montaigne, to whom he dedicated his first published sermons in 1622), Sanderson ministered in the Diocese of Lincoln as rector of Wyberton (1618–19), vicar of Heckington (1618), and rector of Boothby Pagnell (1619–60). In 1629 he was appointed as a prebend at Lincoln Cathedral, with the stall of Farindon-cum-Balderton. Social and legal justice was a notable feature of his local ministry: he mediated in landlord and tenant disputes, and criticised unnecessary litigation, restrictive trade practices, excessive rents, and enclosure. He preached frequently on public occasions, with sermons at assizes, visitations (such as Laud's metropolitanical visitation of 1634), Paul's Cross, and the royal court where, encouraged by Laud, Charles I made him a royal chaplain in 1631, famously saying: 'I carry my ears to hear other Preachers, but I carry my Conscience to hear Mr. Sanderson'.⁴ The idea of conscience was to occupy Sanderson greatly in later years. He was also a proctor in all Convocations in Charles' reign.

After becoming DD (1636), in 1637 Sanderson became rector of Muston, Leicestershire, and in 1640 attended the Convocation which passed the Laudian canons. They received royal assent but included the infamous '*et cetera* oath' - Sanderson agreed to take it, but advised the king to clarify its effect in order to avoid 'misconstruction'.⁵ Under it both clergy and laity would swear not 'to alter the government of this church by archbishops, bishops, deans and archdeacons, *et cetera*, as it stands now established and as by right it ought to stand' (Canon 6). It also guarded against the 'usurpations' of Rome. Fearing the oath would mean upholding the Laudian church, which concentrated authority in the episcopacy and church courts, Laud and his canons fell after the Commons' Grand Remonstrance 1641 denounced them as 'contrary to the king's prerogative, to the fundamental laws and statutes of the realm, to the right of parliaments, [and] to the property and liberty of the subject'.⁶ In 1641 Sanderson became a prebend at Southwell and in 1642, the year Charles I set up his court at Oxford, Sanderson was appointed as the regius professor of divinity and a canon of Christ Church; he held the Oxford chair from 1642 to 1648 (and again, at the Restoration, 1660–1). Moreover, in 1643, he was one of several clerics appointed to a committee of the House of Lords to resolve religious issues in peace negotiations for the Treaty of Oxford made between Parliament and Charles I. The talks failed. In any event, that same year Sanderson was chosen to, but did not, participate in the Westminster Assembly of Divines on church reform; its Westminster Confession of Faith 1647 is still a key text in Reformed/Presbyterian polity.

Which brings us to his theology. He was complex. For some, he was 'anti-Puritan' and 'anti-Arminian', but influenced by the Calvinist doctrine of predestination. For others, he was a 'doctrinal Calvinist' but taught that divine election was entirely gratuitous and to suggest otherwise was 'quarter-Pelagian and Arminian novelty'. Yet, he had something of the Puritan in him, denouncing idleness and opposing Rome, though he also rejected Puritan arguments against church ceremonies, and he antagonised Presbyterians and Independents (so prominent among the various parliamentary factions) by accusing them of sectarianism.⁷

Life for Sanderson became more difficult. In 1644 he was ousted from Boothby Pagnell, imprisoned at Lincoln, exchanged for a Puritan minister held by the royalists at Newark, and so returned to Boothby Pagnell. In 1646 he at last took up his Oxford chair but was deprived in June 1648, following Oxford's rejection in 1647 of Parliament's demand that members of

⁴ I. Walton, *op cit.*, 15.

⁵ W. Jacobson, ed., *The Works of Robert Sanderson* (London: 854) 6.361.

⁶ G. Bray, ed., *The Anglican Canons 1529-1947* (London: The Boydell Press, 1998) lxxiii-lxxvii and 568.

⁷ P. Lake, 'Serving God and the times: the Calvinist conformity of Robert Sanderson', *Journal of British Studies*, 27 (1988) 81-116.

the university accept the Solemn League and Covenant (pledging abolition of episcopacy and reform of the Church of England on Presbyterian lines) and the Negative Oath (not to fight for the king). Nevertheless, the Commons allowed Sanderson to attend the king confined on the Isle of Wight - here Charles I either translated himself or ordered translation from Latin to English Sanderson's seven lectures on oaths delivered at Oxford in 1646. Around this time parliamentary soldiers interrupted Sanderson's church services at Boothby Pagnell (objecting to his use of the prayer book), and various royalist clergy (who defended Catholic practice) criticised his liturgical variations. In 1650, Sanderson refused to take the oath of allegiance 'to the Commonwealth of England, as it is now established, without a King or House of Lords'. He did so on the basis that he was already 'engaged' to the monarchy but argued it was possible to take it in good faith (i.e. not unlike the Roman idea of mental reservation).⁸

Despite these travails, at the Restoration, on 28 October 1660, Sanderson was consecrated bishop of Lincoln. His tenure was short but active. On Convocation's episcopal committee preparing the Book of Common Prayer 1662, he wrote the preface, parts of the burial service, the prayer of humble access, and probably the prayer for 'all conditions of men'; indeed, he has been styled 'the outstanding figure of the revision'.⁹ Sanderson also administered his diocese energetically, but he remained hostile to those Puritans who rejected the restored church: in the House of Lords 1661, with bishops Gilbert Sheldon, Edward Reynolds, George Morley, and John Gauden, he successfully blocked the Commons' amendments to the bill to settle ministers that would have allowed some nonconformist clergy to retain their livings.¹⁰

Sanderson died on 29 January 1663 and was buried at St Mary's Church at Buckden (where one of his episcopal residences was located). His will states that he and Anna lived nearly forty-three years 'in perfect amity and with much comfort'. Three sons - Thomas, Robert, and Henry - survived him; two daughters, Katherine and Mary, did not. The will specified a simple funeral, without any flattering sermon, black hangings, and other paraphernalia, 'the mode of these times', or any 'costly monument' but a 'faire flat marble stone', and expressed his hope that his example would encourage others to employ their wealth in charitable works rather than 'funeral solemnities and entertainments'. Several likenesses of him survive.¹¹

THE SANDERSON LECTURES ON HUMAN LAW

Sanderson wrote many works. *Logicae artis compendium* (1615) is a textbook on logic for students which went into ten editions in the seventeenth century, sold 10,000 copies by 1678, and was used by Isaac Newton when a student at Cambridge - it was recommended that he read 'Sanderson or Aristotle himself' - and he used the textbook till 1704. Next, there are the published sermons. Then come works on oaths and obligations: *De juramenti promissorii obligatione*, seven lectures delivered at Oxford in the Michaelmas term 1646 and first published in 1647, later published as *De juramento* (1655) with the final edition in 1722; and *De obligatione conscientiae* (1647). Then came: *Nine Cases of Conscience* (1678); *A Discourse concerning the church* (1688); and *Physicae scientiae compendium* (1690).¹²

⁸ P. H. Sedgwick, *The Origins of Anglican Moral Theology* (Leiden: Brill, 2019) 305-306.

⁹ G. C. Cuming, 'The prayer book in convocation, November 1661', *Journal of Ecclesiastical History*, 8 (1957), 182-92 at 192.

¹⁰ J. Martin, *Walton's Lives* (Oxford: Oxford University Press, 2001) 272-299.

¹¹ McGee, 'Sanderson', op cit.; there are portraits of him at Christ Church Oxford and National Portrait Gallery.

¹² See generally T. Wood, 'A great English casuist', *Church Quarterly Review*, 147 (1948), 29-45. For all Sanderson's works, see: http://www.prdl.org/author_view.php?a_id=488.

Sanderson's work on law is presented in ten lectures 'On Conscience and Human Law', delivered at Oxford in 1647, and written in Latin.¹³ They represent a detailed, discursive and wide-ranging treatment of human law in which propositions are tested, and conclusions offered, in their wider moral and theological contexts. Lectures I to IV are about conscience. First: 'conscience' is 'a faculty or habit of the practical understanding, by which the human mind, by the right use of reason and argument, applies the light, which it possesses, to the cognizance of moral actions';¹⁴ and 'God alone has an absolute and direct command over the consciences of men'. Second: 'the immediate rule of the Conscience is the light which is then present to the mind, or (which is the same) the ultimate judgment of the practical understanding'. Third: 'the written Word of God is the supreme and primary, but not the adequate, rule of the Conscience'. Fourth: 'the proper and adequate rule of the Conscience is the Will of God howsoever revealed, or...the law imposed by God upon a rational creature' – namely: (1) 'by the Law of Nature, which consists of certain practical principles that are self-evident, and is the Law of God written in our hearts [Rom. 2.15 is cited], and impressed upon the mind, as it were, by an inward light, and connatural with it'; (2) 'by the written Word of God [in] both Testaments; which is an outward light supernaturally revealed, and infused into us'; and (3) 'by a knowledge arising from both...by our own reflection or the instruction of others; which is a sort of acquired light, introduced chiefly by the help of reason and discourse, and by the authority (that is, the judgment and practice) of the Catholic Church'.¹⁵

The nature of human law and the obligation to obey it

Lecture V deals with 'the general obligation of human laws'. While 'the law of God', 'primarily', 'absolutely, and by its own proper virtue, obliges the Consciences of all', human laws 'bind the Conscience not primarily, and by themselves, but secondarily, and by consequence; not absolutely, but relatively; not by their own power, but by virtue of some Divine precept or institution on which they are founded'. 'Law' itself is 'a rule of action laid upon the subject by a superior that has full commission and authority'; 'as those laws are called Divine which are constituted by the immediate authority of God Himself, whether they are natural or positive; so those are said to be Human, which (though they derive their authority from God, yet) are directly imposed upon the subject by the commands of men'.¹⁶

That 'law obliges' means that 'it imposes upon the subject a necessity of obedience'. Law has two aspects - law is 'directive' because it 'informs the subject what the will of his superior is, and shows him his duty, whence it is called a canon or rule'; law is 'obligatory' as it 'exacts obedience...(by which it differs from counsel or advice) upon pain of sin; sin in itself being nothing else than a violation of the law we ought to follow'. This 'obligatory force and effect of a law is founded upon the will and power of the lawgiver', so that 'it is not so much the law itself, as the intention and authority of the lawgiver, that, as an efficient cause, imposes an obligation upon the Conscience' to obey the law. Moreover: 'to oblige the Conscience, is so to bind a man to obedience under the penalty of mortal sin...that if he disobeys, he is not only liable to temporal punishment, either expressly fixed by the laws, or

¹³ *Bishop Sanderson's Lectures on Conscience and Human Law*, edited, in English, by C. Wordsworth, Bishop of Lincoln (Lincoln: J. Williamson; London, Oxford and Cambridge, Rivingtons, 1877); ix: the editor thought the lectures relevant to the 'condition of the Church of England', 'various important and difficult questions' on 'the relations of Church and State', and the laws 'both Civil and Ecclesiastical', 'now occupying men's minds'.

¹⁴ *Ibid.*, p. 2, Lecture I.2. Hereafter the relevant pages in the 1877 edition follow the Lecture number and 'verse'.

¹⁵ Lecture V.1 (121-122). In *A Discourse [on] the Church* (1688) he defines the 'Catholic Church' as 'all those throughout the World' who by doctrine and worship profess Christ, e.g. the 'particular' Church of England.

¹⁶ Lecture V.2-3 (122-124): he cites Romans 13.5 and relies on Aquinas.

to be inflicted at the will of his superior, but he justly falls under the censure of his own Conscience for neglecting his duty, and by that means under the guilt of offending...God'.¹⁷

However: 'Human Laws that are unjust do not oblige the Conscience to obedience'; for instance, a law which forbids the worship of God is 'contrary to a primary obligation, by which the subject is antecedently bound, by virtue of a divine command; and...such a law cannot bind the subject to obedience'.¹⁸ Also, laws 'made by a person, or community, that has no lawful authority, lay no obligation upon the Conscience' but 'carry only the name of Laws'; and 'authority' is 'a lawful power by right, which a superior enjoys by the Law of Nature or of Nations, or by a civil claim'. There is a presumption in favour of those with authority.¹⁹ Yet: 'Human laws...that are not unlawful, do directly, and of themselves, *in general*, lay an obligation upon the Conscience'; and they do so *in particular*, 'though not directly and by themselves, yet by consequence, by the general authority of the Divine Law' - that is, 'by virtue of that command in the Divine Law which binds us to pay obedience to the higher powers'. Accordingly: 'a human ruler does not oblige the conscience to obey the law, but God obliges the conscience to obey the human ruler, in all things not unlawful'. In short: 'Therefore, though the magistrate, in the making of a law, has no explicit intention to oblige the Conscience, yet by the enactment of a law he creates something which, by the design and appointment of God, has an implicit and a necessary power of obligation involved in it'.²⁰

The material cause of human law – law, justice and things indifferent

Lecture VI is on the 'material cause' of human law, its 'matter'. The ruler has a 'double power' or 'twofold jurisdiction' to command and to impose sanctions. This creates a 'corresponding double obligation' - 'the subject is bound to obey the commands of the law itself' and is 'obliged to submit to the power of the lawgiver' to sanction. However: 'where the command of a law cannot be obeyed without sin, if the subject submits patiently to the power of the lawgiver [to impose sanctions], he has done as much as his duty requires; nor is he bound in Conscience to execute the commands of the law; so far from it, that he is obliged to disobey, because an unlawful command imposes no obligation'. It is 'always necessary therefore to be subject [i.e. to submit to sanctions]...but it is not always necessary to obey [commands]'.²¹ As a result, legislators should not make laws which: violate the consciences of subjects; are impossible to obey – such law 'binds no man's Conscience to obedience'; and are 'burdensome and oppressive' and 'which a subject cannot obey without great loss and inconvenience' – but the subject must in conscience obey 'if an evident necessity and the urgent occasions of the public require it'. On the other hand, a subject is 'absolutely obliged' to obey any human law that is 'necessary', or 'enjoined' or 'forbidden' by divine law.²²

Next, Sanderson deals more fully with law and justice. As unjust law does not oblige the conscience, it should be disobeyed, because divine law forbids evil and, e.g., 'we commit a sin by obeying it'. A law is unjust if, in relation to (in turn) its efficient, final, formal, and material causes: (1) it is 'made by a person not invested with a lawful power' (a defect of

¹⁷ Lecture V.5 (125-126). In V.6 he discusses Calvin (with whom he disagrees).

¹⁸ Lecture V.7-9 (127-129); again: 'no man can be obliged to contradictions' (this is a canonical *regula iuris*).

¹⁹ Lecture V.11-19 (132-140); he uses Aquinas here; and: if 'public welfare requires', a subject must obey 'the laws of a ruler *de facto*', for e.g. the defence of the realm, administration of justice, or 'care of commerce'.

²⁰ Lecture V.22-41 (143-159).

²¹ Lecture VI.2-3 (161-163). I Peter 2.18, Rom. 13.1-7 are cited.

²² Lecture VI.4-9 (164-168); e.g. a law against eating flesh in Lent might trouble consciences; a law requiring property to be destroyed in war-time must be obeyed, 'as every good man is bound to sacrifice his own interest'.

‘commutative justice’); (2) it does not ‘tend to promote the public good and to preserve the rights of the community’ (a defect of ‘legal justice’); (3) it dispenses ‘favours and burdens, punishments and rewards, by an unequal proportion, without considering the merit of the subject’ (a defect of ‘distributive justice’); and (4) it ‘commands what is base, unbecoming, or any way unlawful’ (a defect of ‘universal justice’), when, ‘so far from binding the subject to obedience...he is absolutely obliged not to obey’ such law.²³ A subject should disobey if there is ‘moral certainty’ a law is unjust, but should obey if there is an error of judgment about its justness, ‘light scruple or objection’, or ‘doubts or suspicions’ about its justness.²⁴

However, it is not ‘necessarily required’, for the conscience to demand obedience, that a law be ‘positively just’. Rather, ‘it is enough, if it has a negative justice’ - ‘if it be not unjust or unbecoming, otherwise there could be no laws made about things indifferent, and of a middle nature’.²⁵ ‘Things indifferent’ are those ‘neither commanded nor forbidden by any Divine Law, natural or positive’ but ‘of themselves, and in their own nature...lawful to be observed, inasmuch as they are not forbidden; and yet they are free not to be observed inasmuch as they are not commanded’. Indeed, ‘things indifferent are the most proper and adequate matter for human legislation’ and ‘all that remain as a field for Human Power to display itself upon, and exert its force, by inducing an obligation where there was none before’ and so ‘to oblige the Conscience of the subject to obedience’. Therefore, while things were ‘before absolutely free, yet if the authority of the law deals with it, is no longer indifferent and free, in the use of it, and as to us, but is either necessary or unlawful, as the exigence of the law requires’.²⁶

Things indifferent are also a proper matter for ecclesiastical laws. God, ‘in His express Word, has commanded that all things in His Church should be done decently and in order’. Being made ‘for the sake of order and decency’: ‘By Ecclesiastical laws I would not be understood to mean such as are made by Ecclesiastical persons without the authority of the Civil Power...but those that are ordained by any lawful authority about ecclesiastical affairs’. He denies that these laws cannot institute rites and ceremonies to worship God ‘in addition to those that are prescribed by Christ and His Apostles in the Gospel’, and that they must extend ‘to the minutest actions, so that we are not to pick up a straw unless...prescribed by the Word of God’. Rather, church laws may ‘add to the Word of God’ as they ‘are not imposed upon the people as the Word of God’.²⁷ But ecclesiastical laws have their limits. For example, the ‘Law of Christ, which is the Gospel’, obliges the Church ‘to preach the Word, to administer the Sacraments, to ordain a ministry, and to exercise the power of the keys’. Thus: ‘it is not lawful for the Church...to diminish, or to change them; but the outward circumstances of those sacred institutions are free, so that any particular Church may determine of them...as the nature of time, place, and custom of the people of God, and their edification, shall require’.²⁸

The efficient cause of human law – supreme civil power and popular consent

Lecture VII explores the ‘efficient cause’ of laws - namely, that ‘they are made by a person invested with a lawful authority’ – otherwise they ‘create no obligation of obedience’. First,

²³ Lecture VI.12-14 (175-176); the footnotes cite e.g. Dan. 3.18, Acts 4.19, and Augustine. See also n. 28 below.

²⁴ Lecture VI.16 (177-178); VI.17 treats tender consciences and VI.18 laws ameliorating the evil of usury.

²⁵ Lecture VI.15 (176-177): if a law is unjust as to its efficient, final, or formal causes, ‘yet if there be no defect of universal justice, that is, if by the force and command of the law, the act to be performed by the subject may be executed by him without any sin of his own, that justice is of itself sufficient to induce an obligation’.

²⁶ Lecture VI.22-24 (183-186).

²⁷ Lecture VI.25-32 (186-195); the notes cite I Cor. 14.40.

²⁸ Lecture IV.32-34 (116-117).

‘legislative power’ is: ‘the power of a superior’, ‘as to command (and to forbid likewise) is an act of superiority’; ‘a power of public jurisdiction’, ‘an outward power to compel the subject to obey, or to inflict punishment...for disobedience’; exercised for ‘the public good of the society itself’; and inclusive of a ‘coactive power to enforce its commands’.²⁹ Second, it ‘is lodged in the supreme power [or] highest authority over the body of the State’.³⁰ In England this is ‘the King alone...the only supreme governor, in all causes, and over all persons throughout his dominions’. Thus: no ‘Bills of Lords or Commons, or of any other persons whatsoever, oblige the subject, or carry the power of a law, unless they are sanctioned by the authority of the king’. After being ‘maturely debated and resolved upon [and] confirmed by the royal assent, they immediately receive the form and authority of a law, and begin, immediately after they are promulgated, to oblige the Conscience of the subject to obedience’. They are called ‘the King’s Laws’ as God ‘has bestowed upon [the kings of England] a sovereign and imperial power, by which they give a force to the laws themselves, and cause them to be received as such’.³¹ Third, ‘the lawgiver is concerned in the making of the law’, whereas ‘the power of a judge is much more restrained’, i.e., ‘to pronounce judgment publicly according to the laws’; thus a ‘law...shall be a rule of justice to the judge himself’ as ‘the judge, who is a subject, is no less obliged to observe [law] than the rest of the people’.³²

Not only is the supreme power the efficient cause of law. Popular consent has a role too: ‘the consent of the people [is] required to make a law obligatory’. Thus: ‘laws proposed and instituted by the head of a community, or by a prince, do not oblige the subjects to obedience, unless they are admitted by the community themselves, and allowed by the customs or suffrages of those that use them’.³³ But rulers do not derive ‘all their power from the people’ – as ‘ministers of God’, their power comes ‘wholly and immediately from God’ – ‘the people only designate the person who is to govern, but he is invested with the authority of governing by God alone’. As such, the idea that ‘whoever confers a power upon another may justly strip him of that power’ contradicts ‘the dictates of Reason and Nature universally received, and confirmed by the consent of all Nations and the general use and practice of Mankind’.³⁴

Be that as it may, in law-making ‘regard ought to be had to the consent and approbation of the people’ because: (1) this avoids ‘passionate and corrupted’ laws; (2) laws not consented to ‘may, morally speaking, be presumed’ to be ‘unjust or too burdensome to the people’; (3) laws ‘abrogated by a contrary custom cease to oblige’; (4) consent assists ‘the public peace of the kingdom’; and (5) ‘all subjects will...readily pay obedience to the prince who expects their consent, and to the laws approved by themselves’. And so: ‘the consent of the people, and the supreme power of the prince, can consist together without opposition’.³⁵ On the basis that ‘at least some consent of the people is required to the making of laws that are to oblige the Conscience of the subjects’, there are ‘degrees of popular consent’. Tacit consent before the proposing of a law’ is the ‘lowest’. Tacit consent after promulgation is ‘when the people offer no objection to a law made and published by the prince, but approve of it rather by their practice and conformity to the will of the prince, and by observing what is enjoined’. Express consent occurs after a law is ‘sketched in outline’ by the prince, by the advice of his Council,

²⁹ Lecture VII.2-4 (197-200): VII.3: and ‘he who lays a command upon another, if he has just authority to do so, obliges the person he commands, but lays no obligation upon himself; because a command is an act of power’.

³⁰ Lecture VII.5-6 (200-201); I Pet. 2.13; Rom. 13.1; I Tim. 2.2 are cited. Other ‘forms of government’ exist.

³¹ Lecture VII.7-10 (201-206): the notes cite e.g. Deut. 33.4, 5; James 2.8; and Bracton, *De Legibus Angliae*, I.I.

³² Lecture VII.12 (207-208): ‘legislative and judicial powers’ are the ‘two illustrious parts of jurisdiction’.

³³ Lecture VII.13 (207-209): he discusses (at 209) e.g. ‘Julian the civilian’; the notes cite Digest. lib. i. tit. iii.

³⁴ Lecture VII.14-21 (209-218): the notes cite e.g. Prov. 8.15; Rom. 13.1, 4, 6; and Ulpian. F. de Constit. Princip. Digest. Lib. i. tit. iv. § I. He also discusses England and elections to the Commons.

³⁵ Lecture VII.22 (218-219): the notes cite Arist. Pol. iii.

and the people, or their greater part, vote for it before its promulgation. The ‘highest degree of all’ respecting the ‘true liberty of the people’ is ‘the express consent of the people before the enacting of the law’ – as in England, where law-making seeks ‘to moderate the power of princes on the one hand, and to check and restrain the licence of the people on the other’.³⁶

Next, Sanderson addresses making ecclesiastical laws: it is ‘agreeable to reason’ that ‘new laws may be made [about] ecclesiastical matters and persons [as] to the circumstances of outward worship, and promoting order, decency, and edification, besides those delivered by Christ and His Apostles in Scripture’. However: in the Church of Rome, the bishops and Pope make laws to oblige clergy and laity ‘without the consent of the civil magistrate’; Puritans would transfer all ecclesiastical jurisdiction from the Crown ‘to their own classes and conventions’; and Erastians would ‘rob the spirituality of all...jurisdiction’, and give up the ‘government of the Church absolutely [to] the civil magistrate’. Therefore: ‘the truer opinion’, being ‘safer to follow’, and ‘agreeable to the doctrine of the Church of England, and to the laws of the Realm’, is one in which ‘the right of making ecclesiastical laws is vested in the bishops and presbyters, and other persons duly elected by the whole body of the clergy of the whole realm, and assembled duly in a lawful synod’ - and exercising this right ‘ought to depend, in every Christian state, upon the authority of the supreme civil magistrate’. Such is the case in England, where Convocation cannot without the permission of the Crown meet ‘to make ecclesiastical canons’; nor are canons ‘agreed to in such a convention, of any force to oblige, till the assent of the supreme magistrate be obtained; by whose public authority and approbation so soon as they are confirmed, they immediately obtain the force of laws, and oblige the Conscience of the subject’.³⁷ He does not say whether canons bind both clergy and laity, nor comment on the role of popular consent in making of English ecclesiastical laws.

The formal cause of human law – promulgation, penalties, and preambles

Lecture VIII is on the ‘formal cause’ of human law. First, promulgation: as it has ‘a power to direct’ and ‘a power to oblige’, ‘a law cannot duly and effectually exercise this twofold power, unless the subject is made acquainted with the will of the ruler, which is by publication; and unless he understands by the penalty annexed how nearly it concerns him to obey it’. Promulgation, then, is ‘the essence of a law’, part of its ‘form’, and ‘so necessary, that without it the law is disabled from putting these powers in execution’ – this is affirmed by ‘canon law’ (Gratian is cited), reason, and Scripture. The ‘customs of different nations’ vary as to process, but ‘all agree’ on an ‘outward sign’ or ‘solemn form’, so the subject ‘be sufficiently convinced that the lawgiver designs that will of his to have the power of a law’, since ‘not every will of a superior, though known to the subject, does immediately, and *ipso facto*, oblige unless it appears that the superior intended it should’. The English way of promulgating statutes seems the most ‘commodious method’, being ‘printed in a known character by the king’s printer’. A law binds all who ‘actually’ or ‘ought to’ know it.³⁸

Secondly, ‘it appears that the fixing of penalties is necessary to the making of laws’ for law to ‘attain its effect with a greater force’ and subjects ‘to do their duty by fear of punishment’.³⁹

³⁶ Lecture VII.23-27 (219-223): the notes cite Arist. Pol. i. 6 and Digest. i. tit. iii. l. 32.

³⁷ Lecture VII.29-30 (224-226).

³⁸ Lecture VIII.1-7 (227-234): the notes cite Gratian. Decret. Pars. I. Distinct. 4. In istis; and: ‘God Himself...solemnly published his law...from Mount Sinai’. For ignorance of law see VIII.8-9 (234-236).

³⁹ Lecture VIII.10 (236-238); VIII.11-25 (238-255) deal in detail with penal law and punishment.

Thirdly, the interpretation of law: ‘The mind of the lawgiver may be inferred partly from the form and manner of the command, and partly from the degree of the penalty annexed; but chiefly from the preamble of the law itself’ designed ‘to recommend the law to the people’. In it the legislator ‘declares the causes and reasons that induced him to make such a law; how just it is, how necessary to take away inconveniences and abuses, and of what advantage it will be to the public good’. By reflecting on it, we can ‘judge the design of the lawgiver, and to be so morally certain of it (for in morals a moral certainty is sufficient) as to conclude that the lawgiver undoubtedly proposed such an end in the making of the law’. If in doubt, we should ‘apply to a person of approved piety and discretion’ to ‘interpret’ the law. Sanderson then explores forms of ‘indulgent’ and ‘stricter interpretation’ in the work of Martin Navarre (Martin de Azpilcueta, 1491-1586), who was ‘of great authority among the Canonists’.⁴⁰

The final cause of human law – legal change and public good as supreme law

Lecture IX examines the ‘final cause’ of human law. First: ‘The ultimate end of the laws is the good of the community, or the peace and tranquillity of the public’, or else ‘temporal’ or ‘outward’ ‘public happiness’ or ‘public good’. Second, human laws particularise divine law: if just, they are ‘no more than certain offshoots and branches derived and taken from the Divine Law; that is, particular determinations of those general rules, which the law of Nature and the Word of God exhibit undetermined’, and ‘wisely adjusted to the quality and advantage of certain people or nations, as the exigency of times and places requires’.⁴¹ Third, as some virtues and vices are ‘internal’ and some ‘external’, ‘legislative power is concerned only with the outward acts, and not with the inward affections’, and ‘neither wisely can, nor rightly ought, either to command or forbid the inward acts of virtues or vices’. In turn, laws ‘may by right command all outward acts of virtue, and may forbid all the outward acts of vice’. Yet, as ‘the variety’ virtues and vices ‘is so great’, if rulers ‘attempt to take notice of every one of them, the very multitude of laws would be an insupportable burden to the community’. Only the ‘most eminent’ virtues/vices should be regulated. That a lawgiver is not disposed to the common good does not affect the obligatory nature of a law if it is just.⁴²

Sanderson ends Lecture IX by discussing legal change: ‘laws may be, and sometimes ought to be, changed; for they have formerly been altered with great advantage to the public; and therefore they may now be changed again; and so they may in all future times, if occasion requires, and it be for the interest of the community’. But change is ‘not without danger’ and ‘ought not to be attempted, but upon evident and extreme necessity’ because: (1) change ‘weakens the power of a government’; (2) frequent changes ‘detract from the authority’ of the law and lawgiver, like a ‘wavering’ person; and (3) ‘to tamper’ with laws makes the people ‘importunate’ and ‘petulant’ and encourages a ruler to be ‘compliant’ and ‘ready to sacrifice his own rights to the humour and caprice of the people’. Sanderson draws here on Aristotle.⁴³

Lecture X deals with ‘the popular maxim’ or ‘common axiom’ that ‘the safety of the people is the supreme law’. This supposes ‘that in every government, a supreme power...superior to all positive laws of men’ must ‘take care by its authority, that neither by the defect of the laws, nor by a too superstitious observance of them, the public should receive damage’. The ‘wisest lawgiver cannot possibly foresee all...events’ nor, ‘by means of laws’, obviate all the

⁴⁰ Lecture VIII.16-17 (243-244); the notes cite Azpilcueta’s *Enchiridion*. cap. 23, §48.

⁴¹ Lecture IX.1-3 (259-261): on the public good, the notes cite *Arist. Ethic.* viii. 11.

⁴² Lecture IX.4-11 (261-267): he discusses St. Paul and St. Peter (the notes cite *Rom.* 13.3, 4 and *I Pet.* 2.14) and Aristotle (the notes cite *Aristot. Ethic. Nicom.* V. 1. 14).

⁴³ Lecture IX.12-13 (267-269): the notes cite *Arist. Pol.* ii. 8.

‘calamities that may befall the state’, due to ‘their variety, indefinite and uncertain’, and the fact that law deals with ‘generalities’. The lawgiver has ‘sufficiently discharged his duty, if by his laws he ordained what is for the most part just and beneficial to the public’. But for ‘unexpected emergencies’, there must be a ‘discretionary authority’ charged ‘to provide for the public safety’ by way of equity: ‘for equity (as Aristotle defines it) is nothing else but the correction of legal justice’, supplying the defects of law, when, ‘by reason of its too general extent, the law does not answer the end of justice, nor promote the good of the public’.⁴⁴

Therefore, ordinarily the sovereign is ‘obliged by the laws made and confirmed by himself, and approved and received by the consent and custom of the people’. However, in an ‘extraordinary emergency’, for public safety, he ‘may lawfully, and with a good Conscience’ act ‘beyond the limit of the laws, or in opposition to them’. This is affirmed by ‘the example of the best of princes’, ‘the dictates of reasons’, and ‘the right of kings’. So if a government will be subverted by foreign foes, or by seditious subjects, ‘unless something be attempted that exceeds the permission of the laws’, then it is ‘lawful for the ruler, by the prerogative of his own power, and...for the subjects, by the presumed will of the ruler (if nothing be done to his prejudice, and a present necessity requires), so far to recede from the words and the sense of particular laws as to defend their...country, and to consult its safety as the supreme law’.⁴⁵

THE SANDERSON LAW LECTURES IN CONTEXT

Modern scholars focus on Sanderson’s theology, not his jurisprudence. He is placed within the development in the late sixteenth and seventeenth centuries of Anglican moral theology in works styled ‘cases of conscience’, or ‘practical divinity’, designed for the use of clergy.⁴⁶ A recent study sums up. Sanderson was ‘undoubtedly the greatest of the English Reformed moral theologians of this period’.⁴⁷ But Sanderson was also an astute jurist. His lectures, as we have seen, rely heavily on for example Scripture, Aristotle, and Aquinas, sometimes on writers from Bracton to Calvin, and Roman civil law. However, he had ‘little concern’ with ‘canon and pontifical law’,⁴⁸ though, as seen, he uses such canonists as Gratian and Martin de Azpilcueta as well as many canonical *regulae iuris*. In this respect, and in his concept of the cosmic legal order and the place of human law within it, Sanderson is reminiscent of Hooker.

Though not mentioned in his law lectures, another influence on Sanderson was Richard Zouche, regius professor of civil law at Oxford 1620-61. When Parliament in 1647 required university members to submit to the Solemn League and Covenant and Negative Oath, Sanderson and Zouche were among twenty university delegates to draw up a manifesto explaining why they could not submit. According to Walton, the delegates charged ‘Dr. Zouch to draw up the Law part [and] Dr. Sanderson...to methodise and add what referred to reason and conscience’. Walton also relates how fourteen or so years later, when Sanderson was bishop of Lincoln, a minister in the diocese, who visited him often, asked Sanderson ‘what books he studied most’. Sanderson replied: ‘he declined reading many; but what he did read were well chosen, and read so often, that he became very familiar with them’, namely Aristotle’s *Rhetoric*, Aquinas’ *Secunda Secundae*, and Tully, as well as ‘the learned Civilian

⁴⁴ Lecture X.16 (283-285): the notes cite Arist. Ethic. v. 14 and Arist. Pol. iii. 11. 19 and 15. 4.

⁴⁵ Lecture X.17-23 (285-293) 1 Sam. 8 is cited; and he also relies on Cicero, *De Legibus* (notes, iii. 8).

⁴⁶ K. Thomas, ‘Cases of Conscience in Seventeenth-Century England’, in J. Morrill, P. Slack, and D. Woolf, eds., *Public Duty and Private Conscience in Seventeenth-Century England, Essays Presented to G.E. Aylmer* (Oxford: Clarendon Press, 1993) 29-56; for Sanderson, see 37.

⁴⁷ P.H. Sedgwick, *The Origins of Anglican Moral Theology* (Leiden: Brill, 2019) 190.

⁴⁸ Lecture VIII.10 (236).

Doctor Zouch who died lately [and his] *Elementa Jurisprudentiae*', which he 'could also say without book; and that no wise man could read it too often, or love or commend too much'.⁴⁹

It would be good to think that this personal nexus with Zouche lay behind Sanderson's recognition that ethical discourse necessitated knowledge of the law. In a letter of 1678 to Walton from Barlow, Bishop of Lincoln, Sanderson is recorded as stating that of 'advantage to a casuist, was a convenient knowledge of the nature and obligation of laws in general'; and without it, one 'never can be a good casuist, or rationally assure himself or others, of the lawfulness/unlawfulness of actions'.⁵⁰ With this in mind, it is worth briefly comparing Sanderson, as to the duty to obey human law in general and ecclesiastical law in particular, with three famous contemporaries, viz: Jeremy Taylor, Matthew Hale, and Thomas Hobbes.

Scholars explain how Jeremy Taylor (1613-67), who is far better known, in his great *Ductor Dubitantium* (1660) derived his casuistic theology from Sanderson.⁵¹ However, they neglect how Taylor builds on Sanderson by applying more fully to church law ideas of conscience, authority, and obedience. First, the Church has a 'merely spiritual' but 'direct power' and 'divine authority', 'left by Christ', 'to make laws and to give commands obliging the conscience, that is, tying the subjects to obedience under the penalty of committing sin, or of incurring the divine displeasure'. Such laws are made 'in all things of necessary duty' as 'apt ministers and advantages of necessary duty'. Second, if 'the canons or rules of ecclesiastical rulers are confirmed by the supreme civil power they oblige the conscience by a double obligation'; and 'princes are by the ties of religion, not of power, obliged to keep the laws of the Church'. Third: 'canons of the apostles which are of order and external government do oblige the conscience by being accepted in several churches, not by their first establishment'. Fourth: 'canons of the ancient general and provincial councils are then laws to the conscience when they are bound upon us by the authority of the...governors of churches'. Fifth: 'The laudable customs of the Catholic Church which are in present observation do oblige the conscience of all Christians', but the 'decrees and canons of the bishop of Rome oblige the consciences of none but his own subjects'. Sixth, with regard to 'ecclesiastical laws', these: 'cannot be universal and perpetual'; and in 'external observances do not bind the conscience beyond the cases of contempt and scandal'. Rather: 'Ecclesiastical laws must be charitable and easy, and when they are not, they oblige not'; and they 'must ever promote the service of God and the good of souls; but must never put a snare or stumbling block to consciences'.⁵²

There are also similarities between Sanderson and Matthew Hale (1609-76), the great common lawyer, a Puritan who took the Commonwealth oath but remained loyal to the Church of England and in 1660 became Chief Baron of the Exchequer and later Chief Justice of King's Bench.⁵³ For example, for Hale too the duty to obey just law is based on 'the law of God' and conscience; in things indifferent the 'supreme power' is unlimited but ought not impose laws that offend a subject's conscience; and law is 'a rule of moral actions, given to a being endued with understanding and will, by him that has power and authority to give the

⁴⁹ Walton, op cit., 19, 44; see also 38: he also read genealogy and heraldry. On Zouche, see R.H. Helmholz, *The Profession of Ecclesiastical Lawyers: An Historical Introduction* (Cambridge: Cambridge University Press, 2019) 157-161: he retained his chair - his *Elementa* (on civil and canon law) was first published in 1629.

⁵⁰ Walton, op cit., 55.

⁵¹ Wordsworth, op cit., v; Thomas, op cit, p. 42; Sedgwick, op cit., 302, 335, 339-345.

⁵² *Ductor Dubitantium*, Bk. III, Ch. 4, 'Of the Powers of the Church', 'Rules' 1 to 20; set out in R. Askew, 'Jeremy Taylor's merely spiritual power: an examination of canon law in *Ductor Dubitantium* 1660', 3 *Ecclesiastical Law Journal* (1994) 156-165 at 164-165.

⁵³ D.S. Sytsma, 'Matthew Hale as Theologian and Natural Law Theorist', in M. Hill and R.H. Helmholz, eds., *Great Christian Jurists in English History* (Cambridge: Cambridge University Press, 2017) 163-185.

same and exact obedience', that is, 'commanding or forbidding such actions under some penalty...contained in such law'; and authority is derived from God and 'the commonalty'.⁵⁴

However, unlike Sanderson in his law lectures, Hale applies the principle of reception to the field of ecclesiastical law. For example, in relation to Roman canon law before and after the Reformation: 'All the strength that...the papal...laws have obtained in this kingdom is only because they have been perceived and admitted either by the consent of parliament, and so are part of the statute laws; or else by immemorial usage and custom in some particular cases and courts, and not otherwise'. Therefore, 'so far as such laws are received and allowed of here so far they obtain and no further; and the authority and force they have here is not founded on or derived from themselves [but] on their being admitted and received by us, which alone gives them their authoritative essence and qualifies their obligation'.⁵⁵ This echoes Taylor – but Hale makes no mention here of conscience alongside reception.⁵⁶

Finally, while for Sanderson the duty to obey laws rests on conscience, for Thomas Hobbes (1588-1679), it is will of the civil sovereign that obliges subjects to obey any law - and peace depends on a civil power absolute in its authority over both state and church.⁵⁷ For Hobbes, 'law in general, is not counsel, but command; not a command of any man to any man; but only of him, whose command is addressed to one formerly obliged to obey him' – 'the civil sovereign', 'assembly or monarch', 'legislator in all commonwealths'. For instance: 'When long use obtains the authority of a law, it is not length of time that makes the authority, but the will of the sovereign signified by his silence'; 'the laws of nature...are not properly laws, but qualities that dispose men to peace, and to obedience'; and to declare what is equity, justice, and moral virtue, 'and to make them binding, there is need of the ordinances of sovereign power'. Moreover: 'every subject...has covenanted to obey the civil law'.⁵⁸ But: 'there ought to be no power over the consciences of men, but of the Word [of God] itself'.⁵⁹

These ideas have implications for church law; and Hobbes and Sanderson differ in part here. For Hobbes, a 'canon signifies a rule; and a rule is a precept, by which a man is guided, and directed in any action', like that of 'a teacher to his disciple', 'without power to compel him to observe' it. But if 'given by one, whom he that receives them is bound to obey, then are those canons, not only rules, but laws'. Also, with their 'doctrine' and 'good and safe advice' for sinners, 'the Scriptures were never made laws, but by the sovereign civil power'. In turn, the early church itself had 'no government by coercion, but only by doctrine, and persuading' with 'no authority to compel' until 'the commonwealth had embraced the Christian faith'.⁶⁰

Hobbes then sets out various possible ecclesial polities of 'Christian sovereigns'. They may: (1) 'make such laws, as themselves shall judge fittest, for the government of their subjects, both as they are the commonwealth, and as they are the church'; or (2) 'commit the government of their subjects in matters of religion to the Pope' who exercises it '*jure civili*, in the right of the civil sovereign; not *jure divino*, in God's right' – but there is nothing in Scripture, 'to prove the decrees of the Pope, where he has not also the civil sovereignty, to be

⁵⁴ A. Cromartie, *Sir Matthew Hale 1609-1676: Law, Religion and Natural Philosophy* (Cambridge: Cambridge University Press, 1995) 46, 49, 90, 92, 180-181.

⁵⁵ Hale, *The History of the Common Law of England* (first printed 1713) 27.

⁵⁶ Hale's view of the reception of papal canon law was also adopted, of course, by ecclesiastical lawyers; see e.g. J Godolphin, *Repertorium canonicum, or An abridgment of the ecclesiastical laws* (London, 1678) 131.

⁵⁷ R. Tuck, *Hobbes* (Oxford: oxford University Press, 1989) 85: *De Cive* XVIII.28.

⁵⁸ *Leviathan*, ed. by C.B. MacPherson (London: Penguin Books, 1968, reprint 1986) Ch. 26 (pp. 311-335).

⁵⁹ *Leviathan*, Ch. 47 (p. 711).

⁶⁰ *Leviathan*, Ch. 42 (pp. 524, 545-549, 550, 551, 554, 557, 558, 560, 566).

laws’;⁶¹ or (3) commit ‘the care of religion to one supreme pastor’, or ‘an assembly of pastors’, and ‘give them what power over the church, or over one another, they think most convenient’. These rights belong ‘to all sovereigns...monarchs or assemblies: for they are the representants of a Christian people [and] church: for a church and a commonwealth of Christian people, are the same’.⁶² But ultimately: ‘All lawful power is of God, immediately in the [civil] supreme governor, and mediately in those that have authority under him’; and this includes ‘the power ecclesiastical of the sovereign’.⁶³ As a result, Hobbes sees ‘Ecclesiastical Law as part of Civil Law...proceeding from the power of ecclesiastical government, given by our Saviour to all Christian sovereigns, as his immediate vicars’.⁶⁴

Conclusion

Robert Sanderson the Church of England cleric and moral theologian was at the same time an outstanding jurist. The lectures he delivered at Oxford in a tumultuous political climate are a superb exposition of human law, of its relation to divine and natural law, of its material, efficient, formal, and final causes, and of the role of conscience in the duty to obey it. In all this, though Calvinist in doctrine, his jurisprudence is heavily reliant on Aristotle and Aquinas; and he so much admired the work of his friend and colleague, civil lawyer Richard Zouche. It is also fitting to compare Sanderson with his contemporaries: Jeremy Taylor was influenced by and built on Sanderson by applying fully the idea, of a duty in conscience to obey law, to the field of church law. Matthew Hale echoes Sanderson in resting this duty upon reception and popular consent. Thomas Hobbes differs from Sanderson in basing the duty on the power of the civil sovereign whose will, alone, is law. Like Taylor, Hale, and Hobbes, Sanderson is equally relevant today as to what makes good law in both church and state. We end with Walton writing a little after Sanderson died: ‘this excellent man did not think his duty discharged by only reading the Church prayers, catechising, preaching, and administering the Sacraments seasonably; but thought if the Law or the Canons may seem to enjoin no more, yet that God would require more, than the defective laws of man’s making can or do enjoin; the performance of that inward law, which Almighty God hath imprinted in the conscience of all good Christians, and inclines those whom he loves to perform’.⁶⁵

⁶¹ *Leviathan*, Ch. 42 (pp. 592, 594): he criticises Bellarmine’s argument that ‘the pope has power to make laws’.

⁶² *Leviathan*, Ch. 42 (pp. 573, 575, 576). Here of course Hobbes echoes Hooker.

⁶³ *Leviathan*, Ch. 42 (p. 594) and Conclusion (p. 725).

⁶⁴ *The Elements of Law* (1650) II.10.7-8. See also e.g. P. Springborg, ‘Leviathan and the problem of ecclesiastical authority’, 3 *Political Theory* (1975) 289-303; and L. Ribarevic, ‘*Leviathan* and medieval *universitas*: Hobbes’s debt to canon law’, 38 *History of Political Theory* (2017) 92-109.

⁶⁵ Walton, op cit., 12-13: ‘He...did therefore become a law to himself, practising what his conscience told him was his duty, in reconciling differences, and preventing law-suits, both in his Parish and in the neighbourhood’.