
**LAW AND FEDERAL-REPUBLICANISM:
SAMUEL RUTHERFORD'S QUEST FOR A
CONSTITUTIONAL MODEL**

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SHAUN ALBERTO DE FREITAS

PROMOTER: PROF AWG RAATH

Professor of Law, University of the Free State

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For you, Mom

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PROLOGUE

“Those who ruled in Christendom and those who thought and argued about government believed that the Gospel was true. They intended their institutions to reflect Christ’s coming reign. We can criticise their understanding of the Gospel; we can criticise their application of it; but we can no more be uninterested in their witness than an astronomer can be uninterested in what people see through telescopes.”¹

1. Background

Accompanying especially the German, Swiss, French, English and Scottish Reformations were challenges related to the limitation and regulation of political power, civic participation in public affairs as well as the attainment of the public interest. Absolute rule and the absence of the individual and the people as a collective in public and political activity required urgent attention. This necessitated constitutional, political and legal theory, which, needless to state, was inextricably connected to a Christian cosmology and epistemology. In this regard, the whole of Scripture acted as a sort of constitution in which the superiority of the Divine law was entrenched. This was a time when (unlike contemporary Western liberal and plural societies) theology, politics and the law were inextricably connected, where some theologians became political theorists, some jurists became theologians, and where the public sphere and religion were substantially inter-related. From these challenges arose an idea of republicanism that had its roots in a European history of scholarship spanning centuries and including Hebrew, Classical Greek and Roman, Patristic, Medieval, Canonist and early Renaissance thinking. This idea of republicanism continues to serve as an enduring value to contemporary constitutional theory.

The republican quest towards a much-needed rearrangement of the guardians and executors of political power as well as a more inclusive role to be played by the individual and the collective was accompanied by a view on the law as something beyond merely positivist law enforced by the governing authorities. The law had a Divine meta-legal foundational and encompassing meaning, which is no different from any other specific legal system during any period, in the sense of it being based

¹ David Field, “‘Put not your Trust in Princes’. Samuel Rutherford, the four causes and the limitation of civil government”, 83-151, in *Tales of Two Cities. Christianity and Politics*, Stephen Clark (ed.), (Leicester, England: Inter-Varsity Press, 2005), 83.

on some or other meta-legal ideological foundation. The only difference, as stated before, being Europe in the sixteenth and seventeenth centuries, the interrelationship between the law and theology was a given. Constitutional law was in essence of Divine origin. The encompassing framework within which a constitutional model was to be sought was to be understood in the context that necessitated an understanding of the law transcending that which mere codifications and legal precedent were able to provide. The presuppositionalist Godly nature of the temporal world (and therefore of constitutionalism and of the law) was clear and accepted and Reformers continued in the legacy of what Harold Berman explains, “The Hebrew culture would not tolerate Greek philosophy or Roman law; the Greek culture would not tolerate Roman law or Hebrew theology; the Roman culture would not tolerate Hebrew theology ... Yet the West in the late eleventh and early twelfth century combined all three, and thereby transformed each one.”² Views on the normative dimension of the ordering of society (which includes constitutionalism) were not separated from the leverage provided for by this integration of the various schools of thought. This came to substantial fruition in the sixteenth- and seventeenth-century political and legal theories stemming from the German, Swiss, English, Scottish and French Reformations.

Seventeenth-century England “was the dramatic center and remains the scholarly center of the seventeenth-century political transformations characteristic of the modern age, where central issues such as the divine right of the ruler; sovereignty, constitutionalism, religious toleration, populism, natural law and reason of state, were vigorously addressed.”³ At the time, Scotland also played an erudite role in this regard. The seventeenth-century Scottish theologian and Puritan⁴ Samuel Rutherford

² Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, (Cambridge Massachusetts: Harvard University Press, 1983), 3.

³ Lee C. McDonald, *Western Political Theory*, (New York and Burlingame: Harcourt, Brace & World, Inc., 1962), 70-71.

⁴ The term *Puritan* has many different definitions and interpretations. A summary of some of the main views on the term is given in Joel R. Beeke, *The Quest for Full Assurance*, (Grand Rapids, Michigan: Banner of Truth Trust, 1998), 82. The term is used here in the sense of Perry Miller’s description of the “marrow of Puritan divinity” as a theology based on the idea of the covenant, *Errand into the Wilderness* (Cambridge: Belknap Press, 1956), 82-83. The Puritan theorists worked out a substantial addition to the theology of Calvinism, which in New England was quite as important as the original doctrine. Embedded in the term ‘Covenant Theology’ or the ‘Federal Theology’, the Puritans held that after the fall of man, God voluntarily condescended to treat with man as with an *equal* and to draw up a *covenant* or *contract* with His creature in which He laid down the *terms* and *conditions* of salvation, and pledged himself to abide by them – “The covenant did not alter the fact that those only are saved upon whom God sheds His grace, but it made very clear and reasonable how and why certain men are selected, and prescribed the conditions under which they might reach a fair assurance of their own standing”, Perry Miller and Thomas H. Johnson, “Introduction”, 1-79, in *The Puritans. A sourcebook*

(1600-1661) contributed towards the furtherance of insights related to the quest towards a constitutional paradigm under the guidance of a specific theocentric understanding of the law (which is also of enduring value to all societies in any age). The law primarily emanated from God and formed part of the character of God. The law also had a substantial natural dimension of and formed part of the instrumental use of the idea of the Covenant towards the fulfilment of the Divine plan for Creation, which included the glorification of God and salvation. The law as found in Scripture (and aligned to the natural law) was to be applied by the civil authorities, and was viewed as moral, including civil and religious responsibilities. Rutherford played a prominent role in this, having also been immersed in the theological, constitutional, political and legal arguments at the time. Robert Baillie, in a letter to William Sprang, minister at Campvere (dated 29 January 1637) states:

Always I take the man [Rutherford] to be among the most learned and best ingynes of our nation. I think he were verie able for some profession in your colledges of Utrecht, Groningen, or Rotterdam; for our King's dominions, there is no appearance he will ever gett living into them. If you could quietly procure him a calling, I think it were a good service to God to relieve one of his troubled ministers; a good to the place he came to, for he is both godlie and learned; yea, I think by time he might be ane ornament to our nation.⁵

Rutherford had an influence on the political and legal issues represented by the Westminster Standards and postulated a foundational and encompassing understanding of the constitutional normative context within which society had to act, even though he humbly remarked that “many before me hath learnedly trodden in this path, but that I might add a new *testimony* to the times”.⁶ Rutherford also played a

of their writings, (An unabridged reprint of the work, originally published by Harper and Row, Publishers, Inc. in a two-volume Harper Torchbook edition, in 1963, Perry Miller and Thomas H. Johnson (eds.), (Mineola, New York: Dover Publications, Inc., 2001). Also see Erroll Hulse, *Who are the Puritans? ... and what do they teach?*, (Evangelical Press: Great Britain, 2000), 192. This ‘federal theology’ was inextricably connected to the tradition of theologico-political federalism, which was revived by the sixteenth-century Swiss Reformer, Heinrich Bullinger. In this regard, the emphasis was placed on the presence and importance of a bilateral and conditional relationship between God and man. This is elaborated upon later.

⁵ Robert Baillie’s ‘Letters and Journals’, Vol. I, p. 9, in Andrew Bonar, *Letters of Samuel Rutherford* (with a sketch of his life and biographical notices of his correspondents), (Portage Publications, 2006), 317.

⁶ Samuel Rutherford, “Preface”, to *Lex, Rex. (or The Law and the Prince)*, (London, 1644), (Harrisonburg, Virginia: Sprinkle Publications, 1982), xxi (Author’s emphasis). This insight by Rutherford will be further enhanced by unveiling the intimate connection there is between Rutherford’s political and legal thought and that of Greek, Roman, Patristic, Medieval and early Renaissance political and legal thought.

major role in furthering the republican legacy, which stretched far back in European political, legal and theological history, and contributed to the furtherance of constitutional thought. This legacy had many roots and was structured around the republican principles of the idea of the covenant, the prominence of the law beyond that of mere positivism, the emphasis on the people as role players in political affairs, the division of powers in ruling bodies, and resistance to political oppression. Here contributors such as Plato, Aristotle, Cicero, Irenaeus, Augustine, Justinian, Ulpian, Gratian, Plutarch, Aquinas, Azo, Marsilius, Bartolus of Sassoferrato, Baldus de Ubaldis and De Molina come to the fore.

According to Rutherford, “arbitrary government had over-swelled all banks of law”.⁷ Note here what the main concerns were, namely the ‘abuse of power’ and ‘false religion’.⁸ The appearance of Bishop John Maxwell’s *Sacro-Sancta Regum Majestas* (The Sacred and Royal Prerogative of Christian Kings) reflected these worrying concerns, serving as a catalyst towards the formulation of *Lex, Rex*.⁹ Robert Gilmour comments that, “[a]mazed at the progress of arbitrary government in Britain, its sea over-swelling all banks of law, and approaching the farthest bounds of absolutism, he [Rutherford] hastens to add a fresh testimony to what he knows has already been so well said on behalf of the glorius cause of freedom.”¹⁰ Rutherford had apparently

⁷ Rutherford, “Preface”, to *Lex, Rex*, xxi.

⁸ In the “Preface” by Rutherford in *Lex, Rex*, the word “truth” is rather prominent, indicating Rutherford’s concern regarding the maintenance and protection of religious truth in the community. This is discussed in more detail in Chapter 4. Rutherford, for example, states “... Truth to Christ cannot be treason to Caesar ...”, Rutherford, “Preface”, *Lex, Rex*, xxi; “The lie is more active upon the Spirits of men, not because of its own weakness, but because men are more passive in receiving impressions of error than truth ...”, *ibid.*, xxi; and, “Lord establish peace and truth”, *ibid.*, xxiv.

⁹ King Charles I yielded himself entirely to the counsels of Laud. A Book of Canons, and a Liturgy, were framed by the Scottish bishops, chiefly by Maxwell, bishop of Ross, revived by Laud, and sent to Scotland to be at once adopted and used, William Hetherington, *History of the Westminster Assembly of Divines*, (Edmonton, AB Canada: Still Waters Revival Books, Reprint edition 1991, from the third edition 1856), 103-104. Also see *ibid.*, 75-76, and 82. In 1633, Charles I, “appointed William Laud as Archbishop of Canterbury, who began purging English pulpits of Calvinist sympathizers and packing them with conservative clerics who were loyal to the Crown and to the textbooks of established Anglicanism – the Book of Common Prayer, the Thirty-Nine Articles of the Faith, and the Authorized or King James Version of the Bible. Charles and Laud strengthened considerably the power and prerogatives of the Anglican bishops and the ecclesiastical courts. They also tried to impose Anglican bishops and establishment laws on Scotland, triggering an expensive and ultimately futile war with the Scottish Presbyterians. English dissenters who criticized these religious policies were pilloried, whipped, and imprisoned, and a few had their ears cut off and were tortured”, John Witte Jr, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, (Cambridge: Cambridge University Press, 2007), 210. For more of Laud’s tyrannous acts see Paul J. Smith, *The Debates on Church Government at the Westminster Assembly of Divines (1643-1646)*, (Submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy, 1975), 59.

¹⁰ Robert Gilmour, *Samuel Rutherford. A Study. Biographical and somewhat Critical, in the History of the Scottish Covenant*, (Edinburgh and London: Oliphant Anderson & Ferrier, 1904), 180.

been working on a book dealing with general principles of government before coming to England, even before Maxwell's work was published. In the words of John Marshall:

Internal evidence suggests that Questions 28-37 [of *Lex, Rex*], on the lawfulness of defensive wars and the question of resistance to Charles, were written independently. They contain only two references to Maxwell; opponents are lumped together generally as 'Royalists'. Elsewhere Maxwell is named directly or branded the 'Popish Prelate.' On the advice of Robert Blair, Rutherford agreed to put the work aside for a few years; as a minister and theologian, political theory lay outside his 'road.' ... The appearance of *Sacro-sancta* changed everything ... More likely it was the tone as well as superficiality of argument ... that provoked Rutherford into responding. *Lex, Rex* was completed within a few months.¹¹

At least two contexts need to be taken into account when considering any sophisticated work of political and legal theory, namely the actual world of experience the author tries to explain, and the inherited world of ideas that assisted to shape his or her attitudes to that experience. These two contexts should not be regarded as rival methodologies; rather, they are complementary.¹² The early Reformation unveiled the constitutional, political and jurisprudential contributions as reflected primarily in Scripture and then in the law of nature (as supported by earlier Pagan contributions, for example, that of Aristotle and Cicero and other Stoic postulations) and, although not providing an altogether new political scheme, contributed to a systematic and concise compilation of constitutionally relevant ideas.

As stated earlier, republican insights from ancient Hebrew, Classical Greece and Rome, the Patristic Age, the medieval period and early Renaissance thinking also proved to be helpful to the Reformers. During the German, Swiss, French, Scottish and English Reformations (and in the early generations of the Founding Fathers of America) Protestant theorists approached Scripture with renewed eyes, also rediscovering its political and jurisprudential implications. Here names such as Heinrich Bullinger, John Knox, John Calvin, Theodore Beza, Peter Martyr Vermigli,

¹¹ John L. Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, (A thesis submitted to the Faculty of Westminster Theological Seminary in partial fulfilment of the requirements for the degree Doctor of Philosophy, 1995), 11-12.

¹² Brian Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, (Cambridge: Cambridge University Press, 1982), 81.

Johannes Althusius and Lambert Daneau come to mind. Although many contributions were produced in this regard, only a few systematic and concise contributions exist. Of those, Althusius' *Politics* (first edition, 1603 and second edition, 1614)¹³ and Rutherford's *Lex, Rex* (1644) not only form a substantial part of, but also represent the two most comprehensive political and legal works of the theologico-political federalist tradition stemming from the sixteenth and seventeenth centuries.¹⁴ Theologico-political federalism emphasised the idea of the covenant both in a theological and political sense where, beyond the covenant between the ruler and God, the people as a collective also had to be understood as being in covenant with God as well as with the ruler.¹⁵

¹³ In fact, Althusius, in his preface to the first edition of his *Politica* states: "I have also noted some things that are missing in the political scientists. For they have omitted certain necessary matters that I think were carelessly overlooked by them; or else they considered these matters to belong to another science. I miss in these writers an appropriate method and order", Johannes Althusius, "Preface to the First Edition" (1603), 1-7 in Frederick S. Carney, *The Politics of Johannes Althusius*, An abridged translation of the Third Edition of *Politica Methodice Digesta, Atque Exemplis Sacris et Profanes Illustrata*, (The digest on political method and illustrating examples of the sacred and the secular), including the prefaces of the first and second editions and with a preface by C. J. Friedrich, London, Eyre and Spottiswoode, 1964, 2.

¹⁴ Friedrich states: "Among the writings of this turbulent period of English history, the anonymous book by Samuel Rutherford, entitled *Lex, Rex: The Law and the Prince; A Dispute for the Just Prerogative of Kings and People* (1644), comes perhaps closest to the Althusian position", Omri K. Webb, *The Political Thought of Samuel Rutherford*, (A dissertation submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the Department of Religion in the Graduate School of Arts and Sciences, Duke University, 1963), xii. The correlation between Althusius' and Rutherford's political and legal theory overlap substantially. In this regard, see Shaun A. de Freitas, *Samuel Rutherford and the Law. The impact of theologico-political federalism on constitutional theory*, (Unpublished LL.M thesis, University of the Free State, 2003), in confirmation of this. *Lex, Rex* also was very similar to George Buchanan's and Philippe DuPlessis-Mornay's political thinking. In this regard also see Edward J. Cowan, "The political ideas of a covenanting leader: Archibald Campbell, marquis of Argyll 1607-1661", 241-261, in *Scots and Britons. Scottish political thought and the union of 1603*, Roger A. Mason (ed.), (Cambridge: Cambridge University Press, 1994), 259; and John D. Ford, "*Lex, rex iusto posita*. Samuel Rutherford on the origins of government", 262-290, in *Scots and Britons. Scottish political thought and the union of 1603*, Roger A. Mason (ed.), (Cambridge: Cambridge University Press, 1994), 283. In fact, DuPlessis-Mornay's *Vindiciae* (there is speculation as to whether he was the true author) was, according to Harold Laski, mainly a brilliant summary of ideas already adumbrated by members of DuPlessis-Mornay's party, Harold J. Laski, "Introduction", 1-59, in Junius Brutus, *A Defence of Liberty Against Tyrants* (A translation of the *Vindiciae Contra Tyrannos* by Junius Brutus) (London: G. Bell and Sons, Ltd., 1924), 34. What is also of interest is the corrolation that there exists between Theodore Beza's *The Right of Magistrates* and the *Vindiciae*, see David W. Hall, *The Genevan Reformation and the American Founding*, (Lanham, Maryland: Lexington Books, 2003), 196.

¹⁵ For more on this see De Freitas, *Samuel Rutherford on Law and Covenant: The Impact of Theologico-political Federalism on Constitutional Theory*. It is reiterated that although *Lex, Rex* is a formidable polemical work on constitutional, political and legal thought, its value increases once one accepts the contributions of Rutherford's other works. *Lex, Rex* (as any of the other concise works of Rutherford) should not be viewed in isolation. Accepting the inextricable relationship between *Lex, Rex* and the rest of Rutherford's major works provides an appreciation of his intellect and biblical knowledge far exceeding any appreciation of any one of his works. Rutherford's thinking on constitutionalism and his take on the law cannot properly be understood by only focusing on *Lex, Rex*.

Especially during the latter half of sixteenth-century Europe, much emphasis on covenantal theology and politics arose. In Scotland, England and the Netherlands (and in other Protestant regions), covenant theology affirmed the link between the church and the state, for breaking the covenant meant breaking the binding with God.¹⁶ In addition, in Europe especially during the first half of the seventeenth century, the most predominant religious thought was that of the ‘religio-political covenant’.¹⁷ By the seventeenth century, reformed churches across Europe found themselves in what Graeme Murdoch refers to as ‘Hebraic patriotism’. This patriotism applied the imagery of Old Testament Israel to their congregations. Initially the understanding was held that all reformed communities were the ‘new Israel’, emphasised by ‘Exodus imagery’, which used to help those reformed refugees across Europe deal with the persecution.¹⁸

As disagreement arose amongst Reformers, the question of exactly which church was the most covenanted began to emerge. ‘New Israels’ were cropping up across reformed communities in Europe, with groups from Transylvania to the Netherlands seeing themselves as chosen people. Scotland formulated its own idea of an elect nation with the central focus on church and state.¹⁹ Far from being ‘backwards and fanatical’, the National Covenant of 1638 was a renewal of the ‘King’s Confession’ of 1581 and reaffirmed the commitment of the people to God and covenant.²⁰ This covenantal paradigm, which was so inextricably connected to Presbyterianism during the Scottish and English Reformations, was confronted with the many challenges facing Presbyterianism at the time, namely “[t]o purge the church of prelatical abuse, stop Laudian innovations in worship and canon law, unite the national churches of England and Scotland along Presbyterian lines, and prevent the spread of heresy and

¹⁶ Kathleen Halecki, *Scottish Ministers, Covenant Theology, and the Idea of the Nation, 1560-1638* (Submitted in partial fulfilment of the requirements for the Doctor of Philosophy in Interdisciplinary Studies with a Concentration in Arts & Sciences and a Specialisation in Early Modern Scottish History at the Union Institute & University Cincinnati, Ohio February 2012), 36.

¹⁷ Halecki, *Scottish Ministers, Covenant Theology, and the Idea of the Nation, 1560-1638*, 160.

¹⁸ Halecki, *Scottish Ministers, Covenant Theology, and the Idea of the Nation, 1560-1638*, 51.

¹⁹ Halecki, *Scottish Ministers, Covenant Theology, and the Idea of the Nation, 1560-1638*, 51-52. Also see *ibid.*, 55.

²⁰ Halecki, *Scottish Ministers, Covenant Theology, and the Idea of the Nation, 1560-1638*, 96. Also see *ibid.*, 1, 6 and 17.

profanity.”²¹ These challenges resulted in religious Presbyterians having had to become political,²² and Rutherford was one of them. According to Julie Fann,

Presbyterians tried to reconcile twin impulses, which the gospel writer explores in Chapter 18 of Matthew: God’s desire to restore the erring to the path of righteousness while preventing the righteous from straying. The Presbyterian *via media* concentrated on joining but not combining, confusing, or choosing between dualities: invisible and visible, saint and sinner, self and other, doctrine and discipline, spiritual and temporal, before and after, part and whole, division and unity, internal and external, and clemency and correction.²³

Rutherford’s understanding of the law was that it was something that played an important role within these twin impulses and dualities. Examples of these are the visible institution of ruling in accordance with the law and the invisible functioning of God in His inculcation of the law into the minds of believers; the importance of the law in the context of the weakness of man whilst maintaining the saintly attributes of man and ruler as capable of exercising and applying the law; the law in the heart of man and as multiplied in the collectivity of believers; law as doctrine and instrument of discipline; law as temporal instrument working towards the spiritual; the internalisation of the law in the individual and the external application of the law as protection of this internal law; and the law as an instrument of unity in for example a religious sense, whilst accommodating to some degree a sense of religious division. The law also had an important role to play within God’s overall plan to “restore the erring to the path of righteousness and to prevent the righteous from straying.”

Theoretical exercises on constitutional, political and jurisprudential themes, such as the origins of government, separation of powers, the relationship between the law and political power, office of magistracy, church and state, tolerance, the idea of the Biblical covenant, political contractarianism, forms of government, liberty of conscience, the election of the ruler, the sovereignty of the people, the status and content of the law, resistance to tyranny, and natural duty (as part of natural right both

²¹ Julie Fann, *Stories of God and Gall: Presbyterian Polemic during the Conformity Wars of Mid-Seventeenth-Century England and Scotland*, (A dissertation submitted to the Faculty of the University of North Carolina at Chapel Hill in partial fulfilment of the requirements for the degree of Doctorate of Philosophy in the Department of English and Comparative Literature. Chapel Hill 2012), 26.

²² Fann, *Stories of God and Gall: Presbyterian Polemic during the Conformity Wars of Mid-Seventeenth-Century England and Scotland*, 26.

²³ Fann, *Stories of God and Gall: Presbyterian Polemic during the Conformity Wars of Mid-Seventeenth-Century England and Scotland*, 104.

individually and collectively) were, as touched upon earlier, not discovered and debated upon for the first time during the Reformation.²⁴ Even those prominent reformed theorists of the fifteenth century such as Theodore Beza relied heavily on earlier ideas. John Witte, for example, states, “Beza’s genius was to sew all these strands of argument together into a more coherent political theory.”²⁵ Beza’s *Rights of Rulers* was a kind of patchwork quilt, sewn together from slender strands of argument scattered over all manner of classical, patristic, scholastic and Protestant sources.²⁶ A similar understanding applies to Rutherford’s *Lex, Rex*. In Cecil Woolf’s observation of the thought of the prominent medieval jurist Bartolus of Sassoferrato (1314-1357) one finds Lord Acton commenting, “Ideas have a radiation and development of their own, in which men play the part of godfathers and godmothers more than that of legitimate parents.”²⁷ Similarly, John Marshall states:

... no one age is the exclusive source of those principles cherished most by western civilization, whether limited government, representative democracy, or religious toleration. One era may contribute a subtle nuance; another may produce a radical intellectual tidal wave that is easy to pinpoint and analyze because of its sheer prominence ... Yet all extreme movements are spawned from a chain of subtle nuances.²⁸

This is certainly true of Rutherford’s constitutional, political and legal thinking. Rutherford also relied on the ‘Scottish orientation’, Scottish history and constitution, Scottish laws, customs and confessions, and such Scottish authors such as Major and Buchanan. “These references to predecessors suggest Rutherford’s related concern; he

²⁴ David Hall observes that Rutherford was not the creator of the themes he articulated so forcefully – “rather, for the most part, he played music that had been composed years earlier by Beza, Ponet, and Buchanan. *Lex, Rex*, so massive and exhaustive, was nonetheless an elaboration of ideas first enunciated by Calvin and Knox; Hall, *The Genevan Reformation and the American Founding*, 259. Also see J. F. Maclear, “Samuel Rutherford: The Law and the King”, 65-87, in *Calvinism and the Political Order*, George L. Hunt (ed.), Philadelphia: The Westminster Press, 1965), 69. Without question, *Lex, Rex* repeats many standard Puritan political arguments. J. P. Burgess also refers to Quentin Skinner who indicated that many of these ideas pre-date the Puritans, J. P. Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, (Unpublished Ph.D. dissertation, University of Chicago, 1986), 43.

²⁵ Witte, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, 136.

²⁶ Witte, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, 135.

²⁷ This is an observation by Savigny cited in Cecil N. Sidney Woolf, *Bartolus of Sassoferrato. His position in the history of medieval political thought*, (Cambridge: Cambridge University Press, 1913), 389.

²⁸ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 3.

was making no radical or original departure, but writing within an established tradition. He saw this tradition as based partly on Scottish politics and history, partly on medieval constitutionalism, but most importantly on the heritage of the Reformed kirk.”²⁹ Other authors in Rutherford’s day said many of the same things, and even better.³⁰

As stated before, Rutherford acknowledged the fact that much of what he said had already been written about. Although addressing similar themes, many of the contributions by the early and later Reformers pertaining to political and legal theory differed in emphasis, and where, although on similar topics, each gave unique and informative biblical commentary also differing in the application of biblical authority, the natural law, the use of rational thought and references to previous theorists. Not only would there be differences in political views on similar topics or issues, but also similarities in biblical commentaries as qualification for certain foundational concepts. However, authors who seem to think the same on matters do have differing perspectives, emphasis and explanations. This also applies to Rutherford.

Rutherford’s contribution exceeds that of his originality pertaining to political and legal thought, and even this connotation of a lessened sense of originality on the part of Rutherford needs to be understood with the necessary circumspection and appreciation. The uniqueness of Rutherford can be confirmed in many ways, for example, his alignment of natural law ideas with that of Scripture; his use of a plethora of theological, political and legal scholarship; his rational, informative and coherent use of Scripture, natural law and logic to refute the questions directed to him; his clear and informative explanations pertaining to secondary causality which concerns an understanding of the Scriptural relationship between Divine Sovereignty and human agency (and the relevance of this for politics and the law); his systematic and informative thoughts on the risks of liberty of conscience and the protection of belief; his informative fusion of the four causes of Aristotle in *Lex, Rex* (also in a manner aligned with Scripture);³¹ his erudite commentary on Romans 13 as

²⁹ Maclear, “Samuel Rutherford: The Law and the King”, 68-69.

³⁰ Webb, *The Political Thought of Samuel Rutherford*, vi-vii. Webb also states that: “Practically every position taken by Rutherford on limiting the power of the king had been published by others before him”, *ibid.*, 176. Also see *ibid.*, vii.

³¹ See Field, “‘Put not your Trust in Princes’. Samuel Rutherford, the four causes and the limitation of civil government”, 83-151.

qualification for resistance against tyranny;³² his insights pertaining to the inter-relationship between theology, politics and the law in the context of the idea of the Covenant; and his encyclopaedic understanding of the law and its encompassing importance to temporal reality. Rutherford's status as the most prominent political and legal author stemming from the Scottish Reformation will be difficult to refute sensibly. According to Tierney,

Medieval intellectuals approached the problems of their society with ideas formed in the earlier, sophisticated civilizations of Greece and Rome. But they did not merely repeat those ideas, parrot-like. They blended the ancient ways of thought with their own Christian world-view; they used classical concepts to rethink the political experience of their own society; and in doing these things they created much of the substructure of later constitutional thought.³³

Long before the contributions by the Medieval Jurists, the Church Fathers had already assisted with the reconciliation of ancient Pagan thought with that of Christianity. Rutherford's constitutional, political and legal thought (as is especially evident in *Lex, Rex*), was radically intellectual in the context of Scriptural thought³⁴ and contributed towards more nuanced postulations to such thought as well. What post-Enlightenment political and legal scholars overlook many times is that there was a substantial integration of religion with political and legal theory for over a millennium preceding Rutherford's time. This makes *Lex, Rex* and so many other sources dating from this period very real,³⁵ which are to be understood as a logical extensions to political and legal scholarship from previous centuries.

A biblical view of human existence, including society, entails the belief that all societal entities are ultimately rooted in Jesus Christ. Nowhere else in temporal life can ultimate meaning and authority be located and, says John Vanderstelt, it is found

³² See Ryan McAnnally-Linz, "Resistance and Romans 13 in Samuel Rutherford's *Lex, Rex*", *Scottish Journal of Theology*, Vol. 66, 2(2013), 140-158.

³³ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 12. In fact, "it is hard to sustain" that Althusius really did make a major innovation in political theory by constructing his whole system through pure political reasoning, independently of the earlier juridical and theological authorities that he knew so well, see *ibid.*, 76-77.

³⁴ Also see Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 12.

³⁵ Unlike today when a source such as *Lex, Rex* will generally be irrelevant or make little or no sense in the eyes of a predominantly Western a-religious and liberal society.

only in the Lord as the Word through whom everything has been created.³⁶ This Rutherford held dear to, and discussed it logically as well as coherently in his political and jurisprudential works. Rutherford's constitutionalism can only be understood properly when realising that to Rutherford politics and the law were inextricably connected to the love for Christ. In the words of David Field:

With the various twists and turns of the arguments, what drove Rutherford's political theory was love for his King Jesus and jealousy for his glory, secured properly not only as sinners received forgiveness from him but also as rulers rendered homage and due submission to him. 'The golden reign and dominion of the Gospel, and the high glory of the never-enough-praised Prince of the kings of the earth' was Rutherford's great ambition.³⁷

To Rutherford (as for many of the Reformers), it was primarily the whole of Scripture that provided the foundational information on Christ and His purpose for Creation against the background of what is required for salvation. This provided Rutherford's understanding of the law with a Christo-centric take on the law. Furthermore, Presbyterians shared a concern with the tangible instruments of salvation.³⁸ Rutherford's political and legal theory needs to be understood against this background. The perception by some that Rutherford's theological thought stands in stark contrast to his political (and legal) views is inaccurate. This surfaces in particular when Rutherford's *Letters* are compared to *Lex, Rex*. This in large part is a consequence of the current popular views that religion should be confined to the private sphere. The love for Christ, as so clearly visible in Rutherford's *Letters*, is also

³⁶ John C. Vanderstelt, "Church in Society", in *Rediscovery of the Church II*, B. Zylstra & J. C. Vanderstelt (eds.), (Institute for Reformational Studies, Potchefstroom University for Christian Higher Education, 1996), 40. This is similar to Herman Dooyeweerd's understanding that: "As sunlight breaks into a marvelous diversity of rainbow hues, and as all these pure pastel paints find union in unbroken, shimmering white, so also all temporal reality aspects find their supra-temporal unity in Christ Jesus, in Whom God has given us all. All temporal aspects of created reality are in Christ Jesus, the true Root of creation, concentrated into the religious supra-temporal fulness of meaning. That is why, as Kuyper says, there is indeed no area of this life of which Christ does not say: Mine! There is no autonomous area of 'nature' existing independently of Christ, above which His kingdom, a supposed 'area of grace' looms as a second building level", Herman Dooyeweerd, *The Christian Idea of the State*, (Nutley, New Jersey: The Craig Press, 1978), 32. Dooyeweerd also states, "The creedal basis of the Christian state in its function as community of faith can only be the confession of God's sovereignty revealed in regime of Jesus Christ, the Governor of all governments on the earth. But this political creed entails for all of state-life the recognition of the truly Scriptural basis for political life. And the heart of it all remains the confession of God's sovereignty in Christ Jesus ...", *ibid.*, 46.

³⁷ Field, "'Put not your Trust in Princes'. Samuel Rutherford, the four causes and the limitation of civil government", 146.

³⁸ Julie Fann, *Stories of God and Gall: Presbyterian Polemic during the Conformity Wars of Mid-Seventeenth-Century England and Scotland*, 27.

visible in his *Lex, Rex* and *A Free Disputation against Pretended Liberty of Conscience*. In addition, those who may perceive Rutherford's *Letters* as signifying the love for Christ in the sense that this contrasts with Rutherford's admonishing messages in *Lex, Rex*, will have overlooked those letters of Rutherford, which send a harsh message for those who do not follow in Christ's ways.³⁹

Early seventeenth-century Scotland had its fair share of challenges regarding the attainment of liberty. This gave rise to thinkers such as Rutherford who formulated insights based on constitutional principles within the context of a Christian paradigm and largely formed part of many centuries of thought. Many of these insights continue to be of fundamental relevance to contemporary constitutional theories.

2. Aim of study

This thesis contributes to already existing informative scholarship on Rutherford's political and jurisprudential thinking by taking a more in-depth look at Rutherford's contribution towards a constitutional basis for the Christian Republic. In this regard, the role of ancient Hebrew, Greek, Roman, Patristic, Roman Law, Medieval, Scholastic, Canonist and early Renaissance thinking on Rutherford's views on republicanism, together with the role of law in this; his idea of the law as understood in a republican sense in support of the elevated role and status of the law and the covenant and the inextricable connection between the two; challenges facing Rutherford regarding late fifteenth- and early sixteenth-century enlightened reasoning; and understanding the task of the law pertaining to the ruler's role in the maintenance, protection and furtherance of religion against the background of freedom of conscience. This thesis primarily illustrates that Rutherford presented a

³⁹ John Marshall has an accurate brief comparative description of Rutherford's *Letters* on the one hand and his other major works in defence of the Scottish Covenant on the other hand namely, "He [Rutherford in defence of the Scottish Covenant] did so through a series of hefty books attacking every conceivable deviation from orthodoxy and from the strict Presbyterianism he believed it his duty to uphold. His style is scholastic, laden with syllogisms and appeals to the rules of logic. This is in sharp contrast to his devotional writings, especially his letters, which have a sweet, tender, even mystical quality, but still with a sharp bite that lets the reader know the author never forgets the issues of the day", Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 8. Also, Reformed political theorists from the sixteenth century, such as Beza and Mornay, reflected the same theological depth as Rutherford (irrespective of their political works). Beza and Mornay, in addition to their political tracts, also formulated devotional and pious reflections of note J. H. M. Salmon, *The French Religious Wars in English Political Thought*, (Oxford: Clarendon Press, 1959), 29.

constitutional model not only of relevance to society in his time, but also a constitutional model that is of enduring value to all societies irrespective of place and time. Rutherford's take on the law cannot be fully understood without looking at his constitutional thinking of which republicanism forms a central facet. The importance of the law emanates from Rutherford's republican thought, which assists in the furtherance of a constitutional model. The converse is also true, namely that Rutherford's constitutionalism cannot fully be understood without a proper understanding of his views on the law.

In all the major revolutions in Western history, transcendent standards have been invoked against the existing power structure.⁴⁰ In the words of Berman, "... the belief in the capacity of man to regenerate the world, and the necessity for him to do so in order to fulfil his ultimate destiny, provided a basis both for a conscious attack upon the existing order and for the conscious establishment of a new order. The sacred was used as a standard by which to measure the secular order."⁴¹ For Rutherford this naturally implies the quest towards a constitutional model. Similarly, for Rutherford, the sacred also had relevance to an understanding of the law in a meta-sense, and the law understood in this context had its own unique role to play towards the attainment of such a new order. Rutherford wrote at a time in which the law was understood by many as something that transcended politics, the view that at any given moment the law was distinct from the state, an understanding which eventually yielded to viewing the law as basically an instrument of the state, merely as a means of effectuating the will of those who exercised political authority.⁴² This was one of the challenges that confronted Rutherford. Berman also adds,

The realization of justice has been proclaimed as a messianic ideal of the law itself, originally associated (in the Papal Revolution) with the Last Judgment and the Kingdom of God, then (in the German Revolution) with the Christian conscience, later (in the English Revolution) with public spirit, fairness, and the traditions of the past, still later (in the French and American Revolutions) with public opinion, reason, and the rights of man, and most recently (in the Russian Revolution) with collectivism, planned economy, and social equality. It was the messianic ideal of justice, above all, that found expression

⁴⁰ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 28.

⁴¹ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 28.

⁴² Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 38.

in the great revolutions. The overthrow of the pre-existing *law as order* was justified as the re-establishment of a more fundamental *law as justice*.⁴³

To Rutherford the law also had a messianic ideal of justice. This messianic ideal of justice included the aspirations towards the overthrow of the pre-existing ‘law as order’ by a more fundamental ‘law as justice’. The law, understood in a foundational sense, was inextricably connected to God’s nature and His purpose with Creation where the idea of the biblical covenant played an important role. Normativity was part of, and formed a foundational part of theology, in the same sense that normativity forms a central part of any ideological perspective. This messianic ideal of justice as represented by early seventeenth-century Scotland and fervently and intelligibly expressed by the Scottish Divines who were present at, and active during the Westminster Assembly, represented an understanding of the law, which Rutherford so clearly and uniquely postulated in his political and legal thought. Ever since the twelfth century, the need for legal systems was not only a practical one, but also was a moral and intellectual one. Law was viewed as the essence of faith and understood as a way of fulfilling the mission of Western Christendom in beginning to achieve the kingdom of God on earth.⁴⁴

However, Rutherford also lived in a challenging time in which the tensions between the temporal and post-temporal, reason and religion, as well as positive and divine laws were coming into conflict with one another⁴⁵ by the ever-widening gap between them. These, in turn, exercised an influence on how the law and its various layers were understood. Rutherford’s idea of the law reflected a harmony between this world and the next, between reason and religion, and between positive and Divine law. During the Reformation (as well as in preceding centuries including the period of the Patristic Fathers and the Middle Ages) the law was not understood as existing separately from theology; the law also had a specific and unique meta-legal connotation (which competes with all other beliefs and meta-legal criteria for an understanding of the law as an idea). Scripture was understood also as a normatively supreme authority, something like that of a Constitution. Rutherford unveils the

⁴³ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 21-22.

⁴⁴ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 521.

⁴⁵ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 553.

normative side of Scripture not only by means of *Lex, Rex*, but also through many of his other works.

Long overdue acclamation directed towards insightful scholarship on the interplay between Rutherford's political, legal and theological thought is also exposed and assimilated in this study. It is especially John Marshall's, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, that tells us something true and unique in this regard and to date there is a lack of emphasis pertaining to Marshall's contribution. Marshall emphasises that law to Rutherford is fundamentally relational in character, binding the soul to God in a deeply personal way, unlike the impersonal approach where God is substituted for reason. This needs to be understood against the background of the covenant and the natural law, as well as how God's creation (hereby including politics and the law) acts as a means for the improvement of the human condition and for the conversion of the elect, as God wills. This again implies ideas on constitutionalism. According to Marshall, Rutherford is concerned with the social order in *Lex, Rex*. The social order is one sphere of nature governed by God's providential activity and where human agency is the pre-eminent means by which God accomplishes His ultimate designs in that sphere. This leads to Rutherford's ideas on secondary causation and his bridging of the gap between God's absolute sovereignty and man's free will and responsibility, which in turn elevates the importance of politics and the law. David Field's application of Aristotelian thought to *Lex, Rex*, together with the importance of Field's analysis for our understanding of Rutherford's view on the law, as well as his emphasis on Rutherford's Christocentric thought, which cannot be separated from Rutherford's political and legal thinking, also enjoys emphasis. The law in this regard had a theocentric dimension linked to especially the republican (and in turn constitutional) concepts of, amongst others, the idea of the covenant and the rule of law, against the background of the Divine purpose with Creation, which had a central soteriological aim. The inextricable connection between magistracy, the law and the cause for religion also becomes clear.

It is suggested that *Lex, Rex* carries more meaning to it than might be realised when placing the emphasis on constitutional thinking. To Rutherford the law was not confined only to the moral (the Decalogue) and judicial law (and ceremonial), but

also included those prescriptive norms understood to be the normative dimension guiding the form and matter of civil power. This emanated from God's normative and just attributes, which is aligned with His purpose with Creation. This is of fundamental relevance to constitutional thinking. Law and federal republicanism were prominent in the thought of Rutherford's works, with special emphasis on *Lex, Rex*, and should be understood as the most prolific work on constitutional, political and legal theory stemming from sixteenth- or seventeenth-century Scotland, which contributes towards a frame for a constitutional model. This is of relevance for a theologically coherent understanding of how the Christian Republic should be moulded, organised and operate. This thesis also presents the enduring value of Rutherford's political and legal thinking and his contribution towards the form and substance of a constitutional model.

The reward emanating from such research not only contributes to the thinking and understanding of those loyal to a specific religious outlook on life, but also, when stripped from its religious attire, presents insights that might be useful to other periods in time, just as the Reformers of the sixteenth and seventeenth centuries filtered the thoughts of pagan philosophers stemming from Ancient Greece and Rome. In this regard, one must distinguish between Rutherford's universalist and particularist contributions. This thesis not only describes and explains Rutherford's particularist understanding of the law against the background of Scripture but also brings universal prescriptions to the fore that are of continuous relevance to the effective regulation of societies.

Running like a golden thread through Rutherford's thinking on constitutionalism are republican insights reflective of popular, foundational and universal norms related to the law as primarily directed towards the ordering of society (in contrast to political power as primarily directed towards the ordering of society); political liberty and equality; the liberty and protection of the conscience (and its relevance to the protection of religious rights and freedoms); the individual's access to fundamental norms; universal and eternal moral norms; the mutual relationship between duty and rights; the importance of communitarianism (in contrast to liberalism); political responsibility and accountability; the frailty of man, which necessitates political and normative structures and consequent application; the moral duty of love to be adhered

to by the ruling authorities towards the community; resistance towards gross political oppression; and the moral duty of love to be exercised by the individual towards one's neighbour and the interests of the community.

3. Outline of study

In the context of a general overview, this thesis begins with an investigation of republicanism and how this comes to fruition in Rutherford's thinking. In this legacy, the law and the covenant stand central, leading towards an understanding of an active and representative citizenry and the division of power, as well as resistance to political oppression. Rutherford contributed towards an elucidation and furtherance of republicanism where the law received substantial emphasis. Secondly, the law gains in understanding when looking at it in the context of its inextricable connection to the idea of the covenant. Rutherford, being the last substantial theorist within the tradition of theologico-political federalism (which was unveiled by Heinrich Bullinger), also furthered the idea of the covenant in its mutual relationship with the law. In this regard, the law and its theocentric character become clear, and the law as part of the Divine purpose gains added meaning. Thirdly, Rutherford reminds the reader of the law as having, as part of republicanism and the idea of the covenant, a substantial religious function to it, requiring from the magistrate the protection, maintenance and furtherance of the true religion. Lastly, the meta-legal aspect of the law according to Rutherford is brought to the fore, followed by an explanation of the important contribution Rutherford made to constitutionalism (not only pertaining to the Christian Republic but also to any society during any period in time).

More specifically, Chapter 1 of this thesis provides a description of the context in which Rutherford wrote in order to provide a more accurate and sensitive understanding of the concerns confronting Rutherford during a challenging period in Western history filled with all kinds of new developments in the line of scientific, political and jurisprudential thought. Sensitivity and understanding towards context are essential, especially when writing about political and legal thought published over three hundred years ago. In this regard, accuracy is also attained pertaining to the true meaning of concepts applicable to the community for which they were published, hereby providing some sense of the specific intellectual matrix within which

Rutherford wrote. In no manner does this negate the possibility of having insights into concepts and ideas that are valid and applicable for all ages – in the words of Friederich, “All political systems are the natural reflection of their historic environment, and there has been no influential political work that is not, in essence, the autobiography of its time. That does not mean the absence from it of a flavour of universality.”⁴⁶ Many contemporary authors repeatedly write with no sensitivity for what was meant in sixteenth- and seventeenth-century Britain with concepts and ideas such as liberty, public good, republicanism, sovereignty, the encompassing nature of the law, federalism, the interplay between rights and duties and the social contract. According to Janet Ainsworth, “Just as fish always in the sea have no consciousness of being wet, scholars always immersed in the ocean of their own normative order may well be unaware that this order permeates the very conceptual tools that they use in attempting to understand the other.”⁴⁷ Charles Taylor comments that what constitutes a society as such is the metaphysical order it embodies, and people act within a framework which is there, prior to and independent of their action.⁴⁸

It is this ‘metaphysical order which embodies a society’ on which Chapter 1 elaborates. There are many historical works dealing with the circumstances and needs in Reformation Scotland and England. This thesis includes extracts from many of these observations and moulds it into an explanation of the needs and fears with which Rutherford (Presbyterianism) was confronted and which pushed him towards clarifying the inextricable relationship between reality and the law, and between religion and the law. Rutherford was surrounded by a dominant spirit all over Western Europe, which represented a strong zeal for finding a biblical model for society and the law. Man and society’s relationship with God was understood in a real and personal manner, and emanating from this experience were efforts at maintaining a godly society, which included aspiring towards freedom in the biblical sense and the limitation of corruption and power, be it spiritually or materially. Without an explanation of ‘divine imminence’, ‘scepticism’, ‘the depravity of man’, ‘tolerance’ and ‘freedom’, a proper understanding of the nature and role of politics and the law

⁴⁶ Laski, “Introduction”, 1.

⁴⁷ Janet E. Ainsworth, “Categories and Culture: On the ‘Rectification of Names’ in Comparative Law”, *Cornell Law Review*, Vol. 82, 1(1996), 31.

⁴⁸ Charles Taylor, *A Secular Age*, (Cambridge, Massachusetts & London, England: The Belknap Press of Harvard University Press, 2007), 192.

would go astray. This chapter addresses these matters in an integrated fashion in order to understand the application of the law in that period of history better.

This chapter also presents an understanding of Republicanism against the background of theologico-political federalism, which naturally implicates Rutherford's thought on the law and the covenant, and the inextricable relationship between the two in particular. Republicanism's meaning for Rutherford's thinking on the ordering of society is explained and serves as a useful concept, acting as a receptacle for other constitutional, political and jurisprudential ideas. This formed part of an age-old legacy of political and legal thought stemming from ancient Greece and Rome and finding its way, often with variations here and there, through the periods of the early Church Fathers, Middle Ages and the early Renaissance. Rutherford was familiar with political and legal thought stemming from ancient Hebrew, Greek and Roman sources and continuing until the end of the thirteenth century, and where names such as Plato, Aristotle, Cicero, Jerome, Augustine, Justinian, Ulpian, Plutarch, Livy, Basilus, Aquinas, Tacitus, Bartolus and Baldus were not foreign to *Lex, Rex*. In addition, Rutherford was exceedingly knowledgeable in the Jewish and Christian aspects related to politics and the law. By the seventeenth century, very complex structures of political and legal ideas had grown into existence in the Western world after many centuries of relevant thought. This thought did not suddenly arise from nowhere in the crises of the seventeenth century. That Rutherford was influenced by the political and legal contributions of preceding centuries as confirmed in, among others, *Lex, Rex*, has been touched upon in previous scholarship. The new religious order introduced by the Reformation lead theorists to determine how a reactionary ruler could be resisted lawfully and replaced. For this, theorists were unwilling and unable to ignore their intellectual heritage completely. Consequently, this thesis brings to light the rich political and legal legacy left by the many preceding centuries more explicitly. Included in Chapter 1's conclusion is some thought on the enduring contribution of Rutherford's republicanist thinking.

This is followed by Chapter 2, which looks at the axiomatic role of the covenant (from a political point of view) and the law in the thought of Rutherford. To Rutherford, as for Cicero, the law was something more than Jean Bodin's command of the ruler, or the accomplishment of practical utility. Rutherford was also

confronted with, among others, the Grotian view regarding the deification of reason whilst maintaining a limited Christian doctrine to allow for the accommodation of denominations. Within the religious fraternity itself there were theologians spurring the prominence of reason on, such as John Milton and Roger Williams. This line of thinking by Grotius would eventually be supported and proclaimed by John Locke, who played a major role in influencing early American politics. The implications this had for an understanding of the law were substantial, to say the least.

The law, according to Rutherford, originated from a dimension transcending mere temporal and horizontal consensus and in this regard, the idea of the covenant played an important role. This could only be understood once it is accepted that society is substantively Christian and this implies the understanding that the national covenant could only come into operation on the attainment of substantial individual covenanting in a theological sense. More emphasis needs to be given to Rutherford's understanding that a biblical political and legal theory can only be applied to a Christian society and that the enforcement of religion to convert the individual is to Rutherford neither tenable nor biblical. To Rutherford the law precedes and is superior to political power, hereby emphasising the rule of law idea. Law is not merely a formal cause of government but also has a relational foundation to it, binding the soul to God in a personal way. This also was of relevance to the covenanted Christian society as a collective, as a corporate body. The sinful nature of man was not so substantial to rid man from an active sense of duty and responsibility. The corruptible character of nature was accompanied by a non-corruptible aspect that, by grace, lent itself to the fulfilment of God's will. This allowed for the ruler, the church (visible) and the law to act externally towards maintaining and protecting the Christian Republic.

The law and the covenant, with the participation and representation of the people (together with another republican principle such as the division of power and resistance towards tyranny) served as instruments towards the attainment of God's purpose with man. However, there is more to the law than this when investigating Rutherford. To ancient Hebrew thinking and that of the Church Fathers, the medieval period as well as that of the early Renaissance, the social order (like the cosmic order) existed because God existed, and was good because God had decreed it to be. Law

was therefore understood as having a universal and godly foundational attribute that transcended an understanding of the law as only moral, judicial or ceremonial, or an understanding of the foundational function of the law as serving the preservation of society. Rutherford was positioned between the end of the Renaissance and the beginning of the Enlightenment. His political and legal thought was committed towards retaining an understanding of the law as that which cannot escape its religious meta-law dimension. The law according to Rutherford had (explicit) foundational transcendence to it. It had an encyclopaedic character, which had everything to do with theology. In this regard, more light will be shed on Rutherford's views on the foundational nature of the law also touching on the idea of the covenant.

Rutherford formed part of the long and influential tradition of theologico-political federalism (which already had strong roots in Scotland towards the beginning of the seventeenth century) and he did not present anything new regarding the basic structure of such covenantal theory. The added insights in this chapter pertain to Rutherford's endeavour towards balancing Divine Sovereignty with that of human agency and by doing so, finding a midway between Anabaptist (and Libertine) withdrawal from the public sphere and the Arminian over-emphasis on human agency. It is in this regard that Rutherford elaborates more than the other theologico-political federalists do on the importance of the covenant to bring about this median. Rutherford, in his theory on the ordering of society, provides unique insights into his balancing of Divine Sovereignty and human agency (both in an individual and communal sense) regarding the functioning of the law within the covenant through the sovereign people (the latter always being subservient to the law). In this manner, Rutherford personalises God's relationship with Creation and consequently with political activity and the application of the law, whilst presenting society with the incentive of working towards the adherence to God's Will in society. In this manner, Rutherford always maintains the vertical aspect of societal thinking amidst threats towards the negation of this aspect in the Enlightened quest to humanise thinking on politics and the law. The Enlightened political endeavour, once having removed the higher religious ends from the public domain, sought to concentrate largely on self-preservation as a foundational aim of governance.⁴⁹ This understanding provides the

⁴⁹ Peter Richards comments that the Aristotelian tradition with which Rutherford explicitly aligned himself, had always insisted on higher dimensions of purpose and order in its attempts to render an

law and its application with its own unique and central meaning for the Christian Republic, which was contrasted with the legal paradigm resulting from scepticism in biblical truth and fuelled from various sectors, including that of Bodin, late-medieval Nominalism (as pioneered by William of Ockham), Antinomianism and Anabaptism.

Implications that the two avenues of sceptical thinking (the one sceptical on the use of biblical truth in the public domain and the other believing that this is what is biblically required due to scepticism in man's infallibility) have on the law and for politics regarding seventeenth-century Britain was of major proportions. It would therefore be apt to elaborate on Bodinian and Anabaptist thinking (which also played a large role in influencing early American political history) which Rutherford saw as a serious threat. Here Rutherford's belief in the credibility of nature (which includes a constitutional model) to act as a portal to grace, even though nature was embedded in sin, is also brought to the fore. How one approaches the status of 'nature' and 'grace' and the relationship between the two also have vast implications for how the political and legal form should be viewed. Chapter 2's conclusion also touches upon the enduring contribution of Rutherford's thinking on the Covenant and the Law.

Lex, Rex's informed promotion of the superiority and encompassing nature of the law, and it being a tract in opposition not only to physical, but also to religious oppression, places Rutherford in the upper echelons of political and legal contributions opposed to religious (in addition to physical) tyranny in the early seventeenth century, hereby substantially enhancing Monochomarchical thought in its defence against religious oppression.⁵⁰ This adds to the substantial acclaim received from modern-day

authentic account of nature and reality. According to Richards, the lower elements of 'matter, form and power' (Richards takes this phrase from the longer title of Hobbes' *Leviathan*), which had been reflected in the principle of self-preservation had not been ignored by Rutherford, but had always held a subordinate position in the hierarchy of political value, see Richards, Peter J, "The Law written in their Hearts?": Rutherford and Locke on Nature, Government and Resistance", (later published as, Richards, Peter J, "The Law written in their Hearts?": Rutherford and Locke on Nature, Government and Resistance", *Journal of Law and Religion*, Vol. 18, 1[2002-2003]), 39-41.

⁵⁰ Comparing the sub-titles/questions of the *Vindiciae Contra Tyrannos* with that of *Lex, Rex* confirms the striking similarity between the two. For example, the sub-title in the *Vindiciae*, namely "Kings are made by the people" (under question 3) overlaps with the nature of questions 4, 5, 6, 7, 9, and 14 in *Lex, Rex*. Then there is much overlap between DuPlessis-Mornay's reference to the importance of the idea that "the whole body of the people is above the king" (under question 3) and Rutherford's questions 8, 9, 19, 21 and 40 in *Lex, Rex*. The tone of DuPlessis-Mornay's enquiry "whether the king is above the law" (under question 3) is similar to *Lex, Rex's* questions 26, 27, and 39. Also see the similarity between the *Vindiciae's* reference to "whether the prince has power of life and death over his subjects" with Rutherford's questions 16, 22 and 23. Needless to say, the *Vindiciae's* questions 1 and 2 are dealt with concisely throughout the whole of *Lex, Rex*. On further inspection one finds many more

scholarship for Rutherford's political and legal thought.⁵¹ The titles of some of Rutherford's substantial works present four main themes, namely the defence of gospel of Free Grace; Presbyterianism as the biblical form of Church government; the primacy of Law; and uniformity of religion and rejection of tolerance in a Christian State.⁵² Regarding the latter two themes, Chapter 3 investigates the role of the ruler in maintaining, protecting and furthering the true religion thereby confirming the inextricable relationship between the law and the uniformity of religion (and a stricter approach towards tolerance). This aspect of political theory has received scant in-depth analysis with special relevance to Rutherford. This was one of the main concerns for Rutherford, understood against the background of his support of the covenant and the law as secondary cause towards the attainment of God's will for Creation. Two important schools of thought that were already popularly supported by the middle of seventeenth-century Britain formed, namely the sceptical view in religious truth for the public sphere (and here the Anabaptists played a major role, including John Milton) and the Presbyterian view that the Bible offered a truth for public application and the instilling of such truth in society (albeit not by force). For Rutherford it was precisely for the reason that nature is weakened due to the Fall that the use of the external ordering of society was required, whilst for the Anabaptists it was the weakened status of nature that qualified the removal of religion from the public sphere. Rutherford, in his support of the religious duties of the magistrate, affirmed the Christian understanding on liberty, namely liberty from the condemnation of death, which the law works in Christ. Liberalism's optimism in man

similarities whether directly or indirectly, although *Lex, Rex* reflects a more informative and intense version of polemical and theoretical opposition against political and religious tyranny. Also see De Freitas', *Samuel Rutherford and the Law. The impact of theologico-political federalism on constitutional theory*.

⁵¹ See for example, S. A. Burrell, "The Apocalyptic Vision of the Early Covenanters", *The Scottish Historical Review*, Vol. 43, No. 135, Part 1 (1964), 15; Hall, *The Genevan Reformation and the American Founding*, 253; Ian M. Smart, "The Political Ideas of the Scottish Covenanters. 1638-88", *History of Political Thought*, Vol. 1, 2(1980), 175; Richard Flinn, "Samuel Rutherford and Puritan Political Theory", *The Journal of Christian Reconstruction* Vol. 5, (1978-9), 49; C. E. Rae, *The political thought of Samuel Rutherford*, (Unpublished M. A. dissertation, University of Guelph, 1991), 73-74; Field, "'Put not your Trust in Princes'. Samuel Rutherford, the four causes and the limitation of civil government", 146-147; and Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 296. Burgess adds that Rutherford dealt more comprehensively with political affairs than did the eminent Puritan theorists such as Thomas Goodwin and John Goodwin, *ibid.*, 96. Whereas Gerard Winstanley's, *The Law of Freedom* lays out a practical programme, *Lex, Rex* is more concerned with theoretical questions about the nature and organisation of the state, *ibid.*, 96.

⁵² David Estrada, "Samuel Rutherford as a Presbyterian Theologian and Political Thinker. The Question of Religious Tolerance", *Christianity & Society*, Vol. 13, 4(2003), 5.

ran hand-in-hand with the view that freedom is found exclusively in man. This understanding of freedom was supported by the faith man placed in his unlimited self, hereby relaxing all limitations supposedly placed there by traditional religion.

Rutherford lived during a time when there was an increase in momentum (even from religious circles) towards the ‘self’ as the autonomous source of authority. Bearing this in mind, religion (and the conscience) in the Christian Republic should be viewed as both the possession of the individual and of the community and required external regulation due to the weakened status of nature. This naturally involves, in addition to theological views, constitutional, political and legal discussion on the matter. This external regulation should be distinguished from the mere use of force. Religion (and the conscience) to Rutherford has a public dimension as well, and this is better understood against the background of the covenant. Whilst all men are born free, their sinful natures require government to limit this evil tendency, and this was as relevant for the protection of the true religion as it was to the sanctioning of external violations of the Decalogue such as blasphemy and murder. However, to Rutherford, there were limits as to how far the ruler could go in accomplishing this, bearing in mind the unique and specialised obligations of the church in this regard. In this manner, Rutherford steered between the extremes of Anabaptism and Erastianism. The law therefore had an important role also in protecting and maintaining the true religion. This naturally implicates constitutional thinking.

It is also in the context of ‘magistracy and religion’ that a response is required towards authors such as John Coffey who criticises Rutherford regarding the relationship between politics and the law on the one hand and religion on the other hand. This is of further importance, due to the similarity of Coffey’s political and legal thinking to that of the Independents of the seventeenth century, as well as to that of John Milton, Roger Williams and John Locke, who placed more emphasis in man’s rational capabilities, and on the New Testament and a watered-down religious doctrine to be applicable to the public sphere at the time. Coffey’s biography on Rutherford (which is described by the publishers as the “first modern intellectual biography of Rutherford” and presents as its central focus the political thinking of Rutherford) titled *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford* requires critical comment. Coffey’s view that his biography on Rutherford

“retells Rutherford’s life as a tragedy”⁵³ is laced with subjectivity⁵⁴ and a weak comprehension of the whole of Scripture. It could easily lead the reader towards doubting the substantial contribution that Rutherford made to political, jurisprudential and theological theory. The publishers of Coffey’s work on Rutherford also portray Coffey’s work as demonstrating that, “While *Lex, Rex* provided a careful synthesis of natural-law theory and biblical politics, Rutherford’s Old Testament vision of a purged and covenanted nation ultimately subverted his commitment to the politics of natural reason ...” This will also be investigated critically and more light will be shed on whether James Culberson’s observation that “Coffey’s analysis in his *Politics, Religion and the British Revolutions* provides exceptional insight on Samuel Rutherford’s thought” is accurate.⁵⁵

In the words of Harold Berman, “... an author of non-fiction has an obligation to disclose at the outset some of his prejudices.”⁵⁶ It would therefore be apt to state that this thesis, which substantially concerns Rutherford’s quest for a constitutional model from which his understanding of the law in an encyclopaedic and superior sense in particular emanates, was embarked upon with the acceptance of the authoritative status to be ascribed to both the Old and New Testaments, together with the authority of the Westminster Confession of Faith. Coffey’s modern and popular investigation into the ‘mind’ of Rutherford, with special emphasis on his political thought, would probably have had more to it if Coffey had been clearer on the denominational lens

⁵³ John Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, (Cambridge: Cambridge University Press, 1997), 29.

⁵⁴ Not that the element of subjectivity should or can never be present in such investigations; and any criticism directed towards Coffey in this regard would in itself be loyal to specific ideological points of departure. It is an open question as to how far a biographical exposition on someone should go regarding subjectivity. However, where there is a Christian doctrinal stance that differs from another Christian doctrinal stance (as is the case in this thesis where the author’s beliefs come into opposition to many of the beliefs reflected by Coffey which can be viewed as a conflict between Baptism and Presbyterianism) then the doctrinal loyalty of the person being criticised requires exposure, and the same applies to the doctrinal loyalty of the person criticising. Coffey’s explicit allegiance to a view that negates the Old Testament in substantial respects, his idea of reason as separated from religion, and his lack of inclusion of central biblical texts pertaining to politics and the law and his lack of understanding of some of those that he does refer to, all point to a view that basically rejects substantial tenets of the Westminster Confession of Faith. This inherently results in a negative idea of Rutherford and his thought. This thesis is not about proving that Coffey’s Baptist views are erroneous, rather this thesis unveils his central beliefs which provide him with a certain understanding of Rutherford’s mind which the author of this thesis disagrees with, and where such disagreement is expressed in an investigation as to what Rutherford’s understanding was of especially politics and the law.

⁵⁵ See James Kevin Culberson, ‘*For Reformation and Uniformity*’: *George Gillespie (1613-1648) and the Scottish Covenanter Revolution*, (Dissertation Prepared for the Degree of Doctor of Philosophy, University of North Texas, [May 2003]), 27, fn. 86.

⁵⁶ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 1.

through which he investigated Rutherford and in which, to the mind of the author of this thesis, a more subjective slant on the part of Coffey would be more readily realised to the reader. Not that subjectivity is absent in all non-fictional works, but at least in explicitly clarifying the specific subjective slant embarked upon, the reader would more easily be aware of the underlying reasoning behind an author's thinking when writing on the intellectual contribution of another. Part of the conclusion of Chapter 3 includes some observations on the enduring contribution of Rutherford's thinking pertaining to the magistracy and religion.

In the Epilogue, this thesis elaborates on the enduring relevance of Rutherford's political and legal thought (which, as mentioned above, is touched upon in the conclusions of all the chapters). In this regard, Rutherford confirmed and elaborated upon republican norms pertaining to the ordering of society. In Rutherford, we find the confirmation of the foundational and normative attributes of Republicanism, namely the idea of the Covenant, the superiority of the law, an active and representative citizenry, the division of political power and resistance towards political oppression. Law to Rutherford is substantially directed towards the ordering of society and it precedes and is superior to political power and should be adhered to by the people. Then there is the importance of the relational (contractarian) aspect in the ordering and day-to-day functioning of society, where not only rights and corresponding duties are established, but they are inextricably connected to a normative dimension that transcends political power as well as merely positivist law, and acts as authority to both political power and participatory citizenship. Even though the importance of the equality of all men should be supported, it was of fundamental importance that man could not be given unlimited authority, as man's constitution with its inherent weaknesses necessitated the assistance of the moral law, with its universal and eternal sense of justice and equity. Then there are Rutherford's views on the conscience in the context of political and legal theory and tolerance, as well as his thoughts in opposition towards the enforcement of a foreign religion, which touches on the protection of religious rights and freedoms in general.

This brings one to the main finding of this thesis elaborated upon in the Epilogue, namely that Rutherford presented a constitutional law model for the ordering of society. Rutherford's political and legal theory places the 'higher' or moral law

(Divine law) above that of political power. The channelling of political power towards effective governance aimed at the common good can only be accomplished through constitutionally normative principles emanating from republicanism and laws (including rights and duties) that are just and equitable. This foundational aspect of the law forms part of the Rule of Law idea and constitutional thinking, the law being understood as something stable and not arbitrary; as something substantive and everlasting. Government is primarily defined in relation to law and not in relation to power primarily. Not only the law, but also the idea of the Covenant carries with it the foundations of modern constitutionalism in that it emphasises the mutually accepted limitations on the power of all the parties to it.

The covenant in itself is not only a moral norm but also carries with it the law as condition for the ordering of society. Although Rutherford's constitutionalist thinking cannot be fully understood outside of its circumstantial and theological context, the fact remains that Rutherford made an enduring contribution towards a credible constitutional model, a contribution necessitated by religious and political persecution as well as by new trends in political and legal thinking threatening the application of constitutionalism. Rutherford's constitutional thinking has underlying insights applicable to any society in any age where the possibility of the abuse of political power is always alive. Rutherford's political and legal thinking remains incomplete without elaboration on the constitutional mould accompanying it, a model which to many who have written on Rutherford's political and legal thinking (and with special relevance to John Coffey) have not received the attention, sensitivity and detail that it deserves. The view that the Scottish Divines were led by (to use John Morrill's views as also supported by Coffey) 'passion rather than constitutionalist' arguments in their opposition to the king⁵⁷ is therefore refuted in this thesis. Jean Jacques Rousseau (1712-1778), who substituted a belief in man's innate goodness for Calvin's advocacy of the persistence of original sin, and whose free spirit, which is often considered the polar opposite of the Puritanical, said of Calvin: "Those who consider Calvin only as a theologian are little acquainted with the extent of his genius. The compilation of our wise edicts, in which he had so large a part, does him as much honour as his *Institute*

⁵⁷ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 168.

...”⁵⁸ This thesis should evoke the same sentiment from contemporary liberal political and legal theorists towards the contributions by Rutherford to constitutional theory.

⁵⁸ Hall, *The Genevan Reformation and the American Founding*, 7.

CHAPTER 1

THE POLITICO-LEGAL CONTEXT OF REPUBLICANISM

“The idea of an absolute reason is impossible for historical humanity. Reason exists for us only in concrete, historical terms, i.e. it is not its own master, but remains constantly dependent on the given circumstances in which it operates ... In fact history does not belong to us, but we belong to it.”¹

“... many before me hath learnedly trodden in this path, but that I might add a new *testimony* to the times”.²

1. Introduction

Sensitivity towards religion is necessary if we are to ask the questions of sixteenth- and seventeenth-century Europe, rather than impose our own.³ S. A. Burrell, regarding the Scottish Covenanters vision and mission, states that:

Because this vision of the Covenanters was cast in terms that sometimes seem vague or unrealistic to a secular-minded generation, we are still not entitled to say that it lacked true historic effect. Are we, in all conscience, more certain that the promises of secular redemption held forth by later revolutionary visions are, in fact, any closer to reality or any more appealing than the promise that men should ‘live again in the joy of Zion, with the assurance of election and the hope of salvation’?⁴

In order to understand this vision of the Covenanters, which includes Samuel Rutherford’s constitutional, political and legal thinking better, the context of sixteenth- and seventeenth-century Europe requires closer analysis. During the

¹ Hans-Georg Gadamer, *Truth and Method* in, Reem Bahdi, “Truth and Method in the Domestic Application of International Law”, *Canadian Journal for Law and Jurisprudence*, Vol. 15, (2002), 267.

² Samuel Rutherford, “Preface”, to *Lex, Rex* (or *The Law and the Prince*), (Printed by John Field, London, 1644, Reprint, Harrisonburg, Virginia: Sprinkle Publications, 1982), xxi (Author’s emphasis).

³ George Yule, *Puritans in Politics. The Religious Legislation of the Long Parliament 1640-1647*, (Great Britain: The Sutton Courtenay Press, 1981), 14.

⁴ S. A. Burrell, “The Covenant Idea as a Revolutionary Symbol: Scotland, 1596-1637”, *Church History*, Vol. 27, 4(1958), 349.

Reformation, knowledge and religion took the form of a substantially biblically influenced society.⁵ Richard Niebuhr comments that:

Every effort to deal with the history of ideas is beset by hazards. Semantic traps are strewn along the way of the inquirer; such words as democracy, liberty, justice, etc., point to different concepts ... as they are used in different periods of history and by different men. The unuttered and frequently unacknowledged presuppositions of those who employ them also vary; and since meaning largely depends on context the difficulties of understanding what is meant are increased by the difficulties of ascertaining what is at the back of the minds ... We are distressed equally by the blindness of historians who deal with the seventeenth and eighteenth centuries, for instance, as if the persons they were interpreting did not believe in God ...⁶

The historical context provides a more lucid understanding pertaining to, for example, liberty, the purpose of civil and ecclesiastical structures, the soteriological end of

⁵ Frederick Gedicks comments that liberals, captured by the association of secularism with public life and the confinement of religion to private life, fail to see how thin the distinction is between knowledge and belief, and that it never occurs to such liberals that religious claims might be rational or that secular claims could be irrational, Frederick Mark Gedicks, "Public Life and Hostility to Religion", *Virginia Law Review*, Vol. 78, 3(1992), 694.

⁶ Richard Niebuhr, "The idea of covenant and American democracy", *Church History*, Vol. 23, 2(1954), 126. Also see: Richard J. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis*, (Oxford: Basil Blackwell Publisher Limited, 1983), 77; Charles Taylor, *A Secular Age*, (Cambridge, Massachusetts & London, England: The Belknap Press of Harvard University Press, 2007), 192; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, (Oxford: Oxford University Press, 2005), 11; Edward L. White III, "Another Look at our Founding Fathers and their Product: A response to Justice Thurgood Marshall", *Notre Dame Journal of Law, Ethics and Public Policy*, Vol. 4, 1(1989), 110; Niebuhr, "The idea of covenant and American democracy", 130; J. P. Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, (Unpublished Ph.D. dissertation, University of Chicago, 1986), 289; Nicholas Rescher, *Pluralism. Against the Demand for Consensus*, (Oxford: Clarendon Press, 1993), 42; and Richard Flinn, "Samuel Rutherford and Puritan Political Theory", *Journal of Christian Reconstruction*, Vol. 5, (1978-9), 49. According to Omri Webb: "Belief in a Divine Supreme Being was virtually universal in the seventeenth century. In political thought, no British theorist, except the materialist Thomas Hobbes, pictured any society in which God is not creator and controller. Samuel Rutherford solidly agreed with his contemporaries that the idea of a sovereign God is the only framework in which the facts and ideals of politics can be discussed. He did not treat the subject by itself in *Lex, Rex*, but it is an assumption throughout the work. That anyone should seriously doubt the belief probably did not occur to him. Exposition of the doctrine would be superfluous", Omri K. Webb, *The Political Thought of Samuel Rutherford*, (A dissertation submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the Department of Religion in the Graduate School of Arts and Sciences, Duke University, 1963), 28. Also see *ibid.*, 64 and 82. Referring to the Westminster Assembly, Robert Paul states: "The basic question at that time was not whether Parliament and the Assembly could produce a new and *different* sort of society and church, but whether they could restore a convincing semblance of the ancient unity of church and society, and in such a way that could convince people of its authority. All Puritans assumed that it could and would be done, and for that reason even the emerging constitutional and social problems would be debated largely in terms of Puritan theology and arrayed with their own panoply of scriptural references", Robert S. Paul, *The Assembly of the Lord. Politics and Religion in the Westminster Assembly and the 'Grand Debate'*, (T. & T. Clark: Edinburgh, 1985), 32.

governance and the law, the covenant, anti-tolerant and anti-sceptic approaches, and the public good. To separate concepts and ideas from its context may lead to a skewed understanding of such concepts and ideas. Such separation runs the risk of criticism of political and jurisprudential theory emanating from a given era in history by looking through the lens of an era, which differs considerably from the ideological and societal context that is being criticised. The same applies when approaching the political and jurisprudential insights emanating from the German, Swiss, French, English and Scottish Reformations, viewed as “a period in which Christianity moulded, rather than accommodated, itself to society”.⁷ This was especially true for fifteenth-century Scotland where the Reformation resulted in a solid establishment of Calvinistic Presbyterianism – “Whereas in England politics controlled religion, in Scotland religion controlled politics”.⁸ The Scottish Reformation elevated the nation to a very high degree of religious, moral and intellectual eminence, and the people were converted to the Protestant faith before the civil power had moved a step in the cause, “and when the legislature became friendly to the Reformation, nothing remained for it to do but to ratify the profession which the nation had adopted”.⁹

Consequently, this chapter begins with a description of the context surrounding Rutherford, where the emphasis is placed in particular upon divine imminence and a republican distribution of power in the form of the people, as opposed to absolute and arbitrary political and ecclesiastical rule, as well as an eschatological understanding of the regulation of society. Context is further elaborated upon by focusing on the inextricable relationship between Divine revelation and reason, the depravity of man and the need for governance, as well as anti-tolerant and anti-sceptic sentiment. In this regard, Rutherford’s concerns for the regulation of power and of society are brought to the fore. The understanding in sixteenth- and seventeenth-century Europe that there was a direct relationship between God and the believer internally introduced new implications pertaining to politics and the law and contributed towards the fulfilment of the republican principle referred to as participatory citizenship and representation.

⁷ David W. Hall, *The Genevan Reformation and the American Founding*, (Lanham, Maryland: Lexington Books, 2003), 19.

⁸ Thomas M’Crie cited in David Estrada, “Samuel Rutherford as a Presbyterian Theologian and Political Thinker. The Question of Religious Tolerance”, *Christianity & Society*, Vol. 13, 4(2003), 4. Also see Andrew Muttitt, “The Conception of Liberty in Samuel Rutherford’s *Lex, Rex*”, *The New Southern Presbyterian Review*, Vol. 3, 2(2005), 20.

⁹ Estrada, “Samuel Rutherford as a Presbyterian Theologian and Political Thinker. The Question of Religious Tolerance”, 4.

Man's depraved nature was also of relevance and understood as necessitating governance and the application of the law. Man's depraved nature also placed a constructive responsibility on the law to provide limitations to unlimited toleration. All of this was viewed as part of the Divine purpose towards salvation, thereby providing politics and the law with a soteriological purpose. Thinking on constitutionalism was also inextricably connected to such a purpose.

The social, religious and political period in which *Lex, Rex* was written also provided for a context in which the allure and relevance of a substantial legacy of political and jurisprudential thought was at a high. With this came centuries of political and legal thought that was not foreign to the integration of politics and jurisprudence or religion. What is also investigated is the concept of republicanism and the legacy of central republican principles stemming from Classical Greece and Rome, Roman law, the Church Fathers, the Medievalists, the Commentators, the Glossators, the Canonists and the sixteenth-century Spanish Catholics (early modern Scholasticism), and which exercised a major influence on Rutherford, as mainly reflected in *Lex, Rex*. Rutherford was no stranger to the legacy of ideas stemming from, for example, Plato, Aristotle, Jerome, Augustine, Plutarch, Livy, Tacitus, Ulpian, Justinian, Aquinas, Bartolus, Baldus, Gerson, Ockham, Basilius, Lavater, Vitoria, Molina, Suárez, Althusius, Buchanan, Calvin, Beza, Vermigli, Mornay-DuPlessis and Bullinger.

The legacy of political and legal thought contributed towards the development and influence of republicanism, more specifically regarding the covenant, the superiority of the law, participatory citizenship, representation, the division of powers and resistance towards political oppression. By Rutherford's time, legal philosophy was fed by a multitude of sources. These sources included Greek and Roman philosophers and Roman jurists. Then there was ancient Jewish legal thought, which arose with the Mosaic Code and culminated in the Talmud. There was also Christianity, which soon became a separate branch and exerted a distinct and powerful influence on Western European medieval legal philosophers. Aquinas' philosophy of law represented a substantial confluence of the Greco-Roman and Judeo-Christian streams of thought. The revival of Roman law and the development of Christian canon law, together with the rise of scholastic philosophy in the late Middle Ages, infused new concepts and themes into the medieval European law, thereby creating fertile ground for early

modern Western legal philosophy.¹⁰ Rutherford, like many others at the time, was therefore exposed to the culmination of this rich legacy of views.

The author of the familiar work, *A Hind let loose (or An Historical Representation of the Testimonies of Scotland)*, namely Alexander Shields, states in the preface of the said source:

And, lest my *words* should not be *goodly* enough, nor my notions graceful to the critics of this age, who cast every thing as new and nice, which is some way singular and not suited to their sentiments; that it may appear the cause here cleared and vindicated is not of yesterday, but older than their grandfathers who oppose it, I dare avouch, without vanity, there is nothing here, but what is confirmed by authors of greatest note and repute in our church, both ancient and modern, namely; [George] *Buchanan*, [John] *Knox*, [David] *Calderwood*, *Acts of General Assemblies*, [James Guthrie's] *Causes of [God's] Wrath*, [Samuel Rutherford's] *Lex Rex* ...¹¹

Looking at Rutherford through the lens of republicanism and the rich legacy of thought on republicanism in the centuries preceding Rutherford provides a more nuanced orientation towards the mind of Rutherford, his exceptional knowledge and extraction of preceding thought and his presentation thereof in a coherent, fresh and Scripturally sound manner for future generations to take note of. This also includes a more informative understanding on Rutherford and his understanding of the law, as well as how we can grasp Rutherford's view on the law better. This also unveils important insights pertaining to the legal thought of other prolific political and legal authors stemming from the Swiss, German, and Italian Reformations such as Heinrich Bullinger, Peter Martyr Vermigli, John Calvin, Theodore Beza and Johannes Althusius.

¹⁰ See Miller Jr, Fred D, "Prologue. Near Eastern Antecedents of Western Legal Thought", 1-6, in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, in *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 6, Enrico Pattaro (ed.), Dordrecht: Springer, 2007, 1.

¹¹ Alexander Shields, "Preface", in *A Hind Let Loose, (or An Historical Representation of the Testimonies of the Church of Scotland for the Interest of Christ. With the True State Thereof in All Its Periods)* (1687), <http://www.gutenberg.org/files/37137/37137-8.txt> (accessed 15 December 2012).

2. Context and *Lex, Rex*

2.1 Revelation and reason

John Coffey states that, “In the twentieth century, in an increasingly secular climate, Rutherford has lost his great nineteenth-century reputation”.¹² This is surely understandable, bearing in mind the different societal and religious contexts dominating the respective eras. If, by stating that ‘Rutherford has lost his great nineteenth-century reputation’, is implied that modern and liberal constitutional, political and legal views are superior to those which formed part of the mainstream debate in sixteenth- and seventeenth-century Europe and America, then this would surely be an erroneous assumption to make. Kingsley Rendell states:

It is understandable that he [Rutherford] should see the civil magistrate as a servant of God in Zion, appointed to administer God’s law among his people. We have long abandoned the aim of establishing God’s kingdom through the medium of the state. The ideal, however, was still cherished in Rutherford’s day, and where was it more likely to be realised than in Scotland? Should not therefore ‘every soul be subject unto the higher powers’? maintained Rutherford. We do an injustice to the seventeenth century divine if we judge him by any other standards than those of his own age.¹³

Regarding the activities of the Scottish Divines during the Westminster Assembly towards the middle of the seventeenth century, Robert Letham emphasises the seriousness behind the Divines’ view of Scripture being the authority on all-important categories of reality. In this regard, the Divines constantly discussed the meaning of passages from the Old Testament and New Testament. Their theology was not grounded on abstract logical speculation or a chain of causal deductivism, but on their grappling with the biblical text in its original languages in interaction with the history

¹² John Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, (Cambridge: Cambridge University Press, 1997), 10. And so have many other prominent authors of old lost their twentieth-century reputation. Here again a change of context is the reason and does not imply something necessarily negative. Coffey’s underlying support of a pluralist and more enlightened societal and political dispensation tends to, in the comparison of ‘then’ and ‘now’, subordinate the religious political views of the reformers, such as Rutherford, to that of a more liberal and humanist view on the said matters. In this regard, Coffey could be elevating the ‘secular’ climate to the ‘older eras of religion’. This is especially confirmed in Coffey’s overall support of a liberal and pluralist dispensation.

¹³ Kingsley G. Rendell, *Samuel Rutherford. A New Biography of the Man & His Ministry*, (Fearn, Ross-shire, Scotland: Christian Focus Publications, 2003), 139.

of interpretation, not only in the Reformed churches, but also in the medieval and patristic periods.¹⁴

More than ten centuries prior to the nineteenth century (when Christianity truly was on the wane), the West remained under Christendom – “church and state, heretic and believer, argued from the Bible and often looked to God for strength”.¹⁵ When John Milton and others debated divorce in the seventeenth century, their proof texts were scriptural, even though what was at stake was a change in the civil law.¹⁶ This was a time when belief in judgement, hell and eternal damnation was almost universal.¹⁷ Stanley Fish rightly states that, “If you believe something you believe it to be true, and perforce, you regard those who believe contrary things to be in error. Moreover, persons grasped by opposing beliefs will be equally equipped (‘on both sides equal’) with what are, for them, knockdown arguments, unimpeachable authorities, primary, even sacred, texts, and conclusive bodies of evidence.”¹⁸ This understanding also applies to views on government and its inescapable overlap with the religious question. Oliver O’ Donovan comments:

In the Christian era there is no neutral performance on the part of rulers; either they accommodate to the energy of the divine mission, or they hurl themselves into defiance ... Every sacred society reaches answers to these questions which it treats as normative, and so makes definite religious judgments about the proper content of religious belief

¹⁴ Robert Letham, *The Westminster Assembly. Reading its Theology in its Historical Context*, (Phillipsburg, New Jersey: P& R Publishing, 2009), 105.

¹⁵ William Edgar, “The National Confessional Position”, 176-199 in *God and Politics. Four Views on the Reformation of Civil Government*, Gary Scott Smith (ed.), (Phillipsburg, New Jersey: Presbyterian and Reformed Publishing Company, 1989), 180. Edgar adds that, “from the Christian Roman Empire and from the Middle Ages came a tradition of law in the West that owed a great deal to the Bible, both in its general conception of law and in particular instances of law. Family law, for example, reflected the Bible’s teaching about marriage and divorce, and Christian ideals led to rules of war. Even theories of natural law that owed an important debt both to Greek philosophy and to the Bible viewed law in its deepest sense as God-given. Governments did not ‘make’ law, they only codified and applied the law of God”, *ibid.*, 180.

¹⁶ Stanley Fish, “Mission Impossible: Settling the Just Bounds between Church and State”, *Columbia Law Review*, Vol. 97, 8(1997), 2306-2307.

¹⁷ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 235. Paul Smith observes that: “It may seem strange to the modern reader to discover John Pym complaining about the widespread use of crucifixes and the high cost of American tobacco in the very same speech. It is essential to remember, therefore, that in the seventeenth century, religion was an affair of state – as much so as foreign or financial policy”, Paul Joseph Smith, *The Debates of Church Government at the Westminster Assembly of Divines 1643-1646*, (Submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy, Boston University Graduate School, 1975), 49.

¹⁸ Fish, “Mission Impossible: Settling the Just Bounds between Church and State”, 2258.

and practice. The false consciousness of the would-be secular society lies in its determination to conceal the religious judgments that it has made.¹⁹

There needs to be reconsideration in contemporary liberalist and pluralist theory of the popular, yet dichotomous view of ‘reason’ versus ‘revelation’ or ‘rationality’ versus ‘orthodoxy’.²⁰ John Marshall, in his study on the natural law and covenantal thought of Rutherford, also refers to the use of reason and logic from a Scriptural point of view as postulated by Rutherford.²¹ Reformed theology never treated the Bible like a book of magic spells to be read without interpretation, and Christian theology in general has long treated reason an essential part of its hermeneutic tradition.²² According to James Boyd:

It would have astonished most of the great religious thinkers of our own tradition, and many other traditions, too, to hear it said that there was a blanket opposition between the religious and the rational, as though religion consisted of nothing more than an act of faith about which nothing could be said ... but the history of the Western world is in large measure the history of sophisticated religious thought and argument. The ‘religion’ that eschews thought would be thought by many not to deserve the name. And one might

¹⁹ Cited in David Field, “‘Put not your Trust in Princes’. Samuel Rutherford, the four causes and the limitation of civil government”, 83-151, in *Tales of Two Cities. Christianity and Politics*, Stephen Clark (ed.), (Leicester, England: Inter-Varsity Press, 2005), 138-139.

²⁰ Glenn Moots refers to this in his discussant comments on the panel at the American Political Science Association (APSA), 2007 on the topic of “Civil Theology of the American Founding, <http://www.lsu.edu/artsci/groups/voegelin/EVS/2007%20Papers/Glenn%20Moots.htm> (accessed 16 October 2012). Similar terminology would be ‘secularism versus religiousness’. Stephen Perks also reminds one that the idea that the conflict between humanism and Christianity is one of fact versus faith, which has been promoted so much by the ‘scientific’ establishment in contemporary society, is false – the conflict is actually one of faith versus faith, S. C. Perks, *The Christian Philosophy of Education Explained*, (Whitby, North Yorkshire: Avant Books, 1992), 19-22. This insight is so essential and relevant to constitutional and legal theory, especially against the background of this thesis. John Marshall observes that before the eighteenth century, reason was generally viewed as the organ of moral understanding. Man was moral because he was a rational soul. Basic moral principles were among the self-evident truths grasped by the intellect, John L. Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, (A thesis submitted to the Faculty of Westminster Theological Seminary in Partial Fulfilment of the Requirements for the Degree Doctor of Philosophy, 1995), 86-87 [Marshall here refers to the insights of C. S. Lewis]. However, by the eighteenth century, reason came to mean merely the power of deducing one proposition from another, and its function as the organ of ethical norms was lost – moral judgments were relegated to conscience, moral ‘sentiment,’ or taste, *ibid.*, 87 [Marshall again referring to Lewis]. Marshall adds: “Modern readers will be tempted to understand the term in its modern sense when reading it in the work of a much earlier period. Moreover, the modern conception of reason is distinct from the older form in another significant respect. The older form needed external authority to confirm it: the authority of faith, of the Scriptures, of the Church. By the eighteenth century the evidence of reason had become its own interpreter”, *ibid.*, 87 [here Marshall refers to the insights of Passerin d’ Entrèves].

²¹ See Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 149-151.

²² Moots’ discussant comments on the “Civil Theology of the American Founding”, 4.

claim that ‘thought’ as resolutely secular as the modern academic kind is less than wholly deserving of its name, too. Our fears of religious oppression, and perhaps our fears of religious truth, lead us to maintain a false ideology: false in its picture of the world around us, false in its picture of ourselves, and false in its conception of what thought is ...²³

The contemporary and dominant opposition for the integration of religion and rationality is symptomatic of a Western liberal society that is anti-religious. This anti-religiousness (which itself cannot be universally rationalised and which carries within itself some or other affiliation to a belief albeit not religious) has a strong influence on maintaining a scholarly domain fearful of integrating anything religious into scholarship. In the process, ideas not only become marginalised, but are also moulded into subjective lines of thinking. Concepts are fabricated, such as ‘neutrality’, ‘accommodation’, ‘compelling state interest’, ‘human rights’ and ‘equality’, in order to protect some or other subjective understanding pertaining to rationality, values and constitutionalism.

In Medieval and early Renaissance Europe, political thought was fundamentally Christian, an exercise in applied theology. To ask what form political lives should take was, during this period, inevitably to ask what form God wished for them to take. Questions about politics quickly became questions about the proper understanding of God’s commands as reflected in Scripture.²⁴ Looking at the commentaries of the jurists on Roman, canon and feudal law of the late Middle Ages, one would clearly

²³ James Boyd White, “Response to Roger Cramton’s Article”, *Journal of Legal Education*, Vol. 37, 4(1987), 533-534. Robert George states: “Orthodox secularism promotes the myth that there is only one basis for disbelieving its tenets: namely, the claim that God has specially revealed propositions contrary to these tenets. Most orthodox secularists would have us believe that their positions are fully and decisively vindicated by reason and therefore can be judged to have been displaced only on the basis of irrational or, at least, non-rational faith ...”, Robert P. George, *The Clash of Orthodoxies. Law, Religion, and Morality in Crisis*, (Wilmington, Delaware: ISI Books, 2001), 6-7. Stephen Macedo asks whether to live one’s own way is really more important than struggling to establish a common culture that supports piety and other-worldliness and punishes blasphemers; and is ‘peaceful pluralism’ really more important than the ideal of Christian Unity?”, Stephen Macedo, “The Politics of Justification”, *Political Theory*, Vol. 18, 2(1990), 289. Also see Stephen L. Carter, “The Inaugural Development Fund Lectures: Scientific Liberalism, Scientistic Law”, (Lecture Two: The Establishment Clause Mess), *Oregon Law Review*, Vol. 69, (1990), 523; Steven Grosby, “Jerusalem and Athens: In Defense of Jerusalem”, *Hebraic Political Studies*, Vol. 3, 3(2008), 249-250; Stephen L. Carter, *God’s Name in Vain. The Wrongs and Rights of Religion in Politics*, (New York: Basic Books, 2000), 3; and David M. Smolin, “The Judeo-Christian Tradition and Self-Censorship in Legal Discourse”, *University of Dayton Law Review*, Vol. 13, 3(1988), 399.

²⁴ Eric Nelson, *The Hebrew Republic. Jewish Sources and the Transformation of European Political Thought*, (Cambridge, Massachusetts & London, England: Harvard University Press, 2010), 1. This same insight applies to the Reformation.

see the substantial continuities in political thought from the twelfth to the seventeenth century. Many of the issues that the jurists discussed also involved the authority of the prince and the rights of his subjects.²⁵ This was done within a Christian milieu, similar to sixteenth- and seventeenth-century Europe. Whilst investigating the political and jural ideas of this period, the categorisation of thought into separate compartments of religion and rationality, of religion and values, of religion and natural law, or of religion and privacy is not conducive to an informed approach.

This calls for added sensitivity and orientation regarding the religious climate of seventeenth-century Britain. The Papal, the German and the English Revolutions invoked the biblical vision of “a new heaven and a new earth”, whilst the American and French Revolutions adopted Deist versions of the same in which the supremacy of God-given reason was the order of the day.²⁶ The implications both these two events had for the structuring and understanding of law were substantial, just as the Russian Revolution, proclaiming the messianic mission of the atheist Communist Party to prepare the way for a classless society, would have on the understanding of law.²⁷ The vision of the Covenanters towards and into the early period of the seventeenth century had everything to do with seeking, among others, political and jurisprudential insights and designs in accordance with the whole of Scripture – the ultimate and axiomatic authority encompassing reality and society. Although there were differences among the Independents, Covenanters and Erastians at the Westminster Assembly, each of these groups would surely not have perceived ‘the other group’ as so ideologically distanced as would be the instance between contemporary Western liberal thought and Reformed thought pertaining to political and legal theory. As asked at the outset of this chapter, can one truly be more certain that the promises of an irreligious redemption are any closer to reality than the aspirations of, for example, Samuel Rutherford, that men should “live again in the joy of Zion, with the assurance of election and the hope of salvation”?

²⁵ Kenneth Pennington, “Politics in Western Jurisprudence”, in *The Jurists’ Philosophy of Law from Rome to the Seventeenth Century*, Andrea Padovani and Peter G. Stein (eds), *A Treatise on Legal Philosophy and General Jurisprudence*, Vol. 7, (Dordrecht: Springer, 2007), 190. Also see *ibid.*, 204.

²⁶ Harold J. Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, (Cambridge, Massachusetts & London, U. K.: The Belknap Press of Harvard University Press, 2003), 4.

²⁷ See Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, 4.

The endeavour for liberty was something good to religion, but within a context where religion *provided the moral and cultural underpinnings for a liberated society*, also understood against the background of a salvatory purpose already emphasised, for example, in the thought of Thomas Aquinas. Although there were several points at which the Greek ‘good life’ and ‘virtue’ could overlap with Christian thought, Aquinas postulated that the good life inevitably had to be interpreted with final reference to another existence – the good life could not be an end in itself, as it was to the Greeks.²⁸ In medieval thinking the supreme end and ordination of all human existence was one, namely the ultimate union with God in, and through eternal life.²⁹

Centuries later this idea of the ‘good life’ would lose its religious and soteriological character in which the fight for liberty became overtly irreligious in ideological underpinning, consequently giving rise to the dominance of a theory with quite definite views of the good life.³⁰ This brought about drastic shifts in insights pertaining to the nature and purpose of the law and its cosmological and epistemological flavours. In contemporary society, whatever the proper role for religion in politics and law, it must be no different for one religion than another; consequently resulting in a public levelling of religion, causing religion to become largely insignificant;³¹ this, whilst the dominance of other irreligious beliefs enjoy validity and support in the public domain. This provides an overly critical and uninformed approach on how we understand religious views on politics and the law emanating from sixteenth- and seventeenth-century Europe, which in turn has implications also for thinking on constitutionalism.

2.2 Divine imminence, the depravity of man, tolerance, scepticism and freedom

Accompanying the Swiss, German, French, English and Scottish Reformations there was the challenge of addressing abuses by the then corrupt and dictatorial Roman Catholic Church. The period preceding the German Reformation in the sixteenth

²⁸ Cecil N. Sidney Woolf, *Bartolus of Sassoferrato. His Position in the History of Medieval Political Thought*, (Cambridge: Cambridge University Press, 1913), 270.

²⁹ Anton-Hermann Chroust, “The Corporate Idea and the Body Politic in the Middle Ages”, *The Review of Politics*, Vol. 9, 4(1947), 428.

³⁰ Ahdar and Leigh, *Religious Freedom in the Liberal State*, 6.

³¹ Daniel O. Conkle, “Different Religions, different politics: Evaluating the role of competing religious traditions in American Politics and Law”, *Journal of Law and Religion*, Vol. 10, 1(1993-94), 2. Also see *ibid.*, 8 and 10.

century was submerged in power gone awry, and solutions had to be devised to counter this. The Romanist Church and the royal prerogatives were seriously abused. This, and the spiritual feeling in Europe at the time, demanded something new, and were to be understood in a politically and jurisprudentially Christian context.³² Cities such as Zurich, Bern, Basle, Lausanne, Geneva, and St. Gallen, along with the leading French cities of Paris, Lyons, Orleans, Poitiers and Rouen became channels for the broadening tide of the Reformation.³³ From 1550 to 1562, between 7 000 and 10 000 refugees, mostly Protestant, as well as many Huguenot nobles threatened by French kings went to Geneva.³⁴

In Britain, there was also a need to oppose the abuses by the Roman Catholic Church. According to the sixteenth-century Swiss Reformer Heinrich Bullinger, John had painted in *Revelations* what the Lord would reveal to him about the ‘destiny of the church and how cruel it would be vexed by the cruellest persecutions of the old Roman Empire’. To those who were suffering from the Marian persecution the assurance that the reign of the Catholic Church would soon be ended was an essential encouragement.³⁵ The pressure that the Puritans were subjected to in the Elizabethan church led them to have a special interest in Bullinger’s apocalyptic literature.³⁶ The Laudian regime was the Puritans’ captivity in Babylon, and the calling of the Long Parliament was the beginning of their release. As Israel had been led captive because of their idolatry, England too had to oppose idolatry. False worship was the main corrupter of the commonwealth. Therefore, the calling of the Long Parliament took place in an atmosphere of millenarian expectancy.³⁷

³² For example it was at Basle that Calvin learned of the numerous deaths of French Protestants burnt alive, which provoked passionate disapproval from Calvin and the other German-speaking Protestants, ‘whose indignation was kindled against such tyranny’. In this regard, Calvin developed an antipathy to state tyranny from an early stage, Hall, *The Genevan Reformation and the American Founding*, 71. The Protestant opposition to absolutism naturally grew when, among other examples of gross tyranny, thousands of Protestants were slaughtered, in what is referred to as the St. Bartholomew’s Day Massacre of 1572, which forced Calvinists such as Beza to extend the logic of their principles even further, *ibid.*, 174-175.

³³ Hall, *The Genevan Reformation and the American Founding*, 74.

³⁴ Hall, *The Genevan Reformation and the American Founding*, 86.

³⁵ Yule, *Puritans in Politics. The Religious Legislation of the Long Parliament 1640-1647*, 31.

³⁶ Yule, *Puritans in Politics. The Religious Legislation of the Long Parliament 1640-1647*, 97-98.

³⁷ Yule, *Puritans in Politics. The Religious Legislation of the Long Parliament 1640-1647*, 244. Also see *ibid.*, 247-248.

In *Lex, Rex* we find references to many of the abuses by the Roman Catholic Church.³⁸ What also served as a catalyst in the Reformed Scottish cause was the unacceptable interference by the state in the affairs of the Church and an equally unacceptable use of centrally appointed church officers in the coordination of the civil sphere. Charles' decision to appoint Arminian bishops as overseers of the political affairs of a Presbyterian nation and to enforce a liturgy all too similar to Romish sacerdotalism on a Presbyterian national church "was not unlike a large scarlet rag to an uncompromisingly die-hard bull". Consequently, the Covenant was to become a powerful symbol for Scotland's self-proclaimed liberty to organise itself in a manner which challenged the framework of existing government,³⁹ and the understanding, relevance and application of the law and the quest towards formulating a constitutional model. Rutherford played a seminal role in such organisation.

The German, Swiss, French, English and Scottish Reformations provided some of the most ardent and informative contributions to politics and the law, both in theory and practice, leaving behind it a legacy of intellectual thought that was accompanied by a focused and coherent methodology. Not that many of these contributions were entirely unique, having been based on many foundational ideas from the past. Rutherford continued in this spirit pertaining to the furtherance of the Reformation in Britain. Protestant theologians had to recreate an entirely new view of history⁴⁰ and with this an added sense of urgency to come with formulations on the limitations of power and the distribution of justice in order to address the challenges of the day. Almost every Protestant society felt a heightening of religious intensity after its break with Rome. The occurrence of the Reformation may be said to have heightened the sense of religious intensity throughout Europe by creating a feeling of divine

³⁸ Samuel Rutherford emphasises these abuses in *Lex, Rex*. In this regard, see Samuel Rutherford, *Lex, Rex*. (or *The Law and the Prince*), (Printed for John Field, London, 1644, Reprint, Harrisonburg, Virginia: Sprinkle Publications, 1982) for example, xxi (of "The Author's Preface"), 110(1)-110(2), 117(2), 120(2)-121(1), 123(1), 134(1), 145(1), 158(1)-158(2), 161(1), 166(2), 171(1), 185(1), 209(2) and 213(1). William Campbell comments that "fear of an Irish invasion (many of his friends suffered cruelly in the Ulster Uprising) weighed cogently with Rutherford as a reason for resistance to Charles and an alliance with England", William M. Campbell, "*Lex, Rex* and its Author", *Records of the Scottish Church History Society*, (1941), 206. Also see Rutherford, *Lex, Rex*, especially 165(1)-165(2) for a brief description of the threats facing Scotland.

³⁹ Muttitt, "The Conception of Liberty in Samuel Rutherford's *Lex, Rex*", 21-22.

⁴⁰ S. A. Burrell, "The Apocalyptic Vision of the Early Covenanters", *The Scottish Historical Review*, Vol. 43, No. 135, Part 1, (1964), 3.

imminence on a scale unknown since the days of Joachim of Flora.⁴¹ This sense of divine imminence has substantial implications for the introduction of the central republican principle of individual participation in the regulation of society. This understanding was based on the view that the individual's reformation of the person himself or herself was the prerequisite for any regeneration of a nation⁴² – nothing was to be forced upon the individual from external earthly sources.

In stark contrast from Romanist teaching regarding the absolute and exclusive authority of the king and of the Pope, the Reformation reintroduced on an explicit scale a central tenet of republicanism in its emphasis of the important role of the individual regarding participation in the public sphere and in politics. This heralded freedom away from the abusive exercise of absolute, arbitrary, exclusive and unrepresented governance, both in government and in the church. The Reformers taught that the believer's internal realm was directly influenced by the Divine. This provided each individual with a knowledgeable sense of what is good and what is bad. The understanding was grounded on the assumption that society was a collection of Christian believers. The Reformation contributed to the individualism of modernity, giving the individual a new sense of independence by confirming to the individual a claim to a direct, unmediated relationship with God. Martin Luther's concept of the 'priesthood of believers' opened the door to a society not restricted by 'ecclesiastical authority'.⁴³ This overlapped substantially with what was expressed by medieval thought, namely the irreplaceable and irreducible moral dignity and spiritual worth of

⁴¹ Burrell, "The Apocalyptic Vision of the Early Covenanters", 3. Referring to Prof. E. L. Tuveson, Burrell observes that: "The Reformation was becoming a separate and distinguishable historical phenomenon. As it progressed there were embarrassing questions to be answered. How had it happened, for example, that the ark of the faith – the Word itself – had been entrusted to a nest of evil-livers and false preachers? How had it happened that the glorious renovation of the Church had been so long delayed, or at least that earlier advocates of reform had for so long a time had little or no real influence? These questions naturally became more and more pressing as a war of ideas raged between the respective champions of Rome and of the reformed churches ... A new set of ideas about the history of the Church was plainly needed. This need, we may surmise, led the reformers to the momentous step of reviving the Apocalypse as a pattern of history, an illumination of events past and a kind of obscure yet not wholly indecipherable prophecy of things to come", *ibid.*, 4. For seventeenth-century Scotland, this was especially true. In this regard, see *ibid.*, 1-24, especially 5-6.

⁴² Ian M. Smart, *Liberty and Authority. The Political Ideas of Presbyterians in England and Scotland During the Seventeenth Century*, (Presented in fulfilment of the requirements for the degree of Doctor of Philosophy in the Department of Politics, University of Strathclyde, 1978), 20.

⁴³ Lee C. McDonald, *Western Political Theory. The Modern Age*, (New York and Burlingame: Harcourt, Brace & World, Inc., 1962), 17-18. Also see Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, 6.

individual man, seeing in each person “the temple of the Holy Spirit, and the holy vessel of an immortal soul created by God in His own image ...”⁴⁴

A truly biblical constitutional, political and legal theory, as reflected in the views of Rutherford, only makes sense when dealing with a community of believers in the first place. Critics against the establishment and maintenance of a religiously uniform society are quick to accuse theorists such as Rutherford of enforcing religion upon society. Romans 13, one of the most quoted texts of the New Testament in *Lex, Rex* is, according to Rutherford, of relevance to all ‘Christian Republics’⁴⁵ (hereby excluding non-Christian States). Regarding his view on the state of affairs pertaining to a popular Christian ideology in England at the time and the assumption that the society’s conscience was Biblically informed, Rutherford states “A kingdom is not the prince’s own, so as it is injustice to take it from him, as to take a man’s purse from him; the Lord’s church, *in a Christian kingdom*, is God’s heritage, and the king only a shepherd, and the sheep, *in the court of conscience*, are not his”.⁴⁶ This insight is reflected in *Lex, Rex*’s substantial comments on the important role that the people play in the maintenance of the true religion and the election of the king, where the *vox populi* (voice of the people) is assumed to be equated with the *vox Dei* (voice of God).

Rutherford’s understanding of the ideological status of the community being foundationally Christian as condition for the application of the covenant is illustrated in his emphasis on the individual’s responsibility for the maintenance of the true religion. Here Rutherford refers to Junius Brutus’ view that “religion is not given only to the king ... but to all the inferior judges and people also in their kind”.⁴⁷ This understanding is also linked to Rutherford’s emphasis of the peoples’ election of a person (or persons) to the office of rulership, which assumes that only a Christian community will elect someone who will adhere to the Divine Law.⁴⁸ According to

⁴⁴ Chroust, “The Corporate Idea and the Body Politic in the Middle Ages”, 423.

⁴⁵ Rutherford, *Lex, Rex*, 173(1).

⁴⁶ Rutherford, *Lex, Rex*, 42(2). Author’s emphasis.

⁴⁷ Rutherford, *Lex, Rex*, 55(2).

⁴⁸ Also see *ibid.*, 56(1), Rutherford stating that: “The king, as a man, is not more obliged to the public and regal defence of the true religion than any other man of the land; but he is made by God and the people king, for the church and people of God’s sake, that he may defend true religion for the behalf and salvation of all. If therefore he defend not religion for the salvation of the souls of all in his public and royal way, it is presumed as undeniable that the people of God, who by the law of nature are to care for their own souls, are to defend in their way true religion, which so nearly concerneth them and their eternal happiness”, *ibid.*, 56(1).

Rutherford, “God does regulate his people ...”,⁴⁹ “... God determines the hearts of the states ...”,⁵⁰ “God’s inclining the hearts of the states to choose this man and not that man”,⁵¹ and “God moves and bows the wills of many people to promote a man to kingship.”⁵²

In other words, in all of this, Rutherford implies a society that is Christian and reflects the law of God in the processes related to the election of the ruler. Rutherford’s idea of the power of the people in political participation, which includes the election of the ruler (according to the office requirements, which in turn implies God’s precepts) assumes the inclusion of a Christian community. The existence of a dominant Christian conscience among the people was a generally accepted state of affairs. This inference is lucidly set out by John Thorburn, namely “... *vox populi is vox Dei*, the voice of the people, the voice of God. It is so when their voice, procedure, and election are agreeable to that of God: In which case the word of God is said to *come unto them*, John 10: 34. And it is only in this case that it is so; for certainly, when it is contradictory to God’s law, it cannot be called his voice ...”⁵³ This also explains Rutherford’s understanding that “[t]he king can force no man to the external profession and use of the ordinances of God, and not only kings, but all the people should be willing.”⁵⁴ This ‘willingness’ by the people presupposes a Christian community. The same applies to Rutherford’s comment that “by the people and the conscience of the people are kings to be judged.”⁵⁵ The magistrate only has a legal right to pass Christian laws in a Christian State “[w]here a nation hath embraced the faith, and sworne thereunto in Baptisme ...”⁵⁶ Excluding this pre-existing Christian

⁴⁹ Rutherford, *Lex, Rex*, 7(1).

⁵⁰ Rutherford, *Lex, Rex*, 17(1).

⁵¹ Rutherford, *Lex, Rex*, 9(2).

⁵² Rutherford, *Lex, Rex*, 33(1). In his *A Free Disputation Against Pretended Liberty of Conscience*, (Printed by R.I. for Andrew Cook, London, 1649) Rutherford alludes to the importance of his political and legal thought as only being relevant to a Christian society, for example he refers to the Christian magistrate who needs to “tend to the injuring of the souls of the people of God in a Christian society”, *ibid.*, 57 (original version). In this regard, also see *ibid.*, 146 and 331. Rutherford also states that there is: “A vast difference between a people never receiving the true Religion, and a people who have embraced and submitted to laws, that have enacted the profession of the true Religion ...”, *ibid.*, 301.

⁵³ John Thorburn, *Vindiciae Magistratus* (or, *The Divine Institution and Right of the Civil Magistrate Vindicated*), (Printed by D. Paterson, Edinburgh, 1773), 51.

⁵⁴ Rutherford, *Lex, Rex*, 214(1).

⁵⁵ Rutherford, *Lex, Rex*, 116(1).

⁵⁶ Rutherford’s *Due Right of Presbyteries* cited in Chris Coldwell and Matthew Winzer, “The Westminster Assembly and the Judicial Law: A Chronoligal Compilation and Analysis, Part 2: Analysis”, *The Confessional Presbyterian*, Vol. 5, (2009), 79. Also see *ibid.*, 80.

spirit in society negates a proper understanding of Rutherford's views on politics and the law.

One of Rutherford's fellow Scottish Divines, George Gillespie (1613-1648), similarly reflects this understanding. For example, Gillespie argued that every Christian had the right to determine by the private judgement of Christian prudence and discretion whether the magistrate's⁵⁷ laws met the conditions of being lawful and expedient according to the 'rules of the word'. This important determination could not be granted to the prince alone to decide for all his subjects; instead, the prince had to leave it to each of his subjects to determine before God, as the subject compared the prince's commands with Scripture.⁵⁸ This provided a substantial break from Roman Catholic teaching as well as practice, and had major implications for political theory. The internal realm can be seen in vital Scottish documents like the National Covenant – the kingdom of Christ was an inner one from which externals must proceed in order to be valid.⁵⁹

However, there was the understanding of the *depravity* of man as well which had implications for theories on governance, the relationship between government and the church, and the exercise of justice. Belief and practice were inseparable for the Westminster forefathers:

[The divines] have been criticized for being too strict and uncompromising in their views of life and duty. But all excellence is marked by strictness. Strictness certainly characterizes everything which truly represents God. The laws of nature are all strict; the laws of hygiene are strict; and the life which would secure their benediction must be a strict life. So with the laws of morals. Like him who ordained them they know 'no variableness nor shadow of turning.' Any pretended exposition of the moral nature and claims of God which is characterized by looseness ... brands itself as false. Their

⁵⁷ The word 'magistrate' was often used in Protestant political theories stemming from the sixteenth and seventeenth centuries and Rutherford refers frequently in *Lex, Rex* to this word as well. In the Roman Republic, 'magistracy' was the most important and most characteristic element in the Roman constitution. 'Magistracy' denotes 'the governing office', and comes from the Latin *magistratus*, meaning both the official and his office. In the Roman terminology, 'magistrate' includes all political officials, from the consuls down, Hans Julius Wolff, *Roman Law. An Historical Introduction*, (Norman: University of Oklahoma Press, 1951), 27.

⁵⁸ James K. Culberson, '*For Reformation and Uniformity*': *George Gillespie (1613-1648) and the Scottish Covenanter Revolution*, (Unpublished thesis for the degree of Doctor of Philosophy, University of North Texas, 2003), 156.

⁵⁹ Louis Anderson Yeoman, *Heart-Work: Emotion, Empowerment and Authority in Covenanting Times*, (A Thesis Submitted for the Degree of Ph.D. at the University of St. Andrews, 1991), 117.

narrowness has been unctuously deplored. But after all is it not the narrowness of truth?⁶⁰

Although man is sinful, an effective constitutional model was possible, especially designed to counter the sinful nature of man. In many instances, Protestants (generally speaking) and many others today take too little account of the radical nature of human sin⁶¹ and the necessity of divine grace; and give too little credibility to the inherent human need for discipline and order, accountability and judgement. Too little credence is given to the perennial interplay of the civil, theological and pedagogical uses of law, or the perpetual demand to balance deterrence, retribution, and reformation in discharging authority within the church, state, home school and other associations.⁶² For Rutherford, the radical connotation to human sin was a reality that necessitated political and legal intervention towards order and discipline. This also necessitated a constitutional model.

Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary.⁶³ This insight was understood all too well by the Reformers (stemming from the German, Swiss, French, English and Scottish Reformations) in their consideration of matters political and legal, an insight that had already been postulated by Augustine, viewing the root of human government in the consequences of the Fall.⁶⁴ Similarly, Rutherford's work attests to an emphasised and continuous concern for taking into account both the depravity and sanctity of man. Rutherford, in true Calvinist fashion, had no illusions about man in a state of nature.

⁶⁰ David W. Hall, *Windows on Westminster*, (Norcross, GA: Great Commission Publications, 1993), 146.

⁶¹ Here the reader is reminded by the Dutch philosopher, Herman Dooyeweerd that: "... if Christianity had held fast to the ground motive of God's Word, and to it alone, we never would have witnessed the divisions and schisms that have plagued the church of Christ. The source of all fundamental schisms and dissensions is the sinful inclination of the human heart to weaken the integral and radical meaning of the divine Word. The truth is so intolerable for fallen man that when it does take hold of him he still seeks to escape its total claim in every possible way", Herman Dooyeweerd, *Roots of Western Culture. Pagan, Secular, and Christian Options*, John Kraay (trans.); Mark Vander Vennen and Bernard Zylstra (eds), (Toronto, Wedge Publishing Foundation, 1979), 109.

⁶² John Witte, Jr., "The Freedom of a Christian: Martin Luther's Reformation of Law & Liberty", 8 March, 2005, article on the website of Emory Law School, 9. This article is drawn from Witte's Snuggs Lectures at the University of Tulsa, 7-8 March, 2005, http://cslr.law.emory.edu/fileadmin/media/PDFs/Lectures/Witte_Freedom_Christian.pdf (accessed 12 December 2012).

⁶³ Hall, *The Genevan Reformation and the American Founding*, 378. For more specific examples see *ibid.*, 14, 44, 94, 369 and 377.

⁶⁴ Hall, *The Genevan Reformation and the American Founding*, 29.

Government is required to check evil and preserving peace in society, and God must have put the power of accomplishing this end in man's nature.⁶⁵

A central problem for medieval political scholars was the implied dichotomy between natural sociability and human sin. In other words, by what means could man's sinful tendencies be overcome sufficiently to give new vitality to the social element of man's relinquished nature; and was it within man's power to restore some likeness of God's original granting of sociability to human beings?⁶⁶ A version emanating from the Middle Ages (of an Aristotelian provenance), stating that no factor could pre-empt man's impulse to associate. Man's propensity to act unjustly and anti-socially often does not negate their fundamental and inalterable nature. Within each human rests a principle of motion, which impels him to join others in spite of all impediments.⁶⁷ Rutherford supported this understanding and continued towards formulating a constitutional model aimed at reconciling man's propensity towards sin and the obligation of positive governance.

Rutherford also knew that rulers were sinful and needed to be checked.⁶⁸ Sin infects all human beings, and at the same time grace, administered through the church, touches human beings. Rutherford called for the entire nation to submit to reformation. Despite the power of sin, reason, fortified by God's grace, is able *to grasp the divine* and natural law to which man should conform.⁶⁹

Early modern Calvinists gathered additional insights into the nature of rights and their protection around the doctrine of sin. This doctrine led Calvinists from the start to emphasise the need both for individual discipline and for structural safeguards on offices of authority. Individual discipline came in part through regular catechesis and education, through regular corporate worship and communal living. However, the foundation of individual discipline was the law of God and nature, particularly as

⁶⁵ Campbell, "Lex, Rex and its Author", 216.

⁶⁶ Cary J. Nederman, "Nature, Sin and the Origins of Society: The Ciceronian Tradition in Medieval Political Thought", *Journal of the History of Ideas*, Vol. 49, 1(1988), 4.

⁶⁷ Nederman, "Nature, Sin and the Origins of Society: The Ciceronian Tradition in Medieval Political Thought", 5.

⁶⁸ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 108-109.

⁶⁹ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 278 (Author's emphasis).

codified in the Ten Commandments.⁷⁰ The magistrate was to play an integral role in this regard as well. While the offices of church and state are ordained by God and represent God's authority on earth, the officers who occupy these offices are sinful human creatures. Calvinists, therefore, worked hard to ensure that these offices were not converted into instruments of self-gain and self-promotion. By the seventeenth century, they had emphasised the need for the popular election of ministers and magistrates, limited tenures and rotations of ecclesiastical and political office, the separation of church and state, the separation of power between church and state, checks and balances between and amongst each of these powers, federalist layers of authority with shared and severable sovereignty, open meetings in congregations and towns, codified canons and laws and transparent proceedings and records within consistories, courts and councils.⁷¹

In conclusion, one can say that, in order to counter the depravity of every believer, there was not only the need for governance and the external application of the law, but also for those principles akin to constitutionalism and consequently to republicanism to be applied. These were principles such as the superiority of the law, social bonding, representation, a politically active citizenry and the division of powers in civil governance, as well as ecclesiastical structures and resistance towards political oppression.

Matters related to the depravity of man are inextricably connected to questions related to the relevance or irrelevance of *toleration*. For politics and the law, Rutherford's understanding of the depravity of man necessitated a sceptical approach towards unlimited toleration pertaining to religious expression. English elites opposed toleration for fear that a substantial emphasis on toleration would disadvantage the unity they held to be an integral part of Christianity. It also threatened the institution of a unified church and weakened religious orthodoxy, which they considered essential to ties of obligation and contract.⁷² The concern that the Scottish Divines had

⁷⁰ John Witte Jr., *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, (Cambridge: Cambridge University Press, 2007), 333.

⁷¹ Witte, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, 333-334.

⁷² Andrew R. Murphy, *Conscience and Community. Revisiting Toleration and Religious Dissent in Early Modern England and America*, University Park, Pennsylvania: The Pennsylvania State University Press, 2001, 80. Murphy adds that Anti-tolerationists repeatedly asserted that toleration would sanction schism within the church, and that this rupture of Christian unity would in turn lead to

regarding ‘tolerationist theory’ in the context of political thinking is further confirmed when looking at Andrew Murphy’s observation that the tolerationists ascribed to civil government such basic functions as securing minimal conditions of social peace and order.⁷³ In a sense, this represented the prioritisation of practical utility, something that provided too minimal an expectation regarding the obligations of civil government.

There is reason to believe that the Presbyterians and the Independents of the Westminster Assembly misapprehended one another’s opinions on the subject of religious toleration. What the Presbyterians understood the Independents to mean by that term was what they called a ‘boundless toleration’, implying equal encouragement to all shades and kinds of religious opinions, however wild, extravagant and pernicious in their principles. While when the Presbyterians somewhat vehemently condemned such laxity and licentiousness, the Independents seemed to have thought that they intended or desired the forcible suppression of all opinions that differed from their own.⁷⁴ The Presbyterians wanted Church government to be established in the first instance, and then some toleration be shown for tender consciences. The Independents, on the other hand, strove to obtain a legislative toleration first, and then it would have been a matter of time as to which (or whether a) form of Church government should be established.⁷⁵ The Presbyterians not only saw the Independent approach as a potential threat arising in the establishment of all the pernicious heresies that abounded in England at the time, but also as contrary to the purposes to which the Assembly ascribed to, namely the promotion of uniformity in religious matters.⁷⁶

an onslaught of heresy and irreligion (followed inevitably by licentiousness and anarchy), *ibid.*, 102. Also see *ibid.*, 247.

⁷³ Murphy, *Conscience and Community*, 239-240.

⁷⁴ William Hetherington, *History of the Westminster Assembly of Divines*, (Edmonton, AB Canada: Still Waters Revival Books, Reprint edition 1991, from the third edition 1856), 331.

⁷⁵ Hetherington, *History of the Westminster Assembly of Divines*, 334. Commenting on the Scots viewpoint on toleration in the seventeenth century, George Yule states that: “The issue was not just one of a tolerant as opposed to an intolerant spirit as we should tend to judge it with our twentieth century presuppositions. Those who opposed the granting of toleration were not necessarily intolerantly disposed in our modern sense, any more than those who favoured toleration were necessarily tolerantly disposed”, Yule, *Puritans in Politics. The Religious Legislation of the Long Parliament 1640-1647*, 214-215.

⁷⁶ Hetherington, *History of the Westminster Assembly of Divines*, 334. Andrew Murphy observes that: “It is important to reiterate that anti-tolerationists often had good reasons for being concerned about the social and political consequences of toleration. These concerns might be based upon the past actions of those preaching toleration (rebellion and regicide), the examples of others in similar situations (the lack

Related to the issue of toleration was the emergence of *scepticism* in a ‘one-shoe-fits-all’ approach to the message of the Bible. According to Rutherford, there was no place for scepticism.⁷⁷ In this regard, with specific reference to the discussions taking place at the Westminster Assembly in mid-seventeenth-century England, it is important to comment briefly on the views by some authors in their observations and views regarding this Assembly against the background of *toleration* and *scepticism*. This sheds more light on Rutherford’s concern for the functioning of an efficient and religiously uniform Christian Republic, which, in turn, has implications for constitutionalism, politics and the law. Rutherford’s opposition towards such scepticism was also reflected in George Gillespie, a contemporary of his and a fellow Scottish divine.⁷⁸ Scepticism towards the possibility of a uniform religious truth in Rutherford’s time was similar to the views of John Locke. According to Locke, human knowledge was limited; severely limited in supernatural matters; and it would be abusive for a magistrate to impose a doctrine that could not be proven correct.⁷⁹ Something that is inconvenient to determine does not mean that there is no truth to

of reciprocal toleration for Anglicans, Quakers, or Presbyterians in New England or Pennsylvania), or the potential for religious dissent to begin a slide into anarchy or chaos (Muenster or, to some, the Interregnum). We should not lose sight of the radical nature of the measures tolerationists proposed. Proponents of religious liberty sought to dissociate two phenomena (civil and ecclesiastical power) that had been closely affiliated for centuries. Religious functions had long been assigned, without a great deal of controversy, to the civil magistrate, and anti-tolerationists found it difficult to comprehend how, if one might legitimately beg indulgence in religious matters, individuals would not claim conscientious objection to any laws they found inconvenient or simply unpleasant”, Murphy, *Conscience and Community*, 213.

⁷⁷ Also see Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 216-217.

⁷⁸ James Culberson’s view on Gillespie’s thinking pertaining to scepticism in a ‘one sided view’ of the biblical message is that: “First, Gillespie ... believed that the meaning of Scripture was ‘easily determinable’ and ‘evident’ to the honest and humble Christian inquirer. In a number of his writings, he encouraged the reader to approach his arguments with an ‘unbyassed and unprejudiced’ mind in order to learn the truth from God’s Word. In common with his fellow Puritans, Gillespie believed that honest Christians who humbly and diligently studied the Bible would come to the same position. They would agree with one another, not only as to the meaning of Scripture, but also as to its implications for church doctrine, governance, and worship. In addition, he held that while the proclamation of error would sow discord among God’s people, the assertion of truth would lead to greater submission to God and promote peace and purity within the church. Gillespie also affirmed that sin affected both man’s natural reason ... and his ability to attain truth from Scripture. Differences of opinion among Christians did not stem from the ambiguity of Scripture but either from man’s ignorance or his sin he (Gillespie) optimistically believed that God’s Word could be properly understood if one carefully examined the objective meaning of the ‘plaine Text’ ... In short, he contended that ‘the Text rightly understood and interpreted, is the Text.’ Moreover, proper interpretation involved the careful comparison of Scriptural passages, harmonising the meaning of the Bible into a unified whole. Gillespie contended that ‘comparing Scripture with Scripture’ remained the ‘best way that I know to clear Scripture.’ He also emphasised the importance of comparing scriptural texts because ‘that which is not in one place is in another place’”, James Kevin Culberson, *For Reformation and Uniformity’: George Gillespie (1613-1648) and the Scottish Covenanter Revolution*, 85-88. Also see *ibid.*, 127.

⁷⁹ Murphy, *Conscience and Community*, 225. Roger Williams and John Milton would agree.

discover.⁸⁰ Andrew Murphy refers to Rutherford's *A Free Disputation Against Pretended Liberty of Conscience*, the latter reflecting that opposition to toleration was in fact opposition to scepticism.⁸¹ As Murphy explains, "Scepticism purportedly fosters toleration in the following way: since we cannot be certain regarding our claims about truth, we are never justified in imposing our (possibly mistaken) notions on others".⁸² It can consequently be understood that the influences of scepticism became a serious matter for the Scottish Divines and those English Puritans concerned by the disintegration of a uniform religious society. This scepticism also fuelled unlimited support to be ascribed to the conscience, something that was of great concern for Rutherford. Rutherford stated that liberty of conscience "makes every man's conscience his Bible and multiplies Bibles and sundry words of God and rules of faith."⁸³ Scepticism pertaining to universal religious truth also had its fundamental weaknesses. It for example, eventually introduced the development of a non-religious public sphere in Western society and also became the bearer of absolutist political theories as reflected, for example, in Jean Bodin (1530-1596) and which came to fruition in Thomas Hobbes (1588-1679):

⁸⁰ George Gillespie states: "It follows not that because Parliaments may not presume of an unerring spirit, therefore they cannot be certain that they are in the truth concerning this or that particular, so that they may confidently compel men to it, without fear of fighting against God. The acknowledgment of a possibility of error, and that we know but in part as long as we are in this world, may well consist with men's fullness of persuasion from the light of God's word, concerning this or that truth to be believed, or duty to be done", George Gillespie, *Wholesome Severity reconciled with Christian Liberty (or The true Resolution of a present Controversy concerning Liberty of Conscience)*, (Printed for Christopher Meredith, London, 1644), 18.

⁸¹ Murphy, *Conscience and Community*, 106.

⁸² Murphy, *Conscience and Community*, 76. Murphy further explains: "The sceptical tolerationist, we must remember, advances an argument consisting of two statements: (1) we know Truth only partially, and incompletely; therefore (2) we should tolerate", *ibid.*, 78. Here Murphy also refers to John Locke's *Letter Concerning Toleration* and John Stuart Mill's nineteenth-century call for broader tolerance of social nonconformity and individualism, *ibid.*, 76-77. Murphy adds that Jeremy Taylor's *Theologike Eklektike* brings together Christian scepticism and Christian minimalism. In this regard, the basic article of Christian faith is Christ crucified, and the Apostles' Creed represent a reasonable starting point for attempts at unifying disparate Christian perspectives, *ibid.*, 109. Also see the rest of *ibid.*, 109 as well as 243. According to Robert Kraynak, Locke's assault on religious orthodoxy had as its central tenet the understanding that the individual conscience is the final judge of what modes of worship are pleasing to God. Locke loosens the connection between conscience (as the rational faculty that makes moral judgments based on divine law) and law. In this new understanding of conscience, he assigns predominant weight to the individual's subjective state of mind, Sanford Kessler, "John Locke's Legacy of Religious Freedom", *Polity*, Vol. 17, 3(1985), 491. Sanford Kessler states: "Locke implies that neither priest nor prelate, whose concern for the salvation of a given individual is presumably less than that of the individual himself, can claim to be an authoritative guide to heaven. By seeming to equate religious orthodoxy with sincerity of belief regardless of its content, he provides the theoretical rationale for toleration", Kessler, "John Locke's Legacy of Religious Freedom", 491-492. This needless to state, had implications to insights pertaining to the law.

⁸³ *A Free Disputation Against Pretended Liberty of Conscience*, 408 (original version).

The sphere of politics, construed as belonging irrevocably to the realm infected by sin, would come to be understood by some as capable of mastery only by absolute authority. It would be argued that the only reasonable solution to the tragedy of the human condition, played out in the acts of misguided and destructively competitive wills in a fallen 'state of nature,' is to renounce and transfer any claims to self-governance to an overarching authoritative third party, namely, a Hobbesian sovereign.⁸⁴

Freedom should not be viewed simply as a means to the utilitarian goal of the attainment of preferred temporal ends. Freedom for seventeenth-century Europe must be grounded on a Christian view of being and man.⁸⁵ This understanding provides a better understanding of the quest towards a constitutional model for the Christian Republic. The biblical understanding of 'freedom' also needs to be emphasised in the context of the depravity of man and tolerance, and is of constitutional, political and legal relevance. According to Herman Ridderbos,

Christian freedom therefore means freedom from the condemnation and death which the law works without Christ. It means acquittal from God's judgment; it means, even here and now, a good and sanctified conscience. It means, moreover, the freedom, the possibility, to live with the aid of the Spirit in agreement with God's demands as expressed in the law. It is the freedom, moral freedom, to do what God requires. There can be no greater error than using Paul for an appeal to the autonomy of Kant ... Christ, the Spirit, and love form a unity in Paul, and therefore Christ, the Spirit and the fulfillment of the law are not separated.⁸⁶

⁸⁴ Janet Coleman, "The Philosophy of Law in the Writings of Augustine", in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, Fred D. Miller, Jr., and Carrie-Ann Biondi (eds.), Vol. 6, Enrico Pattaro (ed.), *A Treatise of Legal Philosophy and General Jurisprudence*, (Dordrecht: Springer, 2007), 217.

⁸⁵ See Ronald H. Nash, *Social Justice and the Christian Church*, (Mott Media, 1984), 11.

⁸⁶ Greg L. Bahnsen, *Theonomy in Christian Ethics*, (Nacogdoches, TX: Covenant Media Press, 2002), 467-468. In the words of J. Howard Pew: "from Christian freedom come all of our other freedoms", L. John van Til, *Liberty of Conscience. A History of a Puritan Idea*, (Phillipsburg, New Jersey: Publishing [previously published by Craig Press], 1972), vii. Freedom in the biblical sense means freedom from sin. This means freedom to do God's will and love all of God's children, accepting responsibility for and to them. In John Winthrop's view, true moral freedom to do "that only which is good, just, and honest", is defined by reference to a biblical covenant between humankind and God. It consists of reciprocal duties and constitutive virtues based on divine commandment, first of all to love God, and then to love one's neighbour as oneself, Steven M. Tipton, "Republic and Liberal State: The Place of Religion in an Ambiguous Polity", *Emory Law Journal*, Vol. 39, 1(1990), 191. Chapter 20 of the Westminster Confession of Faith (WCF) should be read, together with the preceding one on the law of God, against the background of the recent repression under Laud, on the one hand, and the real threat of the Antinomians and Sectarians, on the other. In WCF 20.1 we find the basis for Christian liberty, which has been purchased for us by Christ under the gospel, and consists of freedom from sin and its consequences, the condemning wrath of God, and the curse of the moral law, Letham, *The Westminster Assembly. Reading its Theology in Historical Context*, 298. Regarding WCF 20.2, the liberty Christ has won brings deliverance from bondage to man, and He alone has the right to determine what we should

Liberalism's optimism in man went hand-in-hand with the view that freedom is found in man. This understanding of freedom was supported by the faith man placed in his unlimited self, thereby relaxing all restrictions supposedly placed there by traditional religion. Man's autonomy was to be trusted due to this optimism, and the more autonomous, the freer. There is this assumption that freedom, democracy and intellectual inquiry allegedly flourished in the pagan era, only to be obliterated in the Christian Middle Ages. This 'religious oppression' supposedly ended when the Enlightenment set modernity on the path to freedom.⁸⁷ What followed, however, was man's continuous disappointment with himself and a legal relativism gone wild, the latter confirmed by Harold Berman's *Law and Revolution. The Formation of the Western Legal Tradition*.⁸⁸ In Western philosophical thought, the understanding of freedom has undergone a change towards an anthropocentric loyalty since the seventeenth century. This changed the course of the aim of constitutionalism, which in Rutherford's time was substantially theocentrically determined.

believe and how we should act – He alone is Lord of our conscience. In the words of Letham: “We are thus freed from anything that is contrary to his Word. In matters of faith and worship, we are also freed from the obligation to follow commands that are additional to what he has revealed in his Word. In the context of the Laudian repression, this was a powerfully liberating statement. Indeed, Christians are prohibited from yielding their consciences to the whims of man. No one has the right to require blind allegiance. Such demands are contrary, not only to conscience, but to reason”. Robert Letham refers to Rutherford's similar understanding in the following: “It is in our power to vow, but not in the churches power to command us to vow”, *ibid.*, 299. Also of importance is Letham's referral to WCF 20.4, teaching that Christian liberty does not undermine civil government – both ecclesiastical and civil authorities have the right to proceed against any who publish such subversive views, since such antinomian egalitarianism was seen as destructive to peace and order. Antinomianism was heresy, denying the legitimacy of the law as a rule of life, and it was also subversive, since its consequences threatened civil order, *ibid.*, 299-300. Letham also, against the background of 21.1 of the WCF states: “Bound in its worship to the direction of the Word of God alone, the church is freed from the dictates of man, whether these are contrary to the Word or simply additional to it. The yoke of imposition is lifted. The church is free from the dictatorial impositions of man and free to worship God, not as man himself may want, but as God requires, whether by express statements in the Scriptures or by good and necessary consequence from it. In this sense, WCF 21.1 must be read in conjunction with the entire section (chapters 19-24) of which it is a central part, dealing with law and liberty, church and state”, *ibid.*, 303. In order to provide a better context in this regard, Letham adds, “When we reflect on the drastic imposition of the Book of Common Prayer by the Elizabethan settlement and its aftermath, we see why the Assembly produced a directory of worship services within the boundaries of the regulative principle of Scripture. It was the binding legal requirement, imposed by the crown, with penalties attached, that was the real nub of the problem with the liturgy for Puritan minds. While opposing the legal imposition of set liturgies, the Assembly was not abandoning liturgies as such. The Directory for the Publick Worship of God contains a range of model prayers to be used in the regular service, at the start, before the sermon, after the sermon, before and after baptism, during and after communion ...”, *ibid.*, 303-304.

⁸⁷ M. Stanton Evans, *The Theme is Freedom*, (Washington, D.C.: Regnery Publishing, Inc., 1994), 15-16.

⁸⁸ (Cambridge, Massachusetts & London, England: Harvard University Press, 1983).

In order to have a better understanding of Rutherford's quest for a constitutional model it is important to clarify the relevance and meaning of ideas related to 'divine imminence', 'the depravity of man', 'toleration', 'scepticism' and 'freedom'. For Rutherford and his supporters these issues served as important motivations for seeking an effective model for the regulation of society. The ideas related to Divine eminence and opposition to too much scepticism regarding man's ability to obtain religious truth provided a renewed trust in the ability of man to participate in political activity, which is an understanding central to republicanism. This understanding had to be balanced with the understanding of man's depraved nature and the consequent risks attached to unlimited toleration, which in turn required a constitutional model for regulation and the seeking of freedom understood in the context of seventeenth-century Europe.

2.3 The soteriological purpose of the law and government

There is the understanding that the ultimate social state "wherein righteousness dwells" lies beyond the present age of history (and even beyond the mixed state of the millennium) in the consummated "new heavens and earth" (2 Pet. 2:13; cf. Rev. 21:1-22:5). However, bearing in mind that the idea of a perfect world or society should not be promoted, the aim should be that until that time comprising the end of the world, it should be the Christian's aim to let the light of Jesus Christ and His Word dispel *as much as possible* the darkness of our rebellious world. Christ does not expect His followers to prefer more darkness to less, but to *reform* their societies as much as possible in anticipation of the world that is coming.⁸⁹ It is in this regard that Rutherford would opt for the view that politics help *prepare* the coming kingdom – in other words, politics can be applied to work towards reformation, where the church

⁸⁹ Greg L. Bahnsen, "Westminster Seminary on Pluralism", 89-111, in *Theonomy. An Informed Response*, Gary North (ed.), (Tyler, Texas: Institute for Christian Economics, 1991), 104-105. In this regard, Bahnsen states that the question should be: "(1) according to the Bible, do our inevitable sufferings issue in *greater or lesser* manifestations of Christ's saving rule on earth, breaking the power of sin, and (2) should our inevitable sufferings as obedient followers of the Messiah deter us from *striving* to persuade men and societies to submit to His rule (and rules)? Scripture teaches us that our laboring is not in vain and that tribulation is not incompatible with greater manifestation of Christ's saving dominion. Scripture teaches us that persecution and hardship are no obstacles to the Great Commission that we teach the nations to obey all that Christ has commanded. I do not see how any legitimate charge of 'triumphalism' can be laid at our feet for believing these *biblical* truths", *ibid.*, 105-106.

and state (keeping at their proper tasks) promote piety and justice.⁹⁰ Implied in this is Rutherford's quest for a constitutional model.

According to Rutherford, only the church and state is important to bring about a reformation of religion as, "Reformation of religion is a personal act that belongeth to all, even to any one private person according to his place".⁹¹ Because God uses creation as a means towards executing (within his divine providence) the decree of election; the social order itself, through the policies of the state, become a means in the conversion of the elect.⁹² In fact, Creation became God's instrument in the implementation of the covenant of grace. The ordinary use of means may now, according to Rutherford, through the awesome mystery of God's providence, lead to the regeneration of men as well as to the betterment of their earthly lot as God wills.⁹³ In this regard, as is made clear in Chapter 2, political covenanting formed part of this encompassing covenant of grace.

The German, Swiss, French, English and Scottish Reformations (together with Augustine) viewed the march of history essentially as a linear development, a gradual unfolding of God's purpose for the world, while the humanists by contrast claim that the course of human events can be shown to proceed in a series of recurring cycles.⁹⁴ The eschatological connotations provided the Christian community with a rational sense of purpose, hope as well as worth, and consequently with an added sense of responsibility and accountability to a Supreme Being (in the most ultimate sense). This is in contrast to liberalism's fixation upon the naïve idea of a neutral state, which has caused it to be less than critical about goals and purposes exceeding the confines

⁹⁰ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 67. Also, in the words of Burgess in the context of Rutherford's political theory, "Political change has the end therefore of promoting God's purposes", *ibid.*, 64. This insight needs to be understood against the background that it can only be God's doing in converting a substantial number of individuals towards the Christian faith so as to establish a public sphere conducive towards such a paradigm. Rutherford was also clear on this.

⁹¹ *Lex, Rex*, xxiii (of the author's Preface).

⁹² Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 56.

⁹³ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 47.

⁹⁴ Quentin Skinner, *The Foundations of Modern Political Thought*, Vol. 1: *The Renaissance*, (Cambridge: Cambridge University Press, 1978), 109-110. This was similar to Medieval thinking, see Marjorie Reeves, "History and Eschatology: Medieval and Early Protestant Thought in Some English and Scottish Writings", *Medievalia et Humanistica: Studies in Medieval and Renaissance Culture*, New Series, 4(1973), 101 and 102-103.

of physical preservation. Irreligious contributions in political theory fail to provide a clear account of either utilitarian or so-called ‘higher’ ends of government and society. For example, Bodin, who in his attempts at superseding happiness, material and utilitarian advantages, never gave a clear account of these ‘higher’ ends of the state, which left a gap in explaining precisely the reasons for the citizens’ obligation to obey the sovereign.⁹⁵ Rutherford’s theocentric understanding of the law, its purpose for society and the relevance of constitutional and consequent republican principles were inextricably connected to this eschatological understanding of God’s soteriological purpose for the world. This exceeded the importance of *salus populi suprema lex* (the safety of the people is the supreme law). For example, Rutherford emphasises that the defending of religion by the ruler is for the saving of souls.⁹⁶

In modern liberal thinking, concepts such as the ‘highest good’, ‘public interest’, ‘common good’ and ‘the safety and preservation of society’ are relied upon as the ‘final cause’ of politics. Reformed political theory provides its own unique understanding with regard to this ‘final cause and purpose’, not limiting itself to the mere attainment of happiness and effective inter-relationships (and the accompanying normative fluctuations), but rather aspiring towards the attainment of God’s revealed will for the individual and society as reflected in the whole of Scripture, with happiness and social effectiveness as by-products (and with an accompanying stable normative system). Consequently, the proximate end for which God has ordained magistrates is the promotion of the public good, and the ultimate end is the promotion of His own glory. Man is also ascribed soteriological hope in this regard. This evidently follows from the revealed fact that the glory or manifested excellence of the Creator is the chief end He had in the general system of things; hence, the appointed chief-end of each intelligent agent.⁹⁷

The view on ‘common good’ for society obtains added meaning against the background of the covenanted Christian community – the community that follows in the religious precepts of God is met with favour, while the community that violates

⁹⁵ George H. Sabine, *A History of Political Theory*, 3rd Edition, (London: George G. Harrap & Co. Ltd., 1963), 402-403. Bodin provided “a major defect of theoretical construction, because his theory of sovereignty was left standing merely as a definition of something which sometimes exists but for which he has no explanation”, *ibid.*, 404-405. Also see *ibid.*, 413-414.

⁹⁶ *Lex, Rex*, 56(1), 70(1), 72(1) and 105(1).

⁹⁷ A. A. Hodge, *The Confession of Faith*, (Edinburgh and Carlisle, Pennsylvania: The Banner of Truth Trust, Reprint of the 1869 edition), 295.

the true religion suffers God's displeasure. The covenantal dimension can therefore indirectly contribute to the soteriological 'success' of the community of souls. Although John Calvin dealt with the soteriological aspects of magistracy, much is owed to the theologico-political federalists for their emphasis on the covenantal implications of the office of magistracy in the context of soteriological politics. Rutherford also contributed in this regard.⁹⁸

Contrary to the Kantian model, man is not the end,⁹⁹ but the *means* towards the glorification of God. As Plato's statesmen had to enquire what this good was and consequently what was required to make a good state,¹⁰⁰ Puritan constitutional, political and jurisprudential theory interprets this good as being primarily speaking to glorify God and to provide structures conducive to the working of the Spirit. The importance of spiritual progress made the Puritans (including Rutherford) to conceive a society where the state was only a framework to protect the growing spontaneous life of the spirit. In less religious times, the freedom of the spirit became the freedom of scientific research.¹⁰¹ Since at least the seventeenth century, enlightened intellectuals have been fascinated with the attempt to replace the fear of the hereafter as the basis for morality with a more natural scientific psychology. It was thought that men must be convinced that their fullest satisfaction would come from the subordination of their individual loves to the greater good of the whole. In this regard, the public good was, as it were, a common bank in which every individual had his respective share.¹⁰² In other words, God was no longer given a place in Western political and legal theory and the purpose of society shifted from a theocentric to an anthropocentric understanding.

This affected constitutional thinking accordingly. The Reformation went further than postulating a limited idea of the ends of the community as shown in, for example,

⁹⁸ See Shaun de Freitas and Andries Raath, "Samuel Rutherford and the Soteriological Implications of the Office of Magistracy in the Covenanted Christian Community", *Journal for Christian Scholarship*, Vol. 43, 3rd & 4th Quarter, (2007), 31-50. Bettina Koch, in observing Althusius' views in this regard, states: "The right of the realm is not limited to the welfare of the political body; it also covers the soul's welfare", Bettina Koch, "Johannes Althusius: Between Secular Federalism and the Religious State", 75-90, in *The Ashgate Research Companion to Federalism*, Ann Ward and Lee Ward (eds.), Farnham, Surrey, England: Ashgate Publishing Company, 2009, 80.

⁹⁹ Sabine, *A History of Political Theory*, 433.

¹⁰⁰ Sabine, *A History of Political Theory*, 46.

¹⁰¹ A. D. Lindsay, *The Modern Democratic State*, Vol. 1, (Oxford University Press), 168.

¹⁰² Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, (Chapel Hill: The University of North Carolina Press, 1969), 69.

Aristotle's *polis* as a purely human creation designed to fulfil everyday ends.¹⁰³ The German, Swiss, French, English and Scottish Reformations also enriched Augustine's view that political society was a divinely ordained order imposed on fallen men as a remedy for their sins.¹⁰⁴ Rutherford understood the *individual and the collective as an active means to an end* based on the covenant and the law in a theocentric sense, which differed from the anthropocentric view in support of the *individual and the nation as the end*. This is similar to Aquinas' affirmation that states (*civitas*) exist to pursue the ultimate ends of human life, and more specifically emphasised that "the ultimate end of the whole universe is considered in theology, which is the most important without qualification".¹⁰⁵ Rutherford's emphasis on the important role of the law and politics for the attainment of divine purposes was the continuation of the medieval break from the approach by the Church Fathers, who viewed human institutions as never being able to become good, and understood the Church as being supreme over political authority. In this regard, the Church's existence could be justified by protecting the peace and the Church.¹⁰⁶

Medieval thought (having reached its climax in the thought of Aquinas) broke decisively with this tradition, and understood political society and the state as having ceased to be institutions of sin; rather, they became the embodiment of moral purpose and instruments in the realisation of justice and virtue.¹⁰⁷ It is in this regard that Rutherford's views on primary and secondary causation provide a unique explanation

¹⁰³ See Skinner, *The Foundations of Modern Political Thought*. Vol. 1: *The Renaissance*, 50.

¹⁰⁴ The descriptions of Aristotle's and Augustine's views on the ends of political society are found in Skinner, *The Foundations of Modern Political Thought*, Vol. 1: *The Renaissance*, 50. In fact, similar to Reformed political thought, Augustine's *City of God* is described as a book about the 'optimal form of corporate human life' in light of its 'last end', Stanley Hauerwas, *The State of the University. Academic Knowledge and the Knowledge of God*, (Malden MA, USA: Blackwell Publishing, 2007), 142.

¹⁰⁵ Nicholas Aroney, "Before Federalism? Thomas Aquinas, Jean Quidort and Nicolas Cusanus", 31-48 in *The Ashgate Research Companion to Federalism*, Ann Ward and Lee Ward (eds.), (Farnham, Surrey, England: Ashgate Publishing Company, 2009), 35. In the words of Aroney: "Aquinas can thus agree with Aristotle as to the superiority of the city-state, but this is subject to the important qualification that he is here concerned with 'human matters', understood from the point of view of natural reason. The city seeks that which is highest 'among all human goods', but it does not seek that which is highest in an unqualified sense", 181.

¹⁰⁶ W. Friedmann, *Legal Theory*, 5th Edition, (London: Stevens & Sons, 1967), 104.

¹⁰⁷ Friedmann, *Legal Theory*, 105. "The medieval, as perhaps no other civilization, attempted to conform nature and history to a supernatural, invisible, but above all perfect, reality because reality was divine. Medieval man, also conscious of his misery and sin, tried in every way to make his own age an image of the eternal, beginning with those laws by which man was called to reign over the world in justice and peace", Andrea Padovani, "The Metaphysical Thought of Late Medieval Jurisprudence", in *The Jurists' Philosophy of Law from Rome to the Seventeenth Century*, Andrea Padovani and Peter G. Stein (eds.), *A Treatise on Legal Philosophy and General Jurisprudence*, Vol. 7, (Dordrecht: Springer, 2007), 77.

as to the political and legal means towards the ordering of society and the active role that the government played in the eschatological purpose of God for His Creation.¹⁰⁸

2.4 Conclusion

In this section, it was argued that a more nuanced approach to constitutional, political and legal thought of Rutherford necessitates a more in-depth discussion on the relevance of ideological context. The Reformations in sixteenth- and seventeenth-century Europe grounded their revolt also in biblical calls for freedom of the church from the tyranny of the pope, freedom of the laity from the hegemony of the clergy, freedom of the conscience from the strictures of canon law, freedom of the state from the rule of the church. John Witte adds that “freedom of the Christian” was the rallying cry of the early Protestant Reformation, and it drove theologians and jurists, clergy and laity, princes and peasants alike to denounce medieval church authorities and canon law structures with unprecedented alacrity.¹⁰⁹ Janet Ainsworth comments that, “Just as fish always in the sea have no consciousness of being wet, scholars always immersed in the ocean of their own normative order may well be unaware that this order permeates the very conceptual tools that they use in attempting to understand one another”.¹¹⁰ The metaphysical order in which a community is embodied provides more understanding and sensitivity to the reason why theorists say what they say. Overlooking this in an analysis on Rutherford will continue to frustrate scholars who remain bound to their own conceptual tools whilst attempting to understand ‘the other’. This, however, does not negate contributions towards constitutional, political and legal thought stemming from this era in history, which is of enduring relevance. This will be elaborated upon, especially in the Epilogue.

In sixteenth- and seventeenth-century Britain, the unity of religion and society, of religion and rationality, and the view that the entire Bible carries ultimate authority, were generally inherently accepted. It was especially in a region like sixteenth-century Scotland that the Reformation was most effective and where covenant theology was shared by most people. At the time, the cosmological and

¹⁰⁸ This is dealt with in more detail especially in Chapter 2 of this thesis.

¹⁰⁹ Witte, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, 27-28.

¹¹⁰ Janet E. Ainsworth, “Categories and Culture: On the ‘Rectification of Names’ in Comparative Law”, *Cornell Law Review*, Vol. 82, 1(1996), 31.

epistemological authority in Scotland was the Bible (as it was for the larger part of Europe). Rutherford's ability to argue accurately from such a source of authority requires appreciation, because the context in which he lived measured ability and insight in accordance with applying the Bible logically, coherently and informatively. Already more than half a millennium prior to Rutherford, Britain became substantially immersed in a Christian way of life where law and theology were not understood as separated entities, and where the whole of the Decalogue received priority.¹¹¹

Emanating from this context are further important and more specialised matters that require emphasis in order to provide more orientation towards a proper contextual understanding, and in turn provides a more lucid understanding regarding the nature and function of politics and the law. This also orientates one towards an improved understanding of Rutherford's thinking on constitutionalism. The first matter in this regard is the emphasis especially introduced by the early Reformation and confirmed by the later Reformers, namely the idea of 'divine imminence'. This entailed the teaching that the believer is internally (directly) influenced by God, which implies that every believer has knowledge of what is right and what is wrong. This view was coupled to the idea that a Christian society was composed of believers and therefore a Christian society composed of individuals who knew what was right and what was wrong had the capacity to participate fully in political activities. This heralded an important development towards the attainment of the republican principle related to the important status of the people, their active participation in governance and the law, as well as the idea of representation. In this regard, there was little scepticism in the believer's ability to participate actively in political and other activities, and man's relationship with God was viewed as real, direct and personal. However, this understanding was not to exclude a sense of depravity on the part of the individual believer, which brings one to the second important matter, namely the idea related to the depravity of man and its consequences for political and legal theory.

Viewing man as a sinful being necessitated political and legal intervention towards order, discipline and salvation. This included the quest towards seeking a constitutional model. God placed the power of accomplishing these ends in man's

¹¹¹ See for example, Stephen C. Perks', *Christianity and Law. An Enquiry into the Influence of Christianity on the Development of English Common Law*, (England, Avant Books, 1993).

nature against the background of His absolute providence. In order to counter this weakness in man, there was not only a need for governance and the external application of the law but also, more specifically, a need for the application of republican principles, namely social bonding, the superiority of the law, a politically active citizenry, representation, the division of powers in ruling and ecclesiastical structures and resistance towards political oppression. Thirdly, clarity on the meaning of toleration also provides better context and gives a better insight into the parameters of the application of the law. The depraved nature of man that necessitated a sceptical approach towards unlimited toleration and the law had to be applied accordingly. This especially pertains to the magistrate's role in the maintenance of the true religion (bearing in mind the distinctions to be drawn related to the functions of the civil ruler and that of the church), which is elaborated upon in Chapter 3. This understanding was in contrast to those who supported a sceptical approach to biblical truths; an understanding which would eventually gain in momentum and which leads to the privatisation of religion and an 'anti-religious public sphere' in modern liberal Western societies. Freedom also requires a specific understanding connoted to sixteenth- and seventeenth-century Reformed thinking and which consequently provides valuable insights into the relevance of politics and the law.

Fourthly, there is the idea related to the soteriological purpose of the law and of government. God uses creation as a means towards executing salvation. This entails that politics and the law serve as a means towards the accomplishment of grace. In this regard, the mere attainment of happiness and order in society is not the final goal of the law, but rather the law is to serve the accomplishment of salvation and the glory of God. Bearing in mind the above, a reasoned argument is presented regarding Rutherford's political and legal thinking and consequently his thinking on constitutionalism. By ignoring important matters related to 'divine eminency', 'human depravity', 'limited toleration', 'freedom' and 'the soteriological purpose of government', a skewed understanding of Rutherford's approach to politics and the law is presented. These factors assist in reconciling reason and revelation when looking at the constitutional mind of Rutherford. In the following section, the influence of the legacy of republican thought on Rutherford is investigated, which confirms his allegiances towards the attainment of a constitutional model for the society he was living in.

3. *Lex, Rex*'s republicanism and the historical heritage

3.1 Introduction

In the previous section, the context of sixteenth- and seventeenth-century Europe was explained, providing a more nuanced understanding of the constitutional, political and legal thought of Rutherford. Included in this were the increasing threats in support of absolutist rule and the prioritisation of natural law over and against religion. Examples of these are Bodin's emphasis on political power, which fed later schools of political thought that would support an overwhelmingly positivist application of the law to political power, whilst Grotius (1583-1645) furthered the development of a noteworthy separation between the Bible and human reason.¹¹² This would be followed and developed upon by John Locke (1632-1704), whose political theory had a major impact in the West, especially during the founding era of American political history. This also has implications for the understanding of the relationship between church and state as well as the relationship between religion and the public sphere. Scepticism in biblical truth and in religious uniformity was gaining momentum. In an effort to counter these developments, Rutherford postulated a republican theory for the regulation of society. This relied substantially on the importance both of covenantal and rule of law thought, as well as other basic republican principles, such as the office of rulership, the importance of the people and an active, equal and representative citizenry, the division of powers in political activity, and resistance towards political oppression.

Rutherford was not the first to express views on the importance of the said republican principles. It was these very principles that came under threat in the early seventeenth century. Grotian and Bodinian influences resulted in a weakening of the idea of the Covenant as understood by theologico-political federalist thinking, which emphasised the covenant between God and the Christian Republic. This had implications for how the law was to be understood. The understanding of the law was also moving towards a less biblically substantiated content, being gradually replaced by reason and the

¹¹² Grotius reduced Christianity to a few basic tenets, focusing on a minimal faith and opposing the view that the diversity of opinions within Christendom belied the excellence of its doctrines. In this regard Grotius' *De Veritate* of 1627 played a major role. Grotius also tried to explain the Old Testament as an autonomous source that had functioned in its own time. For more on this see for example, Henk Nellen, "Minimal Religion, Deism and Socinianism: On Grotius's Motives for Writing *De Veritate*", *Grotiana*, Vol. 33, 1(2012), 25-57.

command of the ruler. Bodinian traits of monarchical absolutism was also posing a serious threat to an active participatory citizenry and its representation, not to even mention the threats that arose towards the division of powers and the idea of mixed government.

Intertwined with such principles emanating from *Lex, Rex*, was the legacy of similar earlier ideas stemming from ancient Hebrew, Greek and Roman thought, and those of the Church Fathers, the Glossators, the Commentators of the thirteenth and fourteenth centuries and the Canonists, as well as the Spanish Catholic authors around the sixteenth century. Republicanism not only serves as a useful tool towards providing an informed understanding and appreciation of Rutherford's contribution to the limitation of absolute power and a constitutional model for society based on the rule of law, but also brings Rutherford's thinking in line with the contributions stemming from a rich legacy of preceding political and constitutional thought. Brian Tierney comments that:

The similarities of thought among writers of very different religious convictions are not merely coincidental. In seventeenth-century writings we can find Calvinist and Catholic political theorists quoting each other's works approvingly, relying on one another for authority in this particular sphere without any evident sense of embarrassment. I think they could do this only because they were all drawing on a common tradition of thought.¹¹³

There are perhaps few political concepts that have so many diverse interpretations as those of republicanism.¹¹⁴ This chapter provides a specific understanding of republicanism where the biblical covenant, the Divine law with its natural law component, the participation and representation of the individual and the community, as well as the division of power and resistance to tyranny, form the backbone to a

¹¹³ Brian Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, (Cambridge: Cambridge University Press, 1982), 3-4.

¹¹⁴ See Akhil Reed Amar, "The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem", *University of Colorado Law Review*, Vol. 65, 4(1994), 749; Andrew Heywood, *Political Theory. An Introduction*, 3rd Edition, (New York: Palgrave Macmillan, 2004), 205; Robert E. Shalhope, "Republicanism and Early American Historiography", *The William and Mary Quarterly*, Vol. 39, 2(1982), 335; Gordon S. Wood, "Classical Republicanism and the American Revolution", *Chicago-Kent Law Review*, Vol. 66, 1(1990), 14; G. Stourzh, *Alexander Hamilton and the Idea of Republican Government*, (Stanford, California: Stanford University Press, 1970), 44; John W. Maynor, *Republicanism in the Modern World*, (Cambridge, UK: Polity Press, 2003), 4; and Walter S. H. Lim, *John Milton, Radical Politics, and Biblical Republicanism*, (Cranbury, NJ: Associated University Press, 2006), 14.

biblical idea of republicanism, identifiable in the thought of Rutherford. The republican project was a project spanning many centuries of thinking, working towards the attainment of an effective constitutional model for the freedom and regulation of society. Rutherford played an important role in this project, whether by re-emphasising certain aspects (also in unique ways) or by providing new ideas to already established ones. *Lex, Rex* also reconciles the fundamental republican principles with Scriptural authority.

The different meanings regarding republicanism do not alleviate the complexities accompanying such a concept. Be as it may, this investigation brings essential characteristics to the fore of what could be understood as central elements related to the republican project. These elements formed a visible path through the centuries of Western political and constitutional thought. Along this path, one finds the culmination of many of these elements in *Lex, Rex*. Although not all the sections of this path look the same (where different contexts provide different forms to the path) there are many similarities. The Reformations in the sixteenth and seventeenth centuries did not present a political and constitutional theory that was foreign to what Europe had experienced and witnessed in over a millennium of its directly preceding history, where theology had been substantially interwoven with all aspects of reality. In other words, the Reformation did not establish a *sui generis* Protestant political theory. Sixteenth- and seventeenth-century political scholars shared the same core ideas, which extended back into Western theoretical political antiquity. Many of these core ideas can be encapsulated in the concept of republicanism; therefore, the historical legacy of republicanism and its parallels with Rutherford's thinking, especially as reflected in *Lex, Rex*, are emphasised next.

3.2 Republicanism

3.2.1 Introduction

Ellis Sandoz speaks of the Federalist and Anti-federalist debates over the true meaning of republicanism.¹¹⁵ P. J. D. Jacobs refers to “American Republicanism” which, according to George Washington, required Christianity in order to be

¹¹⁵ Ellis Sandoz, *Republicanism, Religion, and the Soul of America*, (Columbia, Missouri: Missouri University Press, 2006), 91.

successful, and on the other hand, “French Republicanism without Christian principles”.¹¹⁶ Richard Epstein states that ‘republicanism’, defined in structural terms, could and did include within its ‘capacious’ confines thinkers who disagreed on a wide range of issues, such as Harrington, Locke and Adams.¹¹⁷ Iseult Honohan speaks of the diverse strands of the historical tradition, which reflect a dispute about what republicanism means today and what it has to offer: “There is, in effect, a battle for the soul of republicanism, in which alternative historical strands have been marshalled to support the credentials of contemporary expressions”.¹¹⁸ Cicero’s character in *De Re Publica* (Scipio) finds relevance to constitutional and political discourse, more specifically to the concept of republicanism in his comment that:

... if the name of a subject is agreed upon, the meaning of this name should first be explained. Not until this meaning is agreed upon should the actual discussion be begun; for the qualities of the thing to be discussed can never be understood unless one understands first exactly what the thing itself is. Therefore, since the commonwealth is the subject of our investigation, let us first consider exactly what it is that we are investigating.¹¹⁹

There is a meaning of ‘republicanism’ that is connoted to the legal theory of “republican Rome, as revived in Renaissance Italy, restated in Commonwealth England, realised in George Washington’s North America, and reanimated by the French Revolution.”¹²⁰ The most important authors in this tradition include Polybius, Cicero, Titus Livy, Niccoló Machiavelli, James Harrington, Algernon Sidney, John

¹¹⁶ P. J. D. Jacobs, *The Influence of Biblical Ideas and Principles on Early American Republicanism and History*, (Dissertation in partial fulfilment of Philosophiae Doctor, Faculty of Theology of the Potchefstroom University for Christian Higher Education, 1999), 147. Although Jacob’s theme refers to republicanism, and provides definitions preceding his investigation, he fails to provide a definition of republicanism.

¹¹⁷ Richard A. Epstein, “Modern Republicanism – Or the Flight From Substance”, *The Yale Law Journal*, Vol. 97, 8(1988), 1634.

¹¹⁸ Iseult Honohan, *Civic Republicanism*, (London: Routledge, 2002), 6-7.

¹¹⁹ Cicero, *De Re Publica*, 63, Book 1, XXIV, with an English translation by Clinton Walker Keyes, (London & Cambridge, Massachusetts: Heinemann Ltd & Harvard University Press, 1928 [reprint 1943], The Loeb Classical Library, T. E. Page, E. Capps, L. A. Post, W. H. D. Rouse, and E. H. Warmington [eds]). In his *De Officiis*, Cicero states: “For every systematic development of any subject ought to begin with a definition, so that everyone may understand what the discussion is all about”, *De Officiis*, Book I:ii, The Loeb Classical Library, T. E. Page; E. Capps; and W. H. D. Rouse (eds), (London: William Heinemann Ltd, New York: G. P. Putnam’s Sons, First print 1913, Reprinted 1921, 1928), 9.

¹²⁰ M. N. S. Sellers’, “Republican Liberty” (in *Jurisprudence of Liberty*) cited in Mortimer Sellers’, “Republicanism, Liberalism, and the Law”, *Kentucky Law Journal*, Vol. 86, 1(1997-98), 2 in *Cicero and Modern Law*, Richard O. Brooks (ed.), (Farnham, Surrey: Ashgate Publishing Company, 2009), 514.

Adams, James Madison and Jean-Jacques Rousseau.¹²¹ The central elements to such an understanding of republicanism include pursuit of the common good through popular sovereignty and the ruler of law, under a mixed and balanced government comprising a deliberative senate, an elected executive, and a popular assembly or representative lower house in the legislature.¹²² The meaning to be ascribed to republicanism in this thesis is substantially similar to this understanding, where social bonding and the covenant, the law's superiority, an active and representative citizenry, divisions of political power and resistance towards tyranny, form the main attributes of republicanism. These elements of republicanism formed part of a rich historical legacy, which was ardently consulted by the political and legal theorists in the sixteenth and seventeenth centuries.

A considerable body of radical political ideas had already been built up in the course of the later Middle Ages, and reached a new peak of development at the start of the sixteenth century.¹²³ European political thought in the sixteenth century drew upon two major resources, namely Aristotelian philosophy and Roman jurisprudence.¹²⁴ University education in late sixteenth- or early seventeenth-century England would have been required to study the original Latin texts of, among others, Cicero, Sallust, Livy¹²⁵ and Tacitus.¹²⁶ Myron Gilmore comments that “one has only to pick up any of the works of Dumoulin, Charondas, Bodin or Loyseau (to mention some of the most important French theorists of the sixteenth century), to see how much they depended not only on the citation of the Roman texts, but also on the long line of authors from

¹²¹ Mortimer Sellers', "The Republican Legal Tradition", cited in Sellers, "Republicanism, Liberalism, and the Law" in *Cicero and Modern Law*, 514.

¹²² M. N. S. Sellers', *American Republicanism: Roman Ideology in the United States Constitution*, cited in Sellers, "Republicanism, Liberalism, and the Law" in *Cicero and Modern Law*, 514-515.

¹²³ Quentin Skinner, *The Foundations of Modern Political Thought. Vol. 2: The Age of Reformation*, (Cambridge: Cambridge University Press, 1978), 114.

¹²⁴ Donald R. Kelley, "Elizabethan political thought", 47-79, in J. G. A. Pocock (ed.), *The varieties of British political thought, 1500-1800*, (Cambridge: Cambridge University Press, 1993), 64.

¹²⁵ Livy lived in the period approximately from 59 BC to 17 AD and was a Roman historian who wrote a formidable work on the history of Rome and the Roman people. *Lex, Rex* refers to Livy.

¹²⁶ Quentin Skinner, "Classical Liberty and the Coming of the English Civil War", in Martin van Gelderen and Quentin Skinner (eds.), *Republicanism. A Shared European Heritage*, Vol. II, (Cambridge: Cambridge University Press, 2002), 9-10. Nicholas Grimalde's translation of Cicero's *De officiis* was issued as early as 1556 and became a best-seller in 1558 when it appeared in a dual-language version, *ibid.*, 10. Henry Savile's translation of Tacitus' *Historiae* and *Agricola* had been published in 1591, with Richard Grenewey's versions of the *Annals* and *Germania* following in 1598, *ibid.*, 10. Tacitus was born in 56 AD and was a senator as well as a historian of the Roman Empire. *Lex, Rex* refers to Tacitus.

the Glossators to their own time who had commented on the Roman texts”.¹²⁷ Propositions such as the view that the ruler is a delegate of a sovereign people; that secular authority is created by the act or recognition of the community; and the doctrine that a idolatrous ruler may rightfully be deposed by force, could all be derived either from the *Corpus Juris* or from medieval writings.¹²⁸

3.2.2 *The historical heritage*

3.2.2.1 *Introduction*

Lex, Rex makes no pretence to great originality, but is an example of how the thought of (among others) George Buchanan (1506-1582), the continental monarchomachs, and Johannes Althusius came together to support the rule of law, a popular voice in government, and limited monarchy.¹²⁹ However, there is more to this. *Lex, Rex* relied on an older legacy of republican thinking. By the seventeenth century, very complex structures of constitutional ideas had grown into existence in the Western world after centuries of significant change.¹³⁰ These ideas were not suddenly engendered out of nowhere in the crises of the seventeenth century.¹³¹ John Figgis states that: “In the structural development of society and the fundamental topics of human discussion there has been more continuity than in outward history; and despite all their differences the thoughts of men, form a more living unity than their empires or even their roads.”¹³²

That Rutherford was influenced by the constitutional, political and legal contributions of preceding centuries is confirmed in *Lex, Rex*. Rutherford was indebted to the

¹²⁷ Myron Piper Gilmore, *Argument from Roman Law in Political Thought 1200-1600*, (Cambridge: Harvard University Press, 1941), 5. This also included a reliance on the works of the Italian jurist and Commentator, Baldus, see Joseph Canning, *The Political Thought of Baldus De Ubaldis*, (Cambridge: Cambridge University Press, 1987).

¹²⁸ J. W. Allen, *A History of Political Thought in the Sixteenth Century*, (London: Methuen and Co. Ltd., 1977), 360.

¹²⁹ Peter J. Herz, *Covenant to Constitutionalism: Rule of Law as a Theological Ideal in Reformed Scotland*, (A dissertation submitted in partial fulfilment of the requirements for the Doctor of Philosophy degree), (Department of Political Science in the Graduate School, Southern Illinois University at Carbondale, 2001), 154.

¹³⁰ The sixteenth and early seventeenth centuries included a flourishing of an unprecedented diversity of schools and theories, which combined traditional elements and novel developments, or found new uses for well-traversed concepts, Oliver O’ Donovan and Joan Lockwood O’ Donovan (eds), *From Irenaeus to Grotius. A Sourcebook in Christian Political Thought 100-1625*, (Grand Rapids, Michigan, Cambridge, U. K.: William B. Eerdmans Publishing Company, 1999), 549.

¹³¹ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, x.

¹³² John N. Figgis, *The Divine Right of Kings*, (Cambridge: Cambridge University Press, 1914), 372.

Middle Ages for his theories on law. The new religious order introduced by the German, Swiss, French, English and Scottish Reformations lead theorists to determine as to how a reactionary ruler could be resisted lawfully and replaced. For this, theorists were unwilling and unable to jettison their intellectual heritage completely.¹³³ This is what happened when some Continental and Scottish thinkers devised a revolutionary doctrine out of two old ideas namely: the ‘superior status of law’ and the ‘social contract’. In the words of Omri Webb: “Rutherford’s argument that a people have rights against an erring king is based on the second as well as the first idea.”¹³⁴

The sixteenth-century political Reformed theorist Johannes Althusius knew many medieval authors at first hand, whilst other medieval doctrines were known to him through their transmission by later authors.¹³⁵ Althusius treated the Roman codebooks of the *Corpus Iuris Civilis* and the commentaries of the Glossators and the Bartolists “as a kind of legal supermarket supplying concepts and doctrines which could be used eclectically for the analysis of political and constitutional questions.”¹³⁶ The striking

¹³³ Webb, *The Political Thought of Samuel Rutherford*, 138-139.

¹³⁴ Webb, *The Political Thought of Samuel Rutherford*, 139. The Sophists theorized that a social compact came into being as men, who were living in constant war in a lawless state of nature, learned that in order to have an individual freedom, each man had to give up some of his freedom to act completely independent, J. W. Gough’s, *The Social Contract*, cited in, Webb, *The Political Thought of Samuel Rutherford*, 140. A second form of contract could be called a ‘contract of government’ (or a contract of submission), in which the people are thought to have made a contract with their ruler in which they promise obedience to him, and he promises good government and protection of the people. Roots of this idea are found in the early Middle Ages in such teachings as the Augustinian concept that secular government is an artificial institution made for the benefit of sinful man; in the Teutonic theory of kingship with its practice of the election and coronation of kings; and in the contractual nature of feudalism, *ibid.*, 140

¹³⁵ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 71. The *Vindiciae Contra Tyrannos*, which Althusius often quoted, assisted to remind Protestant political theorists of medieval conciliar ideas, *ibid.*, 71. In similar fashion, *Lex, Rex* refers to the *Vindiciae* no less than seven times. The *Vindiciae* of 1579 is, according to Omri Webb, the most famous and influential of the Monarchomachs’ tracts in opposition to suppression. However, Rutherford, as pointed out by Webb, often quoted Beza and Hotman who also formed part of Monarchomachist thought, Webb, *The Political Thought of Samuel Rutherford*, 154c-154d. In the words of Webb: “The name ‘monarchomach’ was used first by William Barclay, the royalist writer, in his *De regno et regali potestate* (1600), one of the works which Rutherford singles out for extensive refutation in *Lex, Rex*. The name did not imply necessarily opposition to monarchy as such, but was applied simply to writers who in general justified the right to resist a ruling authority”, *ibid.*, 154c (with a citation to George Sabine’s, *A History of Political Theory*).

¹³⁶ Peter Stein’s *Roman Law in European History* cited in Daniel Lee, “Popular Liberty, Princely Government, and the Roman Law in Hugo Grotius’s *De Jure Belli ac Pacis*”, *Journal of the History of Ideas*, Vol. 72, 3(2011), 372. Also see Frederick S. Carney, “Translator’s Introduction”, xiii-xxxvii, in Frederick S. Carney, *The Politics of Johannes Althusius*, (An abridged translation of the Third Edition of *Politica Methodice Digesta, Atque Exemplis Sacris et Profanes Illustrata* [The digest on political method and illustrating examples of the sacred and the secular], including the prefaces of the first and second editions and with a preface by C. J. Friedrich, [London: Eyre and Spottiswoode, 1964]), xxx.

overlap between Rutherford's and Althusius' political and constitutional thinking includes Rutherford in this sharing of this Roman law, and Medieval and Bartolist heritage through Althusius (whether directly or indirectly). Bartolus was one of the legal writers that Althusius substantially supported.¹³⁷ The Spanish Catholics were quoted far more by Rutherford than any other was. This is an indication of the extent to which Rutherford had been influenced by the scholastic revival that had originated at the Spanish Universities.¹³⁸ Underlying scholastic legal science was the belief that the authoritative legal texts both of canon law and of Roman law embodied a universal truth and a universal justice, and therefore they could be taken as starting points for apodictic reasoning, which would establish new insights into truth and justice.¹³⁹ Althusius¹⁴⁰ acknowledged this debt not only to Luther and Melancthon, but also to the great scholastic jurists of earlier times.¹⁴¹

John Coffey also refers to Rutherford's radical scholastic theory that royal power was derived from the community,¹⁴² and that he used a series of scholastic distinctions throughout his early chapters in *Lex, Rex*.¹⁴³ Even *Lex, Rex*'s discussions on the 'origin' of political authority found at the beginning of this work attests to a medieval background. Classical authors too had sometimes discussed the origins of government. When theorists purport to investigate the origins of political authority they are really trying to explain the grounds of political legitimacy and that this form of argument has a medieval background.¹⁴⁴ Looking at Rutherford, we have a theory that "is surprisingly medieval in its emphasis on the law of God, the national church and a concept of society which, whilst recognising the distinctiveness of the

¹³⁷ Carney, "Translator's Introduction", xxx.

¹³⁸ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 74-75.

¹³⁹ Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, 109.

¹⁴⁰ Together with other German jurists of the fifteenth and sixteenth centuries who played a decisive role in creating the new legal science, such as Johann Apel (1486-1536), Konrad Lagus (ca. 1499-1546), Johann Oldendorp (ca. 1488-1567) and Nicolas Vigelius (1529-1600).

¹⁴¹ Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, 110.

¹⁴² Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 158.

¹⁴³ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 159. Here Coffey specifically mentions Rutherford's emphasis that the office of government was natural, but that the particular person who held the office and the form of government were appointed by the voluntary choice of the people, *ibid*.

¹⁴⁴ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 35-39.

individual citizen, also places great emphasis on the paramountcy of his interactive contribution to and within the body corporate.”¹⁴⁵

Catholics and Protestants drew upon the same Christian heritage and the same body of European political experience. The scholars of all churches had the same stock of ideas, which was a rich and varied body of thought extending continuously back to the eleventh century and embodying a tradition which carried it back to antiquity.¹⁴⁶ In general, the Church Fathers accepted the political *status quo*, and they aimed at devising a synthesis between Christianity and classical culture in terms of the theory of the Natural Law. It may be said in general that in respect to human equality, property rights, and the necessity of justice in the state, the Church Fathers were substantially in agreement with Cicero and Seneca.¹⁴⁷ The acceptance by the Church Fathers of the greater part of the values, institutions and legal system of the Roman Empire was equivalent to affirming that Graeco-Roman culture was fundamentally good and therefore could be incorporated into the larger Christian framework.¹⁴⁸

Similarly, the possibility should not be ignored that their background in Roman law sensitised the Reformers and their disciples to the covenantal and legal categories of Scripture.¹⁴⁹ Here it needs to be noted that ‘Roman law’ is open to various meanings such as the Roman law of the *Twelve Tables* and the post-Justinian Roman law of the Eastern Roman Empire, which are only remotely related to the Western legal tradition.¹⁵⁰ Even that part of Roman law that substantially contributed to Western legal systems, especially the texts collected under Emperor Justinian’s auspices, have undergone radical changes of interpretation in the course of making their contributions.¹⁵¹ The Western Romanist jurists of the eleventh to the fifteenth centuries concentrated largely on Justinian’s *Digest*, glossing its thousands of scattered legal rules and decisions and then writing commentaries on the glosses. Jurists of the sixteenth to the eighteenth centuries focused their attention mainly on

¹⁴⁵ Muttitt, “The Conception of Liberty in Samuel Rutherford’s *Lex, Rex*”, 39.

¹⁴⁶ Sabine, *A History of Political Theory*, 354.

¹⁴⁷ Hebden E. L. Taylor, *The Christian Philosophy of Law, Politics, and the State*, (Nutley: The Craig Press, 1966), 149.

¹⁴⁸ Taylor, *The Christian Philosophy of Law, Politics, and the State*, 151.

¹⁴⁹ Herz, *Covenant to Constitutionalism: Rule of Law as a Theological Ideal in Reformed Scotland*, 101.

¹⁵⁰ Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, 101.

¹⁵¹ Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, 101.

Justinian's *Institutes*.¹⁵² Therefore, says Harold Berman, "Roman law must be seen as an evolving element in an evolving legal tradition."¹⁵³

Roman law became one of the greatest intellectual forces in the history of European civilization, because it provided principles and categories in terms of which men thought about all sorts of subjects including politics.¹⁵⁴ For several centuries after the rediscovery of the *Digest*, Roman public-law concepts such as *imperium* and *iurisdictio* supplied the basic vocabulary of debate about sovereignty, the powers of emperor and of city, and the relations between emperor and magistrate. Their potency lay in an abstraction, which permitted ready transfer to modern institutions, and little hesitation was felt about such transfers. The Roman jurists had not employed that rule in that manner.¹⁵⁵ The Roman jurists had also been sparing in defining concepts and it was open to their successors, when they took over Roman terms, to reshape them for their own purposes.¹⁵⁶ The Protestant rationalists sought their backing in ancient statements rather than in those of medieval philosophers, which made it possible for them to find the roots of their thinking in Roman law (in spite of their critical attitude toward the *Corpus Iuris*).¹⁵⁷ Hans Wolff adds, "But many of the solutions proposed by Roman jurists – as well as many of the theories derived from those solutions by expounders from the Glossators to the *Usus Modernus* – were in actual agreement with what seemed 'natural' and therefore rational ..."¹⁵⁸

It may appear paradoxical to treat the Roman law as one of the major sources of modern constitutionalism. In this regard, there is no doubt that the authority of the *Digest* was constantly invoked by aspiring absolutist rulers in order to legitimise the

¹⁵² Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, 101. Berman states that what was taught from the early part of the eleventh century at Bologna was the Roman law compiled by Justinian's jurists. This manuscript consisted of four parts namely; the Code (comprised of twelve books of ordinances and decisions of the Roman emperors before Justinian); the Novels (containing the laws promulgated by Justinian); the *Institutes* (a short textbook acting as an introduction for law students starting off) and; the *Digest* (whose fifty books contained many extracts from the opinions of Roman jurists on a wide variety of issues); Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 127.

¹⁵³ Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, 101.

¹⁵⁴ Sabine, *A History of Political Theory*, 168.

¹⁵⁵ David Johnston, "The General Influence of Roman Institutions of State and Public Law", 87-101 in D. L. Carey Miller and R. Zimmermann (eds.), *The Civilian Tradition and Scots Law*, (Aberdeen Quincentenary Essays [*Schriften zur Europäischen Rechts-und Verfassungsgeschichte*, Bd. 20] Berlin: Duncker & Humblot, 1997), 96.

¹⁵⁶ Johnston, "The General Influence of Roman Institutions of State and Public Law", 96.

¹⁵⁷ Wolff, *Roman Law. An Historical Introduction*, 214-215.

¹⁵⁸ Wolff, *Roman Law. An Historical Introduction*, 215.

extent of their dominion over their subjects. These absolutist rulers were particularly fond of citing the maxim that any prince had to be regarded as *legibus solutus*, ‘free from the operation of the laws’, as well as the maxim that whatever pleases the prince ‘has the force of law’. “Due to the constant repetition of these propositions by the defenders of absolutism, it eventually became a commonplace – restated in much modern scholarship – to associate Roman law with the extinction of political rights, and the cause of constitutionalism with the jurists’ enemies”.¹⁵⁹ Around the fourteenth century, Roman law with its conception of legal authority centralised in the emperor, was no less important for the argument on behalf of the king of France than for that on behalf of the pope. In the thirteenth century, the conception appeared that law is dependent upon the enactment of the prince. This was almost certainly due to the study of Roman law.¹⁶⁰ However, in the words of George Sabine:

The theory of the lawyers was, of course, that of the *Digest*: the emperor’s will has the force of law, though he derives this power from the act of the people which invests him with it. In the thirteenth century there was a difference of opinion among lawyers on the question whether this act had wholly divested the people of the power to make law, some holding that it had and others that a residual authority remained with the Roman people.¹⁶¹

The Roman texts provided the basis for constitutional doctrine as well as the development of the idea of the absolute state; the concept of sovereignty; the claim of the emperor to be the sole source – and sole interpreter – of statute. However, the texts were sufficiently various and sufficiently malleable to be used not just in support of absolutist positions, but also for constitutional and republican ends. A literal reading of the *Lex Regia* from Ulpian’s text supports the view that the people transferred its sovereignty and had it vested in the emperor.¹⁶² However, this did not mean power without legal limit, since the medieval lawyers invariably followed not the view expressed in the *Digest* that the emperor is not bound by the laws, but the

¹⁵⁹ Skinner, *The Foundations of Modern Political Thought*. Vol. 1: *The Renaissance*, 183. Also see *ibid.*, 124.

¹⁶⁰ Carlyle cited in, Sabine, *A History of Political Theory*, 278.

¹⁶¹ Sabine, *A History of Political Theory*, 278.

¹⁶² Johnston, “The General Influence of Roman Institutions of State and Public Law”, 97. Ulpian was the leading lawyer from Syria and counsellor to successive emperors of the Severan age (AD 193-235). Ulpian believed that the role of natural law as a source of Roman law be taken seriously as well as the recognition of natural law to Stoic influences, see Tony Honoré, “Ulpian, Natural Law and Stoic Influence”, <http://users.ox.ac.uk/~alls0079/Stoic%20influence%202.pdf> (accessed 10 April 2013). Ulpian’s contributions are substantially reflected in Justinian’s *Digest*.

rival assertion in the *Code* that it is worthy of a ruler to profess himself to be bound by them. From this, the premise was derived that there are legal limits to the exercising of public power.¹⁶³ According to Rutherford, Ulpian is to be understood as supporting the idea that the power remains in the people to consent and that the people cannot give this power away.¹⁶⁴

By the end of the twelfth century, the republican potential of other texts in the *Corpus* was already being exploited. In his *Lectura super codicem*, treating the people of the city-state as a *universitas*, the Medieval Roman lawyer, Azo (1150-1230), was able to argue that the individuals who made up a people had transferred the exercise of *iurisdictio* to their ruler, but the *universitas* itself had not. It followed that the people as a *universitas* had never lost this power, and the transfer to the ruler was revocable. Glossing the terms *iurisdictio* and *merum imperium*, Azo also argued that, since the higher magistrates of city-states had the power to establish new laws, they too had to be bearers of *merum imperium*. Here the Roman sources were used to legitimate a doctrine of popular sovereignty.¹⁶⁵ For Azo, the emperor was less than the corporate body of the people, but greater than the individuals who composed it.¹⁶⁶ According to Azo, “all rulers have imperium because they have the right to establish law, where the source of that lawmaking right was in the corpus, the universitas, and the communitas.”¹⁶⁷ In the words of Harold Berman, Azo was of the view that, “Jurisdiction did not descend downward from the emperor but upward from the corporate community.”¹⁶⁸

Rooted in the discipline of public law, which now went on to develop independently, were concepts and structures of Roman creation.¹⁶⁹ Concepts that were so well established that their Roman origin was no longer observed persisted: the claim of the sovereign to a monopoly on the passing and the interpretation of legislation; the

¹⁶³ Coing, 92 cited in, Johnston, “The General Influence of Roman Institutions of State and Public Law”, 97.

¹⁶⁴ *Lex, Rex*, 82(2).

¹⁶⁵ Johnston, “The General Influence of Roman Institutions of State and Public Law”, 98. Also see Albert Hyma, *Christianity and Politics. A history of the principles and struggles of church and state*, (New York: J. B. Lippincott Company, 1938), 47.

¹⁶⁶ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 58. Also see *ibid.*, 26 and 56-57.

¹⁶⁷ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 292.

¹⁶⁸ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 292.

¹⁶⁹ Stolleis, 63 cited in, Johnston, “The General Influence of Roman Institutions of State and Public Law”, 102.

concept of the public office exercisable only within defined limits and powers.¹⁷⁰ One finds an element of paradox here, namely, and as stated earlier, that on the one hand, the Roman sources provided a model of the most unrestrained absolutism, apt for the elaboration of theories of sovereignty and unfettered power. However, on the other hand, less prominent but unmistakably present in the Roman sources was a theory of control of powers worked out by the jurists in relation to magistrates. These two very different models do much to account for the continuing appeal of Roman law under the most diverse regimes – “The Digest contained a selection of absolutist and republican texts to suit all tastes”.¹⁷¹

Roman law, which has helped to shape the development of modern Scots law, is mainly, if not exclusively, Roman law as revived and understood by the Glossators and thereafter as understood by the successive schools of Roman lawyers who applied themselves to the study and application of the texts that had survived from antiquity.¹⁷² There are not many traces of Roman law in the early material on Scots law, and what traces there are seem to derive from the use of Canon law rather than from the direct use of Roman law. In addition, the richness and complexity of the Roman law heritage is underestimated.¹⁷³ The sixteenth- and seventeenth-century Scots judiciary system was a conglomeration of medieval and modern elements. The Renaissance monarchs James IV and James V (1488-1542) tried to put an end to the feudal control over the application of justice, and this they did through the establishment of the College of Justice in 1532, which utilised Roman Law.¹⁷⁴

¹⁷⁰ Johnston, “The General Influence of Roman Institutions of State and Public Law”, 102.

¹⁷¹ Johnston, “The General Influence of Roman Institutions of State and Public Law”, 102. In this regard, Otto von Gierke refers to the real dispute which turned more and more on the meaning and terms of the Contract of Rulership, which since the end of the thirteenth century was held as an axiom of political philosophy that the legal basis of all government lies in the voluntary or contractual subjection or submission of the governed. This dispute originally took a strictly juristic form in the dispute of the Glossators as to the legal nature of the ancient ‘translatio imperii’ from the Roman people to the Princes – “One school explained this as a definitive and irrevocable alienation of power, the other as a mere concession of its use and exercise”, Otto von Gierke, *The Development of Political Theory*, (New York: Howard Fertig, 1966), 93.

¹⁷² W. M. Gordon, “Roman Law in Scotland”, 13-40, in R. Evans-Jones (ed.), *The Civil Law Tradition in Scotland*, (The Stair Society, Supplementary Series, Vol. 2, Edinburgh, 1995), 16. Also see Brian P. Levack, “Law, sovereignty and the union”, in Roger A. Mason (ed.), *Scots and Britons. Scottish political thought and the union of 1603*, (Cambridge: Cambridge University Press, 1994), 216-217.

¹⁷³ Gordon, “Roman Law in Scotland”, 16.

¹⁷⁴ F. N. McCoy, *Robert Baillie and the Second Scots Reformation*, (Berkeley and Los Angeles: University of California Press, 1974), 4.

During the Middle Ages, exponents of constitutional thought were preoccupied with matters such as consent, legitimacy, community rights and, beyond these generalities, with rather technical problems concerning the relationship between central and local government, representation, rights of resistance, collegiate sovereignty and the distribution of authority within a complex collegiate sovereign.¹⁷⁵ Even when seventeenth-century authors chose not to cite medieval authorities, the language of their discourse (and the thought it conveyed) had often been shaped by medieval usage.¹⁷⁶ The juridical culture of the twelfth century (the works of the Roman and canon lawyers, especially those of the canonists where religious and secular ideas most obviously intersected) formed a kind of seedbed “from which grew the whole tangled forest of early modern constitutional thought.”¹⁷⁷

The canonist Gratian (in or around 1140 AD) most probably inspired by the example of the *Corpus Iuris Civilis*, produced an immensely influential collective of church law. The revived study of Roman law coincided with the new reflection on all the early Christian texts assembled in Gratian’s *Decretum*, and both currents flowed together in canonistic writing.¹⁷⁸ The medieval canonists did not attribute impeccability or infallibility to the popes and although they conceded substantial powers to the papal office, they knew that the man who occupied that office was after all but a man.¹⁷⁹ The challenge for the canonists was how one could affirm the overriding right of a sovereign to rule and the overriding claim of a community to defend itself against abuses of power simultaneously? – “The Decretist’s approach to such questions was trying to set up a framework of fundamental law, which so defined the very nature and structure of the church that any licit ecclesiastical authority, even papal authority had to be exercised within that framework.”¹⁸⁰

¹⁷⁵ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 103.

¹⁷⁶ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 104.

¹⁷⁷ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 104. Important aspects of medieval life such as the two hierarchies of government (ecclesiastical versus civil), the tensions within each hierarchy (for example, the feudal barons versus royal centrality), and the growth of corporate associations, assist in explaining the content of medieval constitutional thought, *ibid.*, 11. Tierney adds: “The church borrowed secular ideas just as the state borrowed ecclesiastical ones; the church had to become half a state before the state could become half a church. Moreover, some of the secular ideas that the church assimilated were not taken from the contemporary medieval world but from ancient classical civilization”, *ibid.*, 12.

¹⁷⁸ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 13.

¹⁷⁹ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 15.

¹⁸⁰ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 16.

Althusius cited the sixteenth-century canonist Salomonius and stated that the latter had described a social contract in his *De Principatu* (1544). This work was published in France in 1578 (the year preceding the appearance of the *Vindiciae*).¹⁸¹ The theories of Salomonius and of the Huguenot thinkers were “alike based on a groundwork of medieval thought and it was owing to this that they had much in common”.¹⁸² In *Lex, Rex* we find references to Salomonius’ *De Principatu* against the background of the king ruling towards the good of the people (and to *consevare est, rem illaesam servare* – to keep a thing safe);¹⁸³ the refutation of the view that the king is above the state;¹⁸⁴ and defending oneself against tyranny.¹⁸⁵ The *De Principatu* expresses that the right, authority and power of the people is greater than that of the Prince – “the creator being always and necessarily greater than the creature”.¹⁸⁶ Salomonius also emphasised that the people is always the real legislator, and in this regard, the view taken of law by Salomonius appears to be precisely the same as that of Marsilius’ *Defensor Pacis* of 1324 and as that taken up in the *Vindiciae*.¹⁸⁷ Marsilius emphasised the principle of popular consent as the basis of legitimate government.¹⁸⁸ There was also the *Magna Carta* (1215), a medieval catalogue of liberties, rights and safeguards,¹⁸⁹ of which Rutherford was aware.¹⁹⁰ David Hall talks of the *Magna Carta* (among others) as having offered further expressions of pre-modern republicanism.¹⁹¹

¹⁸¹ J. H. M. Salmon, *The French Religious Wars in English Political Thought*, (Oxford: Clarendon Press, 1959), 45. According to Harold Laski, the Monarchomachs are summed up in Salomonius [*Patritii Romani de principatus, lib. VI* (1578)] and Althusius on the one side, and the Society of Jesus on the other, Harold J. Laski, “Introduction”, 1-59, in Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants* (A translation of the *Vindiciae Contra Tyrannos* by Junius Brutus) (London: G. Bell and Sons, Ltd., 1924), 52.

¹⁸² Allen, *A History of Political Thought in the Sixteenth Century*, 336.

¹⁸³ Rutherford, *Lex, Rex*, 65(1).

¹⁸⁴ Rutherford, *Lex, Rex*, 129(1).

¹⁸⁵ Rutherford, *Lex, Rex*, 165(2).

¹⁸⁶ Allen, *A History of Political Thought in the Sixteenth Century*, 333.

¹⁸⁷ Allen, *A History of Political Thought in the Sixteenth Century*, 333-334. According to Salomonius, law is the bond of society – “There can be no kind of society or association among men except upon understood terms and conditions: in civil society these are properly called laws”, *ibid.*, 334.

¹⁸⁸ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 275. Also see Anthony J. Lisska and Brian Tierney, “Philosophy of Law in the Later Middle Ages”, 311-333, in Fred. D. Miller, Jr., and Carrie-Ann Biondi (eds.), *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, Vol. 6, Enrico Pattaro (ed.), *A Treatise of Legal Philosophy and General Jurisprudence*, (Dordrecht: Springer, 2007), 319-330.

¹⁸⁹ Hall, *The Genevan Reformation and the American Founding*, 32.

¹⁹⁰ See for example, Rutherford, *Lex, Rex* 111(1),

¹⁹¹ Hall, *The Genevan Reformation and the American Founding*, 32.

The fourteenth-century jurist, Bartolus of Saxoferrato (1313-1357) and his successor, Baldus de Ubaldis¹⁹² (1327-1400), were also not strangers to *Lex, Rex*. Bartolus and his disciples are generally considered to have been the most complete representatives of the tradition of the revival of Roman law in the West, whose characteristics were a regard for Roman law as *ratio scripta*, and an interpretative effort to fit it to contemporary conditions.¹⁹³ The Roman lawyers at Bologna began to incorporate the concepts and methods of Aristotelian political theory into their glosses and commentaries. One of the earliest leading jurists to employ this scholastic approach was Bartolus. Bartolus was a native of the *Regnum Italicum*, a student at Bologna and subsequently a teacher of Roman law at several different universities in Tuscany as well as Lombardy.¹⁹⁴

Bartolus clearly set out with the intention of reinterpreting the Roman civil code in such a way as to supply the Lombard and Tuscan communes with a legal and not merely a rhetorical defence of their liberty against the Empire. The results was not only to initiate a revolution in the study of Roman law (which was later consolidated by his great pupil Baldus) but also to take a large step towards establishing the distinctively modern concept of a plurality of sovereign authorities, each separate from the other and independent of the Empire.¹⁹⁵ Bartolus, in addition to reinterpreting the ancient law books in such a way as to vindicate the independence of the City Republics, wrote a series of political tracts that are heavily reliant on Aristotle's *Politics*, both in doctrine and style of argument.¹⁹⁶ Quentin Skinner speaks

¹⁹² See for example, *Lex, Rex*, 109(1).

¹⁹³ Gilmore, *Argument from Roman Law in Political Thought 1200-1600*, 6. Also see Wolff, *Roman Law. An Historical Introduction*, 189-190. Cecil Woolf comments that, "The world was preparing for the great reception of Roman Law, and all the theories of Bartolus tended ... to make that reception possible", Woolf, *Bartolus of Saxoferrato. His Position in the History of Medieval Political Thought*, 85.

¹⁹⁴ Cecil N. Sidney Woolf, *Bartolus of Saxoferrato*, (1913) cited in Skinner, *The Foundations of Modern Political Thought*. Vol. 1, *The Renaissance*, 9. According to Cecil Woolf, "The foundations of the political thought of Bartolus were the political conceptions which the Bolognese Glossators, at least a century before Aquinas and the revived influence of Aristotle's *Politics*, had derived from the texts of the Law Books literally interpreted", Woolf, *Bartolus of Saxoferrato. His Position in the History of Medieval Political Thought*, 387.

¹⁹⁵ Skinner, *The Foundations of Modern Political Thought*. Vol. 1: *The Renaissance*, 9.

¹⁹⁶ Skinner, *The Foundations of Modern Political Thought*. Vol. 1: *The Renaissance*, 51. John Figgis states that Bartolus: "... speaks to us from kingship with the schoolmen on the one hand and the Caesars on the other. He helps us to see how the bed of that river Tiber, on which he once discoursed, has carried along with its soil the hopes and the thoughts and the dreams of men for longer than we care to think. Even England could not quite escape the influence of the Roman law ...", Figgis, *The Divine Right of Kings*, 372.

of Jean Bodin's scornful approach towards the Bartolist attempt "to establish principles of universal jurisprudence from the Roman decrees".¹⁹⁷

Bartolus introduced the distinction, not to be found in Aquinas or earlier writers, between the *tyrannus absque titulo* and the *tyrannus de exercitio* (the former is the usual Greek tyrant who gets power without laws).¹⁹⁸ Althusius made mention of the *tyrannus absque titulo* as well and refers to this as a tyrant without title.¹⁹⁹ Althusius also referred to the *tyrannus exercito* (tyrant by practice).²⁰⁰ Mornay-DuPlessis,²⁰¹ as well as Rutherford also expresses similar thinking in this regard.²⁰²

It is noteworthy that Bartolus decided that a tyrant *absque titulo* was guilty of treason as offending against the *Lex Julia de Majestate*, while a tyrant *de exercitio* fell under the *Lex Julia de Vi Publica*. Figgis asks, "Can this have any reference, remote or indirect, to the temper of the mind which condemned Charles I for treason against his people?"²⁰³ Most probably, taking into account that Bartolus was cited by some who were in support of the execution of Charles I, due to Bartolus' demonstration that the whole people were greater than a king was and might depose him for treason against them.²⁰⁴ This points us to an understanding that the view that Rutherford's theory on resistance is at its foundation dependent on, "the old Jewish doctrine that it was not unlawful to oppose acts of tyranny,"²⁰⁵ needs to be enhanced by attributing other influences beyond that of "the old Jewish doctrine".²⁰⁶ This language is frequently mentioned in *Lex, Rex*.

¹⁹⁷ Skinner, *The Foundations of Modern Political Thought*. Vol. 2: *The age of Reformation*, 290.

¹⁹⁸ Figgis, *The Divine Right of Kings*, 364.

¹⁹⁹ Frederick S. Carney, *The Politics of Johannes Althusius*, (An abridged translation of the Third Edition of *Politica Methodice Digesta, Atque Exemplis Sacris et Profanes Illustrata* [The digest on political method and illustrating examples of the sacred and the secular], including the prefaces of the first and second editions and with a preface by C. J. Friedrich, [London: Eyre and Spottiswoode, 1964]), 188.

²⁰⁰ Carney, *The Politics of Johannes Althusius*, 188-189. Also see *ibid.*, 186-187.

²⁰¹ Philippe Duplessis-Mornay, *A Defence of Liberty Against Tyrants* (or *Of the lawful power of the Prince over the People, and of the People over the Prince*), (Harold J. Laski [ed.]. A translation of the *Vindiciae Contra Tyrannos* by Junius Brutus, with a historical introduction by Harold J. Laski), (London: G. Bell and Sons, Ltd., 1924), 182. Also see *ibid.*, 183-184.

²⁰² C. E. Rae, *The political thought of Samuel Rutherford*, (MA dissertation, University of Guelph, 1991), 116.

²⁰³ Figgis, *The Divine Right of Kings*, 364.

²⁰⁴ Salmon, *The French Religious Wars in English Political Thought*, 103-104.

²⁰⁵ Rae, *The political thought of Samuel Rutherford*, 37.

²⁰⁶ In *Lex, Rex* we find confirmation that Rutherford was well aware of Bartolus. According to Bartolus 'the basic aim' in government must always be 'peace and unity', and that 'the main aim in a city', and hence the main duty of a just ruler, must always be 'to maintain the citizens in peace and quietness',

During the centuries preceding *Lex, Rex*, many insights were born and eventually accumulated in later thinking on issues pertaining to constitutionalism. Those who applaud the insights of *Lex, Rex* without highlighting the influence on Rutherford, whether directly or indirectly of Roman, Medieval, Renaissance and Catholic sources, leave a considerable gap for a proper understanding of the thinking and knowledge of Rutherford. As stated earlier, Rutherford himself attested to the fact that what *Lex, Rex* is saying, had already been addressed by political and jurisprudential theorists prior to *Lex, Rex*.²⁰⁷

Rutherford's blending of the law and the covenant against the background of the importance of the people and their representation as well as that of the public good, also including the separation of powers idea, results in a clear constitutional and republican model which formed part of a school of thought arising from the many centuries preceding *Lex, Rex*. Rutherford's continuous emphasis on the centrality of the covenant and superiority of the law, as well as his informed exposition and explanation of the people as politically active and sovereign (where the people act as the medium towards the election of the ruler and the form of government), constitutes one of the most informative Christian explanations of constitutionalism and consequently of republicanism.

In what follows, the content and influence of previous centuries of constitutional, political and legal thought is brought to the fore, confirming Rutherford's membership of an age-old legacy of thinking directed towards the limitation of the abuse of political power and the ordering of society. The various principles of Republicanism are investigated, accompanied by confirmation of their relevance to republican insights as well as the parallels of these insights to the legacy left by Roman law, the Medievalists, Renaissance thinking and the Spanish Catholics. From this also arises the striking similarity between this historical legacy of republican thought and the insights expressed by Rutherford.

Skinner, *The Foundations of Modern Political Thought*. Vol. 1: *The Renaissance*, 56. The medieval scholastic, Marsilius also (as for the most orthodox medieval authors) viewed the attainment of peace as the supreme achievement of human fellowship, Alexander D' Entrèves, *The Medieval Contribution to Political Thought*, (New York: The Humanities Press, 1959), 50-51.

²⁰⁷ Samuel Rutherford, "Preface", to *Lex, Rex* (or *The Law and the Prince*), (Harrisonburg, Virginia: Sprinkle Publications, 1982), xxi.

3.2.2.2 *The covenant and social bonding*

According to Helen Silving, ‘citizenship’ emanates from the concept of ‘nation’, which refers to the citizen as a *participant* in the state covenant. Such a citizen becomes eligible to citizenship by birth from certain parents, and becomes a citizen by joining the state covenant. In the Biblical concept of citizenship, strangers are excluded because they are not participants of the state covenant, and not because they are regarded as having inferior qualities. In this regard, God commanded the destruction of the former inhabitants of the Promised Land, because they constituted a threat to the observance of His law.²⁰⁸ The justification for the republican revolution was drawn directly and explicitly from the covenant idea in either its religious or secular form; that is to say, either because God, in establishing His covenant with humanity, rejected tyranny as a violation of the terms of that covenant, or because autonomous humans came together in political covenants or compacts to form civil society in order to protect themselves from the errors of living in a state of nature and to gain the benefits of association on the basis of mutuality. In essence, covenants or compacts created the publics out of which republics could be constructed.²⁰⁹

Nicholas Aroney refers to a definition of federalism, which (while generally acknowledging federalism as meaning the distribution of powers between central and regional governments and the idea of several political communities participating in a system of government in which they each share) is more concerned with the political sources from which the federal system derives its origin and, more specifically, the nature of its founding agreement.²¹⁰ In the words of Aroney:

This approach emphasizes the idea that federal systems of government find their origin in a federating agreement or covenant. A federating agreement such as this presupposes the prior, independent existence of certain constituent political communities, and it sets out what they agree shall be the institutional conditions of federal union, including the

²⁰⁸ Helen Silving, “The Jurisprudence of the Old Testament”, *New York University Law Review*, Vol. 28, 6(1953), 1135.

²⁰⁹ Daniel J. Elazar, *Covenant and Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, Vol. II, (New Brunswick, U. S. A. and London, U. K.: Transaction Publishers, 1996), 50.

²¹⁰ Here Aroney refers to the views of Daniel Elazar, Aroney, “Before Federalism? Thomas Aquinas, Jean Quidort and Nicolas Cusanus”, 33.

distribution of powers, the representative institutions of the federation and the processes by which the federal constitution can be altered in the future.²¹¹

Central to republican theory is the idea that liberty depends on sharing in self-government. This idea in itself is consistent with liberal freedom. Participating in politics can be one among the ways in which people choose to pursue their ends. According to republican political theory; however, sharing in self-rule involves something more. It means deliberating with fellow citizens about the common good and helping to shape the destiny of the political community. However, to deliberate well about shaping the destiny of the political community requires more than the capacity to choose one's ends and to respect others' rights to do the same. It requires knowledge of public affairs and also a sense of belonging, a concern for the whole, a moral bond with the community whose fate is at stake.²¹² This moral bond received attention in the eleventh century, when, at the height of the controversy over the *lex regia*, Manegold of Lautenbach argued that the monarch was an employee of the community who could be dismissed for misfeasance.²¹³ The Roman *municipium*

²¹¹ Nicholas Aroney, "Before Federalism? Thomas Aquinas, Jean Quidort and Nicolas Cusanus", 33. Also see *ibid.*, 41-43. Aroney also refers to the *Vindiciae contra Tyrannos* of 1579, as representing federal thought, more specifically referring to the understanding that the legitimate political authority of a king rests upon a series of covenants he has entered into with representatives of the people in their various towns and provinces, and that it rests with duly constituted inferior magistrates to resist, if necessary, a tyrannical king, *ibid.*, 41. The sixteenth-century Swiss Reformer, Heinrich Bullinger also substantially contributed towards this line of federal thinking. In this regard see Shaun A. de Freitas, *Samuel Rutherford on Law and Covenant. The Impact of Theologico-Political Federalism on Constitutional Theory*, (unpublished Master of Law thesis, University of the Free State, 2003), which clearly shows the parallels in the federal thought of Heinrich Bullinger, Johannes Althusius, Philippe DuPlessis-Mornay, and Samuel Rutherford. For further characteristics concerning this term, including the fact that the inner nature of social groups and the relationships among them are understood as covenantal, see Charles S. McCoy and J. Wayne Baker, *Fountainhead of Federalism. Heinrich Bullinger and the Covenantal Tradition*, with a translation of the *De testamento seu foedere Dei unico et aeterno*, 1534 by Heinrich Bullinger, (Louisville: Westminster/John Knox Press, 1991), 13. Nicholas Aroney adds that the central advantage of this approach is that it has greater explanatory power. Not only does it incorporate a wider range of features of existing federal systems, including what Daniel Elazar called 'self-rule' and 'shared rule', it sheds light on the relationship between the formative ideas and institutional processes by which a federal system comes into being and the distribution of powers, the representative institutions and the amendment formulas adopted thereunder", Aroney, "Before Federalism? Thomas Aquinas, Jean Quidort and Nicolas Cusanus", 33-34.

²¹² M. J. Sandel, *Democracy's Discontent. America in Search of a Public Philosophy*, (Cambridge, Massachusetts and London, England: Belknap Press of Harvard University Press, 1998), 5. Suzanna Sherry speaks of the 'classical' paradigm, which stands in radical contrast to the modern perspective, in that the central theme of the former is *connection* rather than autonomy. Relationships among individuals are more important than between the discrete, abstract individuals themselves. The classical tradition "entails the affirmation that *homo* is naturally a citizen and most fully himself when living in a *vivere civile*" Suzanna Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication", *Virginia Law Review*, Vol. 72, 3(1986), 547-548.

²¹³ Elazar, *Covenant and Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, 78-79.

became part of a political-juridical constitutional order based upon a public social contract, and as Walter Lippman comments, this Roman idea of the public contract advanced the idea that “the first principle of the civilized state is that power is legitimate only when it is under contract”.²¹⁴

The covenant and the law serve as two important elements of republicanism and consequently of constitutionalism. These two concepts formed part of a valuable heritage stemming already from ancient Roman political thinking. There is general agreement that republicanism denotes a vision of a politics that recognises and seeks to strengthen the social bonds within a political community.²¹⁵ This idea dates back to the Classical Greece, where Plato in the second book of his *Republic* puts in the mouth of Glaucon the theory that men found that the evil of suffering injustice was greater than the advantage of doing it and, therefore, made a contract that they would not do or suffer it.²¹⁶ The notion of consensus lies at the heart of Cicero’s own political thought. Cicero took pride in supporting the idea that there was an agreement extending to ‘the whole people’ (understood as the whole of Italy), and in his *De republica*, the need for consensus becomes all the more urgent.²¹⁷

Cicero’s thought in this regard is that “the senate still retains authority, even though it must make some concessions to the will of the people as well as recognize some independence on the part of the consuls.”²¹⁸ Elizabeth Asmis adds, “Although it might be objected that, in practice, nothing has changed, the requirement that each part must share power with the others signifies a fundamental change in the conception of how the state is to be ruled. Just as the consuls and people must heed the authority of the senate, so the senate must be prepared to lend its authority to the commands of the consuls and the will of the people.”²¹⁹ According to Cicero, the *res publica* was what an ‘assemblage of people in large numbers’ (the *populace*) held in common when it came together ‘in an agreement with respect to justice (*consensu iuris*) and ‘for the

²¹⁴ Elazar, *Covenant and Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, 25.

²¹⁵ Terrance Sandalow, “A Skeptical Look at Contemporary Republicanism”, *Florida Law Review*, Vol. 41, 3(1989), 524 (Author’s emphasis).

²¹⁶ A. W. G. Raath and S. A. de Freitas, “The Covenant in Ulrich Huber’s Enlightened Theology, Jurisprudence and Political Theory”, *Acta Theologica*, Vol. 26, 2(2006), 221-222.

²¹⁷ Elizabeth Asmis, “A New Kind of Model: Cicero’s Roman Constitution in *De Republica*”, in *Cicero and Modern Law*, 167-206, Richard O. Brooks (ed.), (Farnham, Burlington: Ashgate Publishing Limited, 2009), 196.

²¹⁸ Asmis, “A New Kind of Model: Cicero’s Roman Constitution in *De Republica*”, 197.

²¹⁹ Asmis, “A New Kind of Model: Cicero’s Roman Constitution in *De Republica*”, 197.

common good (*communione utilitatis*), regardless of the form of government adopted.²²⁰

Aquinas referred to the pact between king and people, and that breach of the covenant by the king gives qualified the termination of such a covenant by the people.²²¹ Medieval authors appealed to Scripture and the authority of the Jurists to establish a contractual basis for limiting the sovereign's power – “the contract between David and the people of Israel, as well as the Jurists' view that according to the *ius gentium*, every free people may set a superior over itself, provided a platform for establishing limits to political governance based on law.”²²² This moral bond with the community was a political principle expounded in much detail in Reformed political theory, and the idea of the Biblical Covenant formed the basis of this ‘moral bond’. Looking at the Church Fathers, Irenaeus was the only one among them who even hinted at a conditional covenant and according to J. Wayne Baker, might have been an influence on Bullinger's views on the covenant²²³ – *Lex, Rex* also refers to Irenaeus.²²⁴ Limitations placed on the absolute power of the king, was a natural corollary to the qualified theory of divine origin brought forward in *Lex, Rex*. This limited power was implicit in the contractual relationship between the king and the people who elected him. This contract theory had its origin in the doctrines of Cusanus and Marsiglio that all human law had its validity in the consent of the people and as a result, the

²²⁰ Elizabeth Depalma Digeser, “Citizenship and the Roman *Res Publica*: Cicero and a Christian Corollary”, in *Republicanism: History, Theory and Practice*, Daniel Weinstock & Christian Nadeau (eds.), (London: Frank Cass Publishers, 2004), 9. Also see *ibid.*, 4. Iseult Honohan observes that *res publica* literally means ‘the public thing’ (*res publica res populi*: the republic is the people's affair). This implies that the people are both the primary concern of government and the source of authority; so all government should be in their common interest, and they retain rights over the exercise of power, Honohan, *Civic Republicanism*, 32. Malcolm Schofield observes that ‘res publica’ in Cicero (as in Latin authors and texts both before and after him) has a notoriously elastic range of uses for example: ‘public[-spirited] activity’, ‘public affairs/business’, ‘the public interest’, ‘the community (as the prime locus of public activity/the prime beneficiary of the public interest)’, ‘the community constituted by the *civitas* or *populus*’, and ‘the country’, Malcolm Schofield, “Cicero's Definition of *Res Publica*”, 207-227, in *Cicero and Modern Law*, Richard O. Brooks (ed.), (Farnham, Surrey: Ashgate Publishing Company, 2009), 210.

²²¹ Charles M. Whelan, “The ‘Higher Law’ Doctrine in Bracton and St. Thomas”, *Catholic Lawyer*, Vol. 8, (1962), 232.

²²² Gierke, *Political Theories of the Middle Age*, 39 in Andries Raath's, “Ulrich Huber's statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)”, 35 (unpublished and later published as Andries Raath, “Ulrich Huber's statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)”, *Journal for Christian Scholarship*, Vol. 49, 3(2013), 37-66). Also see Elazar, *Covenant and Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, 25.

²²³ Elazar, *Covenant and Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, 31.

²²⁴ See *Lex, Rex*, 123(2).

authority and power of the king conceived as legislator depended on such consent.²²⁵ Rutherford refers to Bartolus' view that "the law shall warrant to lose the vassal from the Lord when the lord has broken his covenant".²²⁶

Cicero in his *De Officiis* speaks of the management of *res publica* being similar to the office of the guardian.²²⁷ Contractual thought necessitated postulations related to the 'office' of the ruler. The development towards binding the ruler to the fundamental duties of his office, received a strong impetus from scholastic jurists.²²⁸ In medieval thinking, we find that the relationship between the governing and governed part of the whole was declared as a *sui generis* relationship, which involves reciprocal and correlative rights and duties and only through this reciprocity and correlativity of these rights and duties could the articulated social organism function effectively.²²⁹ With the revival of Roman and canon law in the twelfth century, the doctrine of allegiance to a person and allegiance to an office came to the fore. Alexander III drew a clear distinction between the person of a prelate and his ecclesiastical office in the influential decretal, *Quoniam abbas* – "persons changed but the office remained always the same."²³⁰ Critics of the abdication of Pope Celestine V (in 1294) argued that, since papal power was bestowed by God alone, it could be taken away only by God. To counter this argument, there had to be distinguished between jurisdiction as it inhered in the office of the papacy and in the person of the pope. In this regard, John of Paris or Jean Quidort (ca. 1250-1306) stated, "Although the papacy in itself is from God alone, yet in so far as it is in this or that person, it comes through human cooperation ... it can, then, by human agreement cease to exist in this or that man."²³¹

John Marshall refers to the Conciliarist influence on Rutherford's political ideas as shown in Rutherford's distinction between person and office, which is found in Jean

²²⁵ Campbell, "Lex, Rex and its Author", 221.

²²⁶ Rutherford, *Lex, Rex*, 199(1).

²²⁷ Schofield, "Cicero's Definition of *Res Publica*", 224.

²²⁸ Raath, "Ulrich Huber's statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)", 15. Also see *ibid.*, 16 and Van Gelderen, "The Political Thought of the Dutch Revolt, 1555-1570", 157 in Raath, "Ulrich Huber's statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)", 17.

²²⁹ Chroust, "The Corporate Idea and the Body Politic in the Middle Ages", 448.

²³⁰ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 30-31.

²³¹ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 33. In this regard, Peter Olivi, in his discussion of the case related to the abdication of Pope Celestine, wrote expressively that all jurisdiction as it inhered in a person, even a pope, was *mobilis* – movable or removable – and the perception remained important for the future, *ibid.*, 33.

Gerson.²³² This is also evident in the influence of Buchanan's *De Jure Regni Apud Scotos*, the latter having been deeply influenced by Conciliarism.²³³ According to Gerson, there was a distinction between the divinely appointed and indefectible office, and the human office holder, with the corollary that the office holder, not the human office holder, was subject to conciliar correction.²³⁴ It appears that the distinction between the office and the person representing the office is much older than Scholasticism itself. It can be traced back to the Roman jurisprudence of inheritance, which was applied to the medieval papacy as early as the fourth century.²³⁵ To Gerson, the power that was subject to correction and judgement was neither 'formal' power, nor 'material' power (to use Gerson's terminology), but a third type of power, namely the 'Power in exercise and use' which is a type of power in act, which combines the authority inherent in the Office with the person representing the Office.²³⁶ Rutherford adopts a similar position, namely, "If we speake accurately, neither the man solely nor his power is resisted: but the Man clothed with lawfull habitual power, is resisted, in such and such acts flowing from abused power."²³⁷

This idea of the office of the ruler was also emphasised by the Italian jurist and Commentator, Baldus who stated that emperorship is an office established by the *lex regia* and confirmed by God for a purpose, namely to rule and conserve the empire. The emperor may not do with it as he pleases. He is also not the *dominus* of the empire in the sense of absolute owner, but rather an officer whose function is to act in the empire's interests.²³⁸ Rutherford refers to "those of the law", which includes Baldus' understanding that the king was under the law and that monarchical power

²³² *Lex, Rex* refers to Gerson.

²³³ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 229. The Conciliar movement was an important force within the Roman Catholic Church in the early fifteenth century, which employed councils to find solutions rather than ceding all power to a hierarchy of leaders. The Conciliar movement provided an early glimpse into what would become the modern norm of divided and limited powers, Hall, *The Genevan Reformation and the American Founding*, 40.

²³⁴ Zofia Rueger, "Gerson, The Conciliar Movement and the Right of Resistance (1642-1644)", *Journal of the History of Ideas*, Vol. 25, 4(1964), 472. Also see rest of *ibid.*, 472.

²³⁵ Rueger, "Gerson, The Conciliar Movement and the Right of Resistance (1642-1644)", 473.

²³⁶ Rueger, "Gerson, The Conciliar Movement and the Right of Resistance (1642-1644)", 476.

²³⁷ Rueger, "Gerson, The Conciliar Movement and the Right of Resistance (1642-1644)", 476. Also see *ibid.*, 486.

²³⁸ Canning, *The Political Thought of Baldus de Ubaldus*, 86. If the emperor were to alienate part of the empire committed to his care he would be guilty of destroying his own *dignitas*, that is his office, and thus breaking his coronation oath, *ibid.*, 87.

was not to be aligned with sin or tyranny.²³⁹ The irrevocable commission of imperial power through the *lex regia* was even in positive law terms not of truly absolute power, but rather of power with a limiting and defining purpose, that is, a specific office. The power of the emperor was absolute within the sphere allocated to him.²⁴⁰

The thread connecting the theologico-political federalists (which include Samuel Rutherford) exhibits a common reference pertaining to the office of magistracy, providing a distinction between the ruler as a person and his functions and obligations. For covenantal thought, this is most important, as the office of magistracy implies a condition and responsibility that rest on the shoulders of the magistrate. The office of magistracy therefore forms part of the covenant and contains the blueprint of what is expected for the maintenance and success of the covenant between God and ruler. From this flows the functions of the magistrate, first and foremost to God, and then to the people, the office of magistracy being synonymous with the various functions to be attributed to the office *per se*. The idea of the office of the ruler and its implied accountability gained in importance regarding contractual duties of the ruler, as also emphasised in the tradition of theologico-political federalism.

The idea of ‘oath-taking’ also needed to be included in contractual theory. The notion embedded in the coronation oath that the king, instituted by God, was the protector of law and judgements, was at least as old as tenth-century Anglo-Saxon texts.²⁴¹ In fact, Roman law had already dealt with these issues. Azo’s interpretation regarding the constitutional structure of the Holy Roman Empire included the idea that each Emperor at his election should sign a contract with the electors and other ‘inferior magistrates’ of the Empire, swearing to uphold the good of the Empire as a whole and to protect the ‘liberties’ of his subjects. This was to establish that the Emperor was not *legibus solutus*, but bound by the terms of his coronation oath, and depended on the proper discharge of his duties for the continuation of his authority.²⁴² This was held to qualify the radically constitutionalist conclusion that, since the electors and other princes of the Empire are bearers of the *ius gladii* no less than the Emperor himself, it

²³⁹ Rutherford, *Lex, Rex*, 126(1).

²⁴⁰ Canning, *The Political Thought of Baldus de Ubaldis*, 87. Also see *ibid.*, 203-204 and 219.

²⁴¹ Linda Levy Peck, “Kingship, counsel and law in early Stuart Britain”, 80-115, in J. G. A. Pocock (ed.), *The varieties of British political thought, 1500-1800*, (Cambridge: Cambridge University Press, 1993), 82.

²⁴² Skinner, *The Foundations of Modern Political Thought*. Vol. 2: *The age of Reformation*, 127-128.

must be lawful for them to use the sword against the Emperor if he should fail to observe the terms of his original oath.²⁴³

Digest 1. 4. 1. leaves the possibility for interpreting the transfer of the people's power to the emperor in contractual terms.²⁴⁴ Here Baldus also emphasised that all medieval kings should swear a coronation oath to conserve the rights of their kingdoms symbolised in the imagery of the crown. The king should act as a tutor for his kingdom, which does not act for itself. This tutorial function derives fundamentally from the nature of the royal office, the duties of which are only formalised by the coronation oath.²⁴⁵ This idea of tutorship is present in the thought of the assumed author of *Vindiciae Contra Tyrannos* namely DuPlessis-Mornay, which in Roman law is probably understood to be trusteeship. DuPlessis-Mornay drew from Roman law the origin and duties of the tutor – “on his origin, in the choice and designation of the people; on his duties, in virtue of his mandate or trust”.²⁴⁶

DuPlessis-Mornay observed that in the empire of Germany, the king of the Romans being ready to be crowned emperor, was bound to do homage and make an oath of fealty to the empire, no more or no less than the vassal is bound to do to his Lord when he is invested with his fee.²⁴⁷ DuPlessis-Mornay's *Vindiciae* also speaks of the alliance or confederation, which was renewed between the kings and Ephors of Sparta every month, although those kings were descended from the line of Hercules – “These kings did solemnly swear to govern according to the laws, so did the Ephores also to maintain them in their authority, whilst they performed their promise”.²⁴⁸ Rutherford emphasises the idea of oath taking supported by scholastic thought.²⁴⁹ In addition to this, cognisance needs to be taken of the influence of the *Vindiciae* on *Lex, Rex*, and

²⁴³ Richard R. Benert (1973) cited in Skinner, *The Foundations of Modern Political Thought*. Vol. 2: *The age of Reformation*, 128.

²⁴⁴ See D. 1. 17. 1. 7. and 1. 11. 1.; D. 1. 4. 1. cited in Raath, “Ulrich Huber's statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)”, 34. Skinner refers to George Buchanan who was in agreement with the more radical scholastics such as Almain and Mair, that the people merely delegate their authority to a ruler whose status is not that of a sovereign who is *maior universis* and *legibus solutus* but rather that of a minister who remains *minor universis* and in consequence bound by the positive laws of the commonwealth, *ibid.*, 342.

²⁴⁵ Canning, *The Political Thought of Baldus de Ubaldis*, 219. Also see *ibid.*, 87.

²⁴⁶ Ernest Barker, *Context of Church, State and Education*, (Ann Arbor: University of Michigan Press, 1957), 90-91.

²⁴⁷ Philippe Duplessis-Mornay, *A Defence of Liberty against Tyrants*, 177-178.

²⁴⁸ Philippe Duplessis-Mornay, *A Defence of Liberty against Tyrants*, 176.

²⁴⁹ See for example, *Lex, Rex*, 61(1)-61(2), 106(1), 118(1), 126(2), 129(1), 133(2), 199(2), 200(1)-201(1), 202(1), 217(1), 219(2), 227(1) and 229(2)-230(1). This was also similar to Johannes Althusius' thinking. In this regard, see *Politica*, 35, 119-120, 127-129 and 157-158.

therefore the indirect influence of antiquity on Rutherford's political thought. The Italian Reformer and federalist, Peter Martyr Vermigli (1499-1562), who is referred to in *Lex, Rex* a couple of times, and whose covenantal thinking had had an influence on both the political thinking of the Monarchomachs (which included DuPlessis-Mornay), Althusius and on British political thinking²⁵⁰ was also exposed to Roman law.²⁵¹

It is clear from the above that contractual thinking, together with the important distinction between the office of the ruler and the person of the ruler and the importance of this distinction for contractual thought, as well as the oath-taking responsibility of the ruler, had its origins far back in the history of Western civilization. Rutherford directly and indirectly attests to having been influenced by political and legal thinking stemming from ancient Hebrew, Greek, Roman, Medieval and Renaissance thinking. Classical Reformers referred to in *Lex, Rex* such as DuPlessis-Mornay and Vermigli, who emphasised political and legal insights, related to the covenant, and were exposed to Roman, Scholastic and Humanist thinking, which gave Rutherford an indirect passage towards such thinking.

From the above it is clear that covenantal thinking formed an important part of the thinking of theorists spanning many centuries preceding *Lex, Rex*. Covenanting forms an important part of republicanism and is inextricably connected to the constitutional understanding pertaining to the superiority of the law and its role towards the attainment of the public welfare. The challenges facing Rutherford in this regard and

²⁵⁰ Andries Raath and Shaun de Freitas, "From Heinrich Bullinger to Samuel Rutherford. The Impact of Reformation Zurich on Seventeenth-Century Scottish Political Theory", 853-879 in *Heinrich Bullinger. Life – Thought – Influence*, Zürich, Aug. 25-29, 2004, International Congress, Heinrich Bullinger (1504-1575), Vol. II, Emidio Campie & Peter Opitz (Hrsg.), Theologischer Verlag Zürich, (2007), 859-860. Also see Hall, *The Genevan Reformation and the American Founding*, 136.

²⁵¹ Vermigli being a native of Florence and studying at Padua in the former half of the sixteenth century was exposed to both humanism and scholasticism. In this regard, students interested in canon and civil law had to become acquainted with the *Decretum of Gratian*, the *Theodosian Code*, and the *Justinian* books. Vermigli, although not having had any formal legal training, possessed volumes of law in his library, which included the *Justinian Codex* and the *Digests* that summed up Roman civil law, Mariano Di Gangi, *Peter Martyr Vermigli 1499-1562. Renaissance Man, Reformation Master*, (Lanham, Maryland: University Press of America, 1993), 21 and 132. Rutherford was also acquainted with the works of Justinian. Rutherford questions Justinian's views in the *Digest* regarding whether the emperor in Paul's time (when he wrote Romans 13) was absolute, Rutherford, *Lex, Rex*, 178(1). Rutherford, in Question 15 of *Lex, Rex* (which pertains to the question "whether or not the king is univocally or only analogically and by proportion a father") also refers to the *Novell* of Justinian. This points to Rutherford's familiarity with the works of Justinian, Rutherford in his *A Free Disputation Against Pretended Liberty of Conscience*, refers to the *Justinian Codex*, and the *Novellus* of Justinian, see *ibid.*, 306 (original version). Also see *ibid.*, 308.

his contributions towards the furtherance of constitutional and republican thinking on this topic are elaborated upon in Chapter 2.

3.2.2.3 *The superiority of the law*

The law is also applicable when dealing with constitutionalism and republicanism and forms a foundational pillar alongside the covenant in the ordering of society. In the writings of the ancient Hebrew scholars, Church Fathers, the Canonists and the Reformers, the law was understood as transcending substantive republican ideals of individual freedom and public welfare, and the procedural value of public deliberation. The republican emphasis on ‘the people’ begs the question, from a normative angle, as to what should be meant when referring to ‘the good’. Is it the people as such who determine what the good should be? This introduces the seeking of a normative foundation to republicanism, and arising from this are questions related to whether such a system should reflect changing or relative norms or whether there should be an unchangeable or absolute normative dimension to the foundations of republicanism. These are also questions related to constitutionalism. This also has implications for the substance of social bonding and covenanting, giving rise to questions such as, “What should be the conditions of the covenant?”, or “What are the prescriptive or normative limits in social bonding in society?”

Cicero believed that a divine sanction buttressed any well-founded government, and that “the true law is an expression of the purpose and rule of God.”²⁵² The government had to preserve the ‘bonds of justice (*vincula iuris*) by ensuring that the law reflected natural law, which he defined as ‘right reason consistent with nature,’ an ‘eternal and unalterable law’ whose ‘author’ was God, ‘the universal master’. If this foundation disappeared, the state, according to Cicero, was no longer a *res publica*, but a tyranny.²⁵³ The guarantee of justice in a *res publica* also meant for Cicero that citizens would strive to uphold their responsibilities, namely to obey the law. Since the foundation of the law was natural law, such obedience would involve both civic and religious obligations.²⁵⁴ Baldus’ conception of the emperor’s power was that it was essentially a positive law one, and was as such absolute, in that the emperor in

²⁵² David W. Hall, *Savior or Servant? Putting Government in its Place*, (Oak Ridge, Tennessee: The Covenant Foundation, 1996), 116.

²⁵³ Digeser, “Citizenship and the Roman *Res Publica*: Cicero and a Christian Corollary”, 9.

²⁵⁴ Digeser, “Citizenship and the Roman *Res Publica*: Cicero and a Christian Corollary”, 10.

the exercise of his will was unconstrained by human law. However, this includes the understanding that the emperor was freed from the civil law and not from the natural or divine law.²⁵⁵

Lactantius (who wrote in the latter half of the third century) considered Rome, when properly governed, to be a *res publica*. As such, its primary function was to uphold justice, a responsibility made possible since natural law should provide the foundation for its laws.²⁵⁶ However, by claiming that Christian law consists in piety or cult (*religio*) and in equity (*aequitas*), Lactantius equated the two principles of Christian law with Cicero's two categories of Roman law: divine (concerned with *religio*) and human (concerned with equity). In this way, Lactantius suggested that the Christian conception of divine law was synonymous with natural law, which Cicero claimed was the basis of divine and human law. Although Lactantius agreed with Cicero that true justice lay in upholding divine law, Lactantius thought that this could not be achieved unless one acknowledged the greatest God. No other Christian author before Lactantius had drawn so substantially on Cicero to attempt such a thoroughgoing discussion of justice or so clearly postulated a Christian *res publica* whose foundation was based on a new understanding of natural law.²⁵⁷

Hans Wolff refers to the new school of thought that arose in seventeenth-century Europe, namely that of 'natural law'. This represented the belief in the existence of legal principles inherent to the nature of man, so that they might be considered valid. References to natural law substantially already took root in Ciceronian (Stoic) thinking and the *Institutes* (1. 2. 11) stated that: "Now natural laws which are followed by all nations alike, deriving from divine providence, remain always constant and immutable (*firma atque immutabilia*): but those which each state establishes for itself are liable to frequent change whether by the tacit consent of the

²⁵⁵ Canning, *The Political Thought of Baldus de Ubaldus*, 72.

²⁵⁶ Digeser, "Citizenship and the Roman *Res Publica*: Cicero and a Christian Corollary", 12. Similar to Cicero's views, Lactantius believed that should the state no longer dispense justice in accordance with natural law, then the republic had dissolved into a tyranny, *ibid.*, 12.

²⁵⁷ Digeser, "Citizenship and the Roman *Res Publica*: Cicero and a Christian Corollary", 14-15. Also see Fred D. Miller, Jr., "Early Jewish and Christian Legal Thought", 167-185, in Fred. D. Miller, Jr., and Carrie-Ann Biondi (eds.), *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, Vol. 6, Enrico Pattaro (ed.), *A Treatise of Legal Philosophy and General Jurisprudence*, (Dordrecht: Springer, 2007), 181. Rutherford refers to Lactantius in his Preface to *Lex, Rex*. Tertullian who was a severe critic of pagan philosophy also compared nature to a teacher in the service of God, and that whatever nature teaches us has been taught by God, *ibid.*, 181. *Lex, Rex* also refers to Tertullian a couple of times.

people or by subsequent legislation.”²⁵⁸ In fact, Aristotle is viewed as the father of natural law and largely influenced the thought of Aquinas.²⁵⁹

Protestant rationalists, in their quest for the true natural foundations of human life, as conforming to and perceivable by reason, again raised the postulate of an absolute law.²⁶⁰ Although Wolff refers here to ‘those Protestant rationalists who refused to accept theological explanations’, it could be accepted that there were those Protestant political theorists who, irrespective of their view on the primacy of Scriptural authority, gave natural law its deserved place, also viewing natural law as not necessarily being contrary to the Word of God. Rutherford was one such an example. *Lex, Rex* includes a natural law justification for the limitation of political power and the ordering of society. This is also confirmed by the legacy of Roman law, and Medieval and Renaissance political and constitutional thinking. John Marshall states:

It was the medieval tradition of natural law and human reason, a christianized system anchored in Scripture and the church, that Rutherford inherited. It was the tradition he defended and built upon, but also modified. He was in a world where tradition of every kind was being torn apart at the roots. On one side were Antinomians and Familists, Levellers and Ranters, for whom law and society were malleable according to the dictates of autonomous reason. On the other were Royalists, for whom law was the personal property of the king, the product of autonomous will. In standing against both extremes, he drew upon the past for his weapons, which he reforged on the anvil of Calvinist theology. He was essentially a medieval theologian, who attempted to rally an older tradition in a frontal assault on new ideas.²⁶¹

²⁵⁸ James Walter Tubbs, *Roman Law Mind and Common Law Mind: A Study in the Comparative History of English and Continental Jurisprudence Before 1700*, (A dissertation submitted to The Johns Hopkins University in conformity with the requirements for the degree of Doctor of Philosophy, Ann Arbor, 1989), 181. James Tubbs comments that this text was consistent with (and probably influenced by) passages in Cicero which medieval jurists also knew, *ibid.*, 181.

²⁵⁹ Fred D. Miller, Jr., “Aristotle’s Philosophy of Law”, 79-110, in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, in *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 6, Enrico Pattaro (ed.), (Dordrecht: Springer, 2007), 94. Even Socrates and Plato had allegiances to natural law thinking, but it was especially in Cicero that natural law thinking came to fruition.

²⁶⁰ Wolff, *Roman Law. An Historical Introduction*, 214.

²⁶¹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 89. Also see *ibid.*, 6. The medieval mind represented “that high degree of unity of thought and purpose which had its roots not only in that commonly shared conception of a single harmonious universe governed by one infinitely wise God, but also in the conviction that all first premises of right thought or right action were divinely revealed truths rather than discoveries made by human reason alone”, Chroust, “The Corporate idea and the Body Politic in the Middle Ages”, 423. Early modern scholasticism as reflected by authors such as Suárez, Molina and Vitoria (whom Rutherford refers to in *Lex, Rex*) refreshed the tradition of natural law theory as was

Parliamentary apologists, in 1642, declared that the law of nature is paramount. By the law of nature, power is ‘originally inherent in the people’, and the source of the magistrates’ authority ‘can be nothing else among Christians but the actions and agreements of such and such political corporations’. The “paramount law that shall give law to all human laws whatsoever ... is *salus populi* ... for mere force cannot alter ... the tenor of law ... The charter of nature entitles all subjects of all countries whatsoever to safety by its supreme law.”²⁶² *Lex, Rex* refers to the Roman law source of the *Twelve Tables* as supportive of *salus populi*, *suprema lex* as the “supreme and cardinal law to which all laws are to stoop”.²⁶³ According to A.S.P. Woodhouse, “most striking of all the early pleas is that of Rutherford’s *Lex Rex*”, and that “behind these again lies the long and complex tradition of the law of nature, as it comes down from classical times, as it is adapted and formulated by the Civilians and Canonists, and as it influences the theory and practice of English law”.²⁶⁴

Natural law was the principal instrument in the transformation of the old civil law of the Romans into a broad and cosmopolitan system. An appeal to some absolute ideal finds a response in men particularly at a time of disillusionment and doubt, and in times of simmering revolt.²⁶⁵ The classical sources played a major role in influencing the early Reformers’ apologetics on the rationality and universality of a Godly political system. This was accomplished by the identification of universal principles that were also proclaimed by Roman philosophy. It was Stoicism that introduced

passed down from theorists such as Aquinas, M. W. F. Stone, “The Nature and Significance of Law in Early Modern Scholasticism”, 335-365, in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, Vol. 6, Fred. D. Miller, Jr., and Carrie-Ann Biondi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*, Enrico Pattaro (ed.), (Dordrecht: Springer, 2007), 363.

²⁶² Henry Parker’s, *Observations upon Some of His Majesty’s Late Answers and Expresses*, cited in A. S. P. Woodhouse, “Introduction”, 11-100, in A. S. P. Woodhouse (ed.), *Puritanism and Liberty*, (London: J. M. Dent & Sons Ltd., 1938), 91.

²⁶³ Rutherford, *Lex, Rex*, 119(1). Referring to the English Parliament in the early 1640’s, Quentin Skinner states: “The resulting campaign mounted by the democratical gentlemen and their allies may in turn be said to have progressed in two distinct steps. They began by taking their stand squarely on the fundamental maxim that Cicero had cited from the Law of the Twelve Tables: that, in legislating for a free state, *salus populi suprema lex esto*, the safety of the people must be treated as the supreme law”, Skinner, “Classical Liberty and the Coming of the English Civil War”, 18. Besides referring to Aristotle, Cicero refers at several places in *De Officiis* to the Law of the *Twelve Tables*, which he took to be the earliest legal code established in the *civitas libera* after the expulsion of the kings from Rome. Cicero again refers to the *Twelve Tables* in *De Legibus*, enunciating two golden rules namely: “When giving laws to free peoples’ we must first ensure that they are never dominated by the wills of their magistrates”. The people must ensure that they are entirely ruled by laws, “just as the magistrates govern the people, so must the laws govern the magistrates”. The second golden rule regards the idea that the highest duty of magistrates is to be encapsulated in the maxim, *salus populi suprema lex esto* (the safety of the people must be treated as the supreme law), *ibid.*, 12.

²⁶⁴ Woodhouse, “Introduction”, 91-92.

²⁶⁵ Friedmann, *Legal Theory*, 95-96.

pagan awareness of both the Divine and universal norms, and which had a strong influence on Cicero. In fact, the general feeling immediately preceding Stoicism and that, which can be paralleled with contemporary sentiments, was that the only thing certain in this world was that nothing is certain. The foundations of knowledge were shattered in that there were too many voices. This led the Stoics to search for something firm in an agonising world.²⁶⁶

Consequently, a call for opposition against nationalism, antiquity and custom, and a new construction based on universal reason and cosmopolitanism was endeavoured.²⁶⁷ The Stoics in particular equated nature with reason, and both were equated with God. They believed reason was the unitive principle of the human race. True law was the law of reason or the law of nature.²⁶⁸ The Stoic influence on the Roman lawyers was substantial. The basis of authority for the Romans was the *jus civile* (the will of the people and the law applicable to Roman citizens). Imperial expansion resulted in the establishment of the *jus gentium*, which represented a universal element in the positive laws of all states, chiefly in matters commercial. Greek thought expanded this notion into that of the *jus naturale*, which was considered as the law common to all men.²⁶⁹ It was mainly Cicero who conveyed the combination of Greek philosophy and Roman jurisprudence to the Christian world. Cicero's *Republic* clearly refers to the basis of all human authority as that of the true law of right reason, which is in accordance with nature, applies to all men, and is immutable and eternal – “There is one law and once common master and ruler of men – God, who is the author, interpreter and promulgator of this law”.²⁷⁰

The Roman jurist Ulpian (who is mentioned in *Lex, Rex*) formed part of an inclination back to the Stoic project. In around 200 AD, Ulpian and other intellectuals were

²⁶⁶ Taylor, *The Christian Philosophy of Law, Politics, and the State*, 119. Rutherford was familiar with Stoic thinking; see for example, Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 72.

²⁶⁷ Taylor, *The Christian Philosophy of Law, Politics, and the State*, 131.

²⁶⁸ Barker, *Introduction to Gierke*, in Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 88.

²⁶⁹ Andrew Beck, “Natural Law and the Reformation”, *The Clergy Review*, Vol. 21, (1941), 74. According to Beck, there was not in this line of thought any suggestion that ‘Natural Law’ was in any way a source of positive law, it was rather a principle of equity, a ‘way of looking at things’, a ‘human interpretation’, *ibid.*

²⁷⁰ Beck, “Natural Law and the Reformation”, 74. In Cicero's *Laws*, he insists that this law belongs by right to all men, for all men are given right reason, which is the basis of the law, *ibid.* Also see Carl J. Friedrich, *Transcendent Justice. The Religious Dimension of Constitutionalism*, (Durham, N. C.: Duke University Press, 1964), 9.

becoming dissatisfied with the view that whatever was traditional in a society was inherently right. In both politics and religion, something more universal (rational and philosophical) was sought after.²⁷¹ It seems that Ulpian's predominantly Stoic – “We are born free and equal and should live according to nature ... The precepts of nature are accessible to reason.”²⁷² There were Roman jurists during the period of the Roman Empire who also understood the law to be of a superior nature and in this regard reflected some overlap with Stoicism. For example, Marcian (in the early part of the third century) appealed to the Stoic philosopher Chrysippus, who stated that, “Law is king over all divine and human affairs. It ought to be a standard of justice and injustice and, for beings political, by nature a prescription of what ought to be done and a proscription of what ought not to be done”.²⁷³ Ulpian also expressed a similar understanding.²⁷⁴ In the twelfth century, the Roman jurists under Greek influence had already assimilated the *Jus Gentium* to the law of nature and Christian thought was to carry the process a step further and identify the Law of Nature with the Law of God.²⁷⁵

The medieval church took the pagan conceptions of reason and natural law and Christianised them, serving as their guardian and authoritative interpreter.²⁷⁶ Long before this, Ambrose (ca. 340-397) argued that the Mosaic law was given to human beings because they were unable to obey the natural law and Augustine, who was converted and baptised by Ambrose, provided a similar understanding of natural law.²⁷⁷ Referring to Augustine's *Summa Theologiae*, John Marshall comments that

²⁷¹ Tony Honoré, *Ulpian. Pioneer of Human Rights*, 2nd Edition, (Oxford: Oxford University Press, 2002), 78.

²⁷² Honoré, *Ulpian. Pioneer of Human Rights*, 80. In ethical matters, Cicero was an important source for Ulpian, *ibid.*, 80.

²⁷³ Brad Inwood and Fred D. Miller, Jr., “Law in Roman Philosophy”, 133-165, in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, in *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 6, Enrico Pattaro (ed.), (Dordrecht: Springer, 2007), 139.

²⁷⁴ See Inwood and Miller, “Law in Roman Philosophy”, 139.

²⁷⁵ Beck, “Natural Law and the Reformation”, 75. Here, Beck places the emphasis on Sir Frederick Pollock's reference to Gratian's *Decretum* (published in around 1140) where the Law of Nature is given a first concrete expression as a basis of sovereignty, which had been hitherto universally accepted – “and made sovereignty an absolute super-eminent power, adhering, by nature of association, not in any individual ruler or governing body, but in the aggregate of all the members of the state association, in the people”, *ibid.*, 75-76. Beck adds that this theory of the sovereignty of the people was major pertaining to political and social consequences, *ibid.*, 75.

²⁷⁶ Troeltsch, *The Social Teachings of the Christian Churches*, cited in, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 88. Also see *ibid.*, 2.

²⁷⁷ Miller, “Early Jewish and Christian Legal Thought”, 181. Ambrose's *De Officiis Ministrorum* was modelled after Cicero's *De Officiis*, and just as Cicero succeeded in popularizing Greek philosophy

Scripture was necessary to counterbalance human fallibility in understanding right behaviour, to direct inward motives, and to make sure that everything God judges to be good and evil is fully known.²⁷⁸ It was the medieval tradition of natural law and human reason, a Christianised system anchored in Scripture and the Church that Rutherford inherited.²⁷⁹

The Middle Ages laid the foundations of two eminently important social tenets that emphasised the importance of the law namely, “That every duty of obedience on the part of the subject rested upon the rightfulness of the command and there was no such thing as an unconditional and morally blind duty of obedience and submission.”²⁸⁰ From early times, there had been general agreement among the political scholars of the Middle Ages regarding the understanding that the State rested on no basis of mere law, but on moral or natural necessity, and was itself the creator of law. In addition, the State’s end was understood as promoting material and spiritual welfare. The realisation of the law was also viewed as but one of the proper means to this end, and the State’s relation to the legal order was understood as not dependent and subservient, but independent and dominant.²⁸¹ However, medieval doctrine never gave up the thought that law was by its origin of equal rank with the State and did not depend on the State. The medieval theorist felt bound to base the state upon law and thus to construe its origin as a legal process, while the notion that an illegitimately established government could also have legal efficacy was quite unthinkable. This doctrine was pervaded by the belief that the state was charged with the mission of realising the idea of law, an idea which it did not create and which it could not alter. For the state, the law was not a mere means but an end in itself. It was never doubted that the state-power was bound by truly legal limitations (the law), beyond which its governing power and the subjects’ duty of obedience ceased.²⁸²

Bearing the above two approaches to the relationship between the Law and the State, Otto von Gierke asks how it became possible to think that on the one hand the law

among his fellow Romans, ‘Ambrose reinterpreted Ciceronian Stoicism for a Christian public’”, *ibid.*, 181. Also see *ibid.*, 182. *Lex, Rex* refers to Ambrose on a couple of occasions.

²⁷⁸ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 88.

²⁷⁹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 88-89.

²⁸⁰ Chroust, “The Corporate Idea and the Body Politic in the Middle Ages”, 449. Also see *ibid.*, 450.

²⁸¹ Von Gierke, *The Development of Political Theory*, (New York: Howard Fertig, 1966), 299-300.

²⁸² Von Gierke, *The Development of Political Theory*, (New York: Howard Fertig, 1966), 300.

should exist by, for and under the State, and on the other hand the State should exist by, for and under the law? Von Gierke answers: “The middle ages did not arrive at the thought that State and Law exist by, for and under each other. It solved the antithesis by means of the distinction between Positive Law and Natural Law, a distinction which came down to it from antiquity but was evolved in various forms and elaborated in detail in countless controversies.”²⁸³ During the Middle Ages, there is hardly a trace of the view which, for the sake of a higher end, would free the sovereign from the bonds of Natural Law and of the Moral Law in general. Thus, when Machiavelli based his instruction for Princes on the freedom from restraint, it seemed to the men of his day an unheard-of innovation and a monstrous crime.²⁸⁴ This was understood as being in opposition to natural law. John of Salisbury (1115-1180) provided the Middle Ages with a courageous argument to limit governmental powers by delineating the difference between the tyrant and the lawful ruler and stating that, “The authority of the prince is determined by the authority of right, and truly submission to the laws of princes is greater than the imperial title, so it is the case that the prince ought to imagine himself permitted to do nothing which is inconsistent with the equity of justice.” Therefore, a moral standard was to govern political conduct and limit the scope of the ruling class.²⁸⁵ According to Gerson, in no way were positive laws allowed to be observed to the detriment of Natural and Divine Law and the common good.²⁸⁶

The central meaning of republican government since Cicero has been legislation for the *res publica* (or common good of the people).²⁸⁷ The rule of law (according to Cicero’s *De Officiis*) constrains the people and magistrates from favouring private interests in specific litigation.²⁸⁸ In the *De Officiis*, Cicero holds that laws are enacted for purposes of maintaining society and for the prevention of the impairment of the

²⁸³ Von Gierke, *The Development of Political Theory*, (New York: Howard Fertig, 1966), 300.

²⁸⁴ Von Gierke, *The Development of Political Theory*, (New York: Howard Fertig, 1966), 307.

²⁸⁵ Hall, *The Genevan Reformation and the American Founding*, 31. Also see Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 536.

²⁸⁶ Rueger, “Gerson, The Conciliar Movement and the Right of Resistance (1642-1644)”, 477. Gerson’s distinction between the Divine Law and human or positive laws and the distinction between the Office and its holder were two concepts on which Gerson’s justification of conciliar action rested; and both these complementary concepts entered the controversy of the years 1642-1644, *ibid.*, 486.

²⁸⁷ Sellers, “Republicanism, Liberalism, and the Law”, 515.

²⁸⁸ Sellers, “Republicanism, Liberalism, and the Law”, 515.

bonds of union between citizens.²⁸⁹ Cicero describes the law as the essential bond which secures the privileges in the commonwealth, provides the foundations of liberty, and serves as the fountainhead of justice – “Within the law are reposed the mind and heart, the judgement and the conviction of the state”. To Cicero the state without the law would be like “the human body without a mind, unable to employ the parts which are to be its sinews, blood and limbs”.²⁹⁰

The view that “the king is the living law” formed part of the famous texts of the *Digest* and the *Institutes*.²⁹¹ Then there is also Cicero’s definition of the ruler as the living law who must not give in to his feelings but must do everything as the law prescribes.²⁹² John of Salisbury referred to the *princeps* as the *lex animata* (the breathing law),²⁹³ which is what Rutherford also refers to.²⁹⁴ *Lex, Rex* makes it clear that the interpretation that is apt in this regard is the view that the king is the living law because he should embody that law (or live that law). Not only is the king the living law, but this law has a centrally Divine component to it. According to Baldus, “because the king is the living law, and as long as he concedes his own majesty [i.e. in law giving] this is a race freely given, and his subjects can then say, ‘I sleep, and my heart, that is my king, keeps watch’”. This passage intimates that the king here is as God’s representative the embodiment of the law and concedes it by his grace to his subjects.²⁹⁵

For Baldus the constitutive element of law was not the ruler’s command or the people’s consent alone, but that will exercised in accordance with the moral, religious and rational criteria. Thus, Baldus considered the *ius naturale*, *ius gentium* and *ius divinum* to be so axiomatic that there could be no debate about whether the *princeps*

²⁸⁹ Raath, “Moral Duty and the Organic Conceptions of Moral Good in the Teachings of the Reformers”, 4 (unpublished).

²⁹⁰ Raath, “Moral Duty and the Organic Conceptions of Moral Good in the Teachings of the Reformers”, 6.

²⁹¹ Levack, “Law, Sovereignty and the union”, 230-231.

²⁹² Irena Backus, “Calvin’s Concept of Natural and Roman Law”, *Calvin Theological Journal*, Vol. 38, (2003), 25.

²⁹³ Fritz Schulz, “Bracton on Kingship”, *The English Historical Review*, Vol. 60, 237(1945), 164.

²⁹⁴ See for example, *Lex, Rex*, 98(2), 101(2), 111(1), 116(2), 146(1), 176(2) and 190(1). Rutherford also refers to Basilii’s understanding that the king is “a living law by office”, *ibid.*, 4(2).

²⁹⁵ Canning, *The Political Thought of Baldus de Ubaldis*, 214. The great medieval jurist, Henry de Bracton (d. 1268) postulated that the king is *sub legem*, answerable to the law. In his *De legibus et consuetudinibus Angliae*, in which he systematised the laws of England, Bracton stated that the king was himself under the law “since law makes the king. Therefore let the king render to the law what the law has rendered to the king ... for there is no king where will rules and not the law”, Letham, *The Westminster Assembly. Reading its Theology in its Historical Context*, 23.

could infringe them – “If he does do so, his law is not valid, because otherwise he would be doing the impossible.”²⁹⁶ The fundamental significance of Baldus’ view is that he argued that the positive law of the emperor should not simply be command, but the embodiment of reason, which is in line with Thomist, as well as Roman law (Gaius) thinking.²⁹⁷ Here Baldus also referred to the human race as ‘rational creatures’ in the context of the people’s capacity to govern themselves through the medium of the law.²⁹⁸

Roman law included the idea (from the law *Digna vox*) that the prince should rule under the law and that ‘what touches all should be approved by all’ (the formula *Quod omnes tangit*, which passed into English law via the canonists).²⁹⁹ Although the sovereign is *legibus solutis* regarding positive law, he is bound by the inherent obligating nature of law – “All political power wielded by the emperor has to be performed through law, because without law the whole constitutional system would be subject to uncertainty and governed by the whims and fancies of the sovereign”.³⁰⁰ In addition to the precepts of positive law applicable to the exercise of sovereign power by the *princeps* in Roman law, there are also other legal norms demanding obedience from the emperor. In this regard, the term ‘law’ in *Digesta* 1. 1. 11. implies

²⁹⁶ Canning, *The Political Thought of Baldus de Ubaldus*, 76. Also see *ibid.*, 77.

²⁹⁷ Canning, *The Political Thought of Baldus de Ubaldus*, 78.

²⁹⁸ Canning, *The Political Thought of Baldus de Ubaldus*, 112.

²⁹⁹ Gaines Post, *Studies in Medieval Legal and Political Thought* cited in, Kelley, “Elizabethan political thought”, 65. There was the famous *Lex Digna Vox*, stating that “It is a word worthy of majesty of the ruler that the prince professes himself bound to the law” (Code 1, 14, 4), Donald R. Kelley, “Law”, 66-94 in J. H. Burns (ed.), *The Cambridge History of Political Thought 1450-1700*, (Cambridge: Cambridge University Press, 1991), 68-69.

³⁰⁰ D. 1. 14. 4. cited in Raath, “Ulrich Huber’s statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)”, 14. Raath adds that, according to Roman law, the sovereign receives his powers from law and he is bound by the inherent obligating nature of positive law because the citizens are bound together by legal principles and transfer their sovereign power through the law (the *lex regia*), and the dignity of the emperor’s office demands that he subjects himself to the principles of positive law, see D. 1. 14. 4. cited in *ibid.*, and D. 1. 1. 11. consecutively. Also see D. 1. 3. 2. cited in *ibid.*, 17. Raath adds that in medieval scholastic jurisprudence it was held that although the *leges* depends upon the will of the sovereign, its existence limits him in practical terms in that the emperor whose power is a legal creation, should work through law, Canning, *The Political Thought of Baldus de Ubaldus*, (2003), 74 cited in Raath, “Ulrich Huber’s statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)”, 15. Quentin Skinner observes that according to Zasius, the Emperor Maximilian, together with the ‘leading citizens and princes’ of the Empire ‘promulgated a constitution’ in which the Emperor bound himself not to ‘rescind or interfere with’ the decisions of his own courts. In this regard, Zasius comments that ‘since the Emperor promised to uphold this ordinance’, and ‘since he is also bound by any contracts he makes’, it follows that ‘it cannot be lawful for him to proceed in any way contrary to the positive laws, Skinner, *The Foundations of Modern Political Thought*. Vol. 2: *The age of Reformation*, 130. Skinner also states that many of the followers of Bartolus (as well as of Ockham) had concluded that the community must in consequence be able at all times to bind its ruler to obey the positive laws, *ibid.*, 182.

that in a wide sense the emperor performs his duties subject to all law – including the higher norms of natural and divine law.³⁰¹

The *Corpus Iuris Civilis* states that it is fitting for the Emperor to be bound by the *leges*, specifically because his power derives from the law.³⁰² Baldus considered that law provided a structure for the political life of natural man, a view, which is essentially a creative development of the juristic commonplace (deriving from Cicero) that law is the bond of civil society.³⁰³ DuPlessis-Mornay, in his *Vindiciae*, referred to Agesilaus, king of Sparta, who proclaimed that all commanders had to obey the commandments of the laws.³⁰⁴ Referring to Henry of Bracton's (early thirteenth-century English jurist) argument that, "the law makes the king, therefore the king must make a return to the law by subjecting himself to its rules", Fritz Schulz states that this argument goes back to the *lex digna* as paraphrased by Azo.³⁰⁵

The *Vindiciae* also refers to the kings of Sparta whom Aristotle called lawful princes, who renewed their oaths to rule every month according to those laws they had from Lycurgus,³⁰⁶ and that Archidamus (the son of Zeuxidamus, who was the governor of Sparta) stated: "The laws and the lawful magistrates".³⁰⁷ The *Vindiciae* emphasises the idea of sovereignty of the law over the ruler, one of the two mottos in this regard being the famous passage from the *Codex Theodosianus*, namely: "*Digna vox est majestate regnantis legibus alligatum se principem profiteri*" ("It is a worthy word that the prince himself is to be declared bound by the authority of the laws holding sway").³⁰⁸ Aristotle made it clear in his *Politics* that the rule of law was preferable to that of a person, and that persons should be made guardians and servants of the law. According to Aristotle, "the generality ought to be sovereign". This was grounded in

³⁰¹ Raath, "Ulrich Huber's statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)", 19. Raath adds that in medieval scholastic juristic thought, the legal limits to the *potestas absoluta* set by the *ius naturale*, *ius gentium* and the *ius divinum* provided a structure within which the sovereign was bound to execute his will in accordance with moral, religious and rational principles, *ibid.*, 20.

³⁰² Canning, *The Political Thought of Baldus de Ubaldis*, 74.

³⁰³ Canning, *The Political Thought of Baldus de Ubaldis*, 166.

³⁰⁴ Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, 144.

³⁰⁵ Schulz, "Bracton on Kingship", 168-169. Schulz adds that, "I cannot tell whether Azo was the first to give this explanation. But be that as it may, it was from Azo that Bracton took this famous argument, *ibid.*, 169. Azo's conception of the natural law was that it reflected the contents of the Mosaic Law or the Gospel, Whelan, "The 'Higher Law' Doctrine in Bracton and St. Thomas", 227.

³⁰⁶ Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, 148.

³⁰⁷ Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, 148.

³⁰⁸ Barker, *Context of Church, State and Education*, 92.

the idea that the meeting of the generality produced, as it was a collective person with a collective capacity of judgements. In the words of Ernest Barker:

These two sayings were put together in the thought of the Middle Ages, with the result that the people were regarded as the author of law by the power of their collective reason, and the law thus formed was regarded as the final sovereign. Dicta from Roman Law, enshrining the idea of the power of the popular comitia to make laws, and the idea that the princeps was bound by the laws, added a new corroboration to this way of thinking.³⁰⁹

For medieval thought, the superiority of the law was also important, and in this regard, for Rutherford, just as it was for medieval thought, “the law exists prior to governments”.³¹⁰ The West’s understanding of the historicity of law in the twelfth century and thereafter was connected to the concept of its autonomy and of its supremacy over political rulers. The ruler, although he may make law, did not have the authority to make it arbitrarily.³¹¹ Bracton, in the early thirteenth century stated, “The king must not be under man but under God and under the law, because law makes the king.”³¹²

Charles I’s execution at the hands of parliament defied all previous practice. This assertion of superiority of parliament over the monarchy was nothing less than the claim of legislative supremacy.³¹³ Rutherford refers to Ulpian, who stated, “That the law ruleth the just prince.”³¹⁴ Rutherford also refers to Ulpian’s statement, “*Quod principi lacet legis vigorem habet*”, namely, “The will of the prince is the law; yet the meaning is not that anything is a just law, because it is the prince’s will, for its rule formally; for it must be good and just before the prince can will it, – and then, he

³⁰⁹ Barker, *Context of Church, State and Education*, 106. Also see Inwood and Miller, “Law in Roman Philosophy”, 93 and 99-100. In Plato we also find glimpses of the rule of law idea, see Richard F. Stalley, “Platonic Philosophy of Law”, 57-77, in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, in *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 6, Enrico Pattaro (ed.), (Dordrecht: Springer, 2007), 70-71.

³¹⁰ Webb, *The Political Thought of Samuel Rutherford*, 148.

³¹¹ Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, 5.

³¹² Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, 5.

³¹³ J. G. A. Pocock and Gordon J. Schochet, “Interregnum and Restoration”, 146-179, in J. G. A. Pocock (ed.), *The varieties of British political thought, 1500-1800*, (Cambridge: Cambridge University Press, 1993), 148.

³¹⁴ Rutherford, *Lex, Rex*, 109(1).

finding it so, he putteth the stamp of a human law on it.”³¹⁵ Rutherford’s prioritisation of the law as reflected in his metaphorical terminology runs parallel to the Roman author, Seneca’s (c. 5 BC – AD 65) understanding that the ruler is the *embodiment of law*³¹⁶ as is explained above. Ideas on the superiority of the law and a universal moral basis to the law formed part of a long-standing tradition in Western constitutional, political and legal thought. The theme of ‘the law’ and its importance is one of the underlying themes in *Lex, Rex* (the law and the king) and which is substantially derived from preceding schools of thinking.

The law also played a fundamental role in serving the welfare of the community. Aquinas defined the law as “an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”³¹⁷ It was the responsibility of the ruler to promote the welfare of the whole society. Not doing so, the ruler no longer fulfilled his function.³¹⁸ DuPlessis-Mornay, in his *Vindiciae*, emphasises that kings were created for the good and profit of the people, and that, as stated by Aristotle, those who endeavoured and seek the community of the people are truly kings, whereas those that make their own private ends the only aim of their desires are tyrants.³¹⁹ DuPlessis-Mornay states that:

Now, although many emperors, rather by force and ambition, than by any lawful right, were seized of the Roman empire, and by that which they call a royal law, attributed to themselves an absolute authority, notwithstanding, by the fragments which remain both in books and in Roman inscriptions of that law, it plainly appears, that power and authority were granted them to preserve and govern the commonwealth, not to ruin and oppress it by tyranny.³²⁰

Mornay emphasises this important role of the ruler throughout his *Vindiciae*.³²¹ Althusius³²² and Rutherford³²³ also reiterated this idea. To Rutherford the government

³¹⁵ Rutherford, *Lex, Rex*, 138(1). Rutherford also states that Ulpian is referred to by royalists as supportive of absolute monarchy, *ibid.*, 204(1) (Here Grotius is also referred to by Rutherford).

³¹⁶ Andries Raath, “Moral Duty and the Organic Conceptions of Moral Good in the Teachings of the Reformers”, 4.

³¹⁷ Whelan, “The ‘Higher Law’ Doctrine in Bracton and St. Thomas”, 231.

³¹⁸ Salmon, *The French Religious Wars in English Political Thought*, 7.

³¹⁹ Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, 158.

³²⁰ Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, 176.

³²¹ See for example, Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, 140, 143, 152, 158, 161, 165, 172, 182, 186-187, 189 and 206.

³²² Carney, *The Politics of Johannes Althusius*, 87, 130 and 177.

in general is to act as a father;³²⁴ a watchman;³²⁵ a servant;³²⁶ a feeder;³²⁷ a fiduciary patron;³²⁸ a tutor;³²⁹ marital and husbandry power;³³⁰ the peoples' debtor for happiness;³³¹ a relative;³³² a pilot (of a ship);³³³ and a good and saving shepherd.³³⁴

The concept of the ruler as guardian of the realm and of his people's well-being had been a commonplace of juristic thought for centuries. On Cicero's authority, Salamonio referred to the princes as the "administration (*procuratio*) of the commonwealth for the benefit of those who were entrusted and not of the ones by whom the trust was held. As in the marriage analogy, the king as tutor was once more, and literally, administrator of his charge.³³⁵

There was similarity to this line of thinking in Roman law. In classical Roman law, the emperor was under the duty to serve and govern subject to the common good (the *utilitas publica*) because the emperor is under the obligation to achieve the good of his subjects.³³⁶ The Roman law principles regarding the serving of the public good were substantially supported and developed by the medieval jurists.³³⁷ Medieval

³²³ *Lex, Rex*, 30(2), 48(1), 57(2), 59(1), 62(2), 64(2), 70(1)-70(2), 79(2), 83(1), 92(1), 95(1), 97(1), 102(1), 103(2), 105(1), 114(1), 119(2), 121(1), 124(1)-125(1), 126(2), 128(1)-128(2), 137(1), 142(1), 164(1), 182(1), 184(2), 185(1), 187(1), 193(2), 194(2), 203(2), 208(1), 210(1) and 228(2).

³²⁴ Rutherford, *Lex, Rex*, 26(1), 59(1), 62(1)-62(2), 64(2), 102(1), 116(2), 128(1)-128(2), 164(1) and 218(1).

³²⁵ Rutherford, *Lex, Rex*, 59(1), 70(1), 182(1) and 197(2)-198(1).

³²⁶ Rutherford, *Lex, Rex*, 59(1), 70(1), 79(2), 145(1) and 197(2)-198(1). In this regard, Rutherford's thought is much the same as Althusius' – See Carney, *The Politics of Johannes Althusius*, 15 and 106.

³²⁷ Rutherford, *Lex, Rex*, 64(2), 65(1) and 132(2).

³²⁸ Rutherford, *Lex, Rex*, 72(1). In the words of Rutherford, "To the thinking of the learned jurists, this power of the king is but fiduciary, which is a type of power by trust, pawn or loan", *ibid.*, 86(1)-86(2). Here Rutherford refers to among others, the "Gloss" and to "Novel". In this regard, also see *ibid.*, 98(2) and 197(2)-198(1).

³²⁹ Rutherford, *Lex, Rex*, 69(1), 102(2), 116(2), 128(1)-128(2) and 153(1). Compare this to François Hotman's view that: "The king stands in the same relation to the kingdom as the father occupies in respect of the family, the tutor to the pupil, the pilot to the sailor, the general to the army", Henry M Baird, "Hotman and the 'Franco-Gallia'", *The American Historical Review*, Vol. 1, 4(1896), 623. *Lex, Rex* refers to Hottman a couple of times.

³³⁰ Rutherford, *Lex, Rex*, 69(2) and 116(2).

³³¹ Rutherford, *Lex, Rex*, 103(2).

³³² Rutherford, *Lex, Rex*, 123(2).

³³³ Rutherford, *Lex, Rex*, 102(2).

³³⁴ Rutherford, *Lex, Rex*, 179(1)-179(2). Also see Carney, *The Politics of Johannes Althusius*, 57.

³³⁵ Howell Lloyd, "Constitutionalism", 254-297, in J. H. Burns (ed.), *The Cambridge History of Political Thought 1450-1700*, (Cambridge: Cambridge University Press, 1991), 263. The maxim *quod omnes similiter tangit ab omnibus comprobetur*, originally specific to the conduct of joint guardianship in Roman law, had passed through the hands of medieval canonists and conciliarists to graduate from a private-law rule of procedure into a 'principle of public law', *ibid.*, 271.

³³⁶ D. 1. 4. 1. cited in Raath, "Ulrich Huber's statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)", 23. Also see D. 1. 2. 16. cited in *ibid.*

³³⁷ Raath, "Ulrich Huber's statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)", 23. Also see *ibid.*, 37. In this regard, see Canning, *The Political Thought of Baldus de Ubaldis*, (2003), 99-104 in *ibid.*, 24. Also see Raath, "Ulrich Huber's statement of the

jurists also regarded the feudal bond as a fundamental legal relationship or contract without which human interaction in society would be impossible.³³⁸ Baldus emphasised that the emperor's duty to conserve the empire was manifestly an expression of his responsibility to serve the common good, the *utilitas publica*, and a basic requirement for any medieval ruler.³³⁹ Judgement by subjects illustrates the reciprocity existing between the emperor and those he rules; a conception that, according to Joseph Canning, Baldus might have, derived from feudal sources in part: "Relatively speaking, the emperor is said to be like a father and just as his subjects are bound to obey him well, he is also bound to rule them well."³⁴⁰ The king ought to be the tutor of his kingdom, not its pillager or common destroyer; and the king ought to protect the welfare of the *res publica*.³⁴¹

The proposition that the welfare of the people was the end of political society was, as stated before, applicable to the law. The Spanish Dominican, Domingo de Soto (1494-1560) supported this idea. However, law was not merely an instrument for political use in pursuit of the common good that might emanate from questionable sources at any time. By that same tradition, law was a measure of human acts in relation to justice, an attribute that, to Aristotle and Plato, was essential to the very existence of the political community.³⁴² Although Augustine had appeared to deny the latter proposition, he too had pronounced justice to be a necessary constituent of law, so that, as De Soto once stated, an unjust law would be a contradiction in terms. Therefore, the law properly conceived, afforded a people its surest means of attaining a condition at once of common good and justice.³⁴³ Many other authors would

Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)", 24-25 regarding confirmation of the scholastic jurists' interpretation of the legal principles in the *Corpus Juris Civilis*, which represents a significant development towards providing a legal basis for the common good to limit the sovereign's political powers.

³³⁸ Canning, *The Political Thought of Baldus de Ubaldus*, 83 cited in Raath, "Ulrich Huber's statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)", 35. According to Baldus, "because the royal office is set up by the kingdom as a corporation, he regards the office of the sovereign as a function limited by the purpose for which it was instituted, which purpose is to protect the rights of the kingdom ... thus all rulers should swear a coronation oath to conserve the rights of their kingdoms. The duties attached to the coronation oath demand of the sovereign that he should protect the welfare of the *res publica*", Canning, *The Political Thought of Baldus de Ubaldus*, 219-220 in Raath, "Ulrich Huber's statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)", 36.

³³⁹ Canning, *The Political Thought of Baldus de Ubaldus*, 90.

³⁴⁰ Canning, *The Political Thought of Baldus de Ubaldus*, 91.

³⁴¹ Canning, *The Political Thought of Baldus de Ubaldus*, 219.

³⁴² Lloyd, "Constitutionalism", 264-265.

³⁴³ Lloyd, "Constitutionalism", 265.

cheerfully adopt the time-honoured formula of the *Digest* for their summary definitions of law being “the art of the good and the just”.³⁴⁴ One also finds that during the eighteenth century, republican government had no other end than the welfare of the people (*res publica* or the public good).³⁴⁵

Republicanism is popularly known for its prioritisation of the active role that the people should have in the ordering of society and in the process the importance of the law either forgotten or ignored. From the above it is clear that within republican thought preceding seventeenth-century Europe there arose since Aristotle, but especially since the Stoics, the idea that the law should enjoy a high status of authority. Law in this regard is understood as something just and of moral relevance, something which reflects universality and which has its source from nature and from the Divine.

The republican principle of the importance of the sovereignty of the people dated many centuries prior to pre-modern thinking and was introduced as a desperate resource to counter the abuse of royal and aristocratic power. However, there is the view that history shows that this idea of the sovereignty of the people never did any good, but was only another power of evil. It is one thing to employ it in a manner pleasing to God, however, it is a very different thing when a community declares its own sovereignty in defiance of God and His laws – “It is not democracy itself that is objectionable, but the repudiation of the moral code. Every form of government is antichristian which raises its head against God, whether it is wielded by the people or by an autocrat”.³⁴⁶ In this regard, the law was viewed as being coterminous with that

³⁴⁴ Lloyd, “Constitutionalism”, 265.

³⁴⁵ Wood, *The Creation of the American Republic 1776-1787*, 55. Also see *ibid.*, 68. Cicero came up with the term ‘republic’, from the Latin words, *res publica*, or ‘public things,’ ‘property of the public,’ by which he meant a regime devoted to the service of the people. Though the term ‘republic’ *per se*, originates in the first century B. C. E., the essential notion that the power of government should be exercised in the interests of the common good was already at play in Greece in the sixth century B.C.E., Joshua A. Berman, *Created Equal. How the Bible Broke with Ancient Political Thought*, (Oxford: Oxford University Press, 2008), 171.

³⁴⁶ Henry W. J. Thiersch, *On Christian Commonwealth*, (Translated and adapted under the direction of the author, from the German of Henry Thiersch), (Edinburgh: T & T Clark, 1877), 42-43. Daniel Elazar also alludes to the importance of the moral code (as part of the covenant) in the limitation of power, commenting that politically the covenant idea has within it the seeds of modern constitutionalism in that it implies the accepted limitation of power on the part of all the parties to it – a limitation not inherent in nature but involving willed concessions. In the community’s covenantal relationship with God, the leaders who bind themselves through the covenant limit their powers, by serving the people in accordance with the terms of the Covenant (which is God’s law), Daniel J. Elazar,

which is moral, just and Divine and which best serves the attainment of the public good in the Christian Republic. This understanding is in full agreement with constitutionalism, the law being viewed as that which precedes political power and authority and by which justice, morality and the effective regulation of society is served. Rutherford's contribution in this regard is elaborated upon in especially Chapter 2 and the Epilogue.

3.2.2.4 Participatory and representative citizenship

Participatory citizenship

P. Hume Brown comments that:

These bold notions as to the inherent right of a people to govern itself, of necessity remained simple theory, till the sixteenth century. So long as the Western nations owned universal allegiance to the Pope, the fundamental principles on which society rests could never be the subject of practical discussion. It was the great Protestant revolt from Rome that brought to direct issue the question of the mutual relations of king and people ... In no European country did this become more apparent than in Scotland ...³⁴⁷

A central theme of the constitutional and republican project is the inclusive and active role of the people in the exercise of political authority in a given society. Expressions in this regard can be traced many centuries back into Western civilization. The reasoning of the maxim, *rex singulis major, universis minor* (the individual the greater, the whole the lessor), which epitomized the theory of popular sovereignty as expressed in the *Vindiciae contra Tyrannos* and the writings of the Reformer and Calvin's contemporary at Geneva Theodore Beza (1519-1605), was derived from Aristotelian premises. The latter described a human society as alone providing a full life for its members (and which endowed such a society with an organic unity).³⁴⁸ Neither Augustine nor Suárez (nor the majority of pre-modern Christian writers) regarded divine appointment to political authority as precluding human appointment.

The Book of Joshua as a Political Classic, (Jerusalem Center for Public Affairs), 5, <http://www.jcpa.org/dje/articles/judges.htm> (accessed 23 December 2012).

³⁴⁷ Robert Gilmour, *Samuel Rutherford. A Study. Biographical and somewhat Critical, in the History of the Scottish Covenant*, (Edinburgh and London: Oliphant Anderson & Ferrier, 1904), 177-178. Gilmour then refers to Knox's dialogue with Queen Mary where Knox tells Queen Mary that God has nowhere commanded that kings exceed their bounds, *ibid.*, 178. This was the view that Buchanan defended in his *De Jure Regni* (The Rights of the Crown in Scotland), *ibid.*, 178-179.

³⁴⁸ Salmon, *The French Religious Wars in English Political Thought*, 7.

Rather, they endorsed a theory of dual appointment, divine and human.³⁴⁹ Aquinas was also clear on the important role of the people in the election of the ruler.³⁵⁰ Three themes dominated the thought of the neo-classical American republicans, namely the good of the commonwealth as a whole, the subordination of individual interests through the promotion of civic virtue, and citizen participation in a deliberative, value-selective form of government.³⁵¹

The great debates on republicanism in post-Renaissance Europe were centrally directed at who could and should count as the public from which order and governance in the public realm was to be derived. The extension of the people to include the common people became an achievement.³⁵² Towards the end of the twelfth century, a form of Republican self-government had come to be adopted almost universally by the leading cities of Northern Italy. This Republican self-government entailed governance “by the will of consuls rather than rulers”, whom were “changed almost every year” in order to ensure that their “lust for power” was controlled and the freedom of the people maintained.³⁵³

Referring to Tacitus’ *Annals* Rutherford states: “It is thought Julius Caesar, in the war against Pompey, subdued the Romans and the senate, and they were subdued again in the battle of Octavius against Cassius and Brutus. But Tacitus saith that was *de facto*, not *de jure*”.³⁵⁴ Rutherford, referring to Livy, says, “How could they make their emperors absolute? Livy saith, ‘The name of a king was contrary to a senate liberty.’”³⁵⁵ Rutherford says this whilst also referring to other authors such as Marius Salomon and Suetonius, who supported opposition to absolute power of the Roman emperor. In Book II of his *History*, Livy begins with a much-cited account of the transition from the *dominatio* of the early kings to the liberty enjoyed by the Roman people under their ‘free state’. Livy equates this transformation with the establishment

³⁴⁹ Joan Lockwood O’ Donovan, “Political Authority and European Community: The Challenge of the Christian Political Tradition”, *Scottish Journal of Theology*, Vol. 47, 1(1994), 7.

³⁵⁰ Hall, *The Genevan Reformation and the American Founding*, 33.

³⁵¹ Sherry, “Civic Virtue and the Feminine Voice in Constitutional Adjudication”, 552.

³⁵² Knud Haakonssen, “Republicanism”, 568-574, in *A Companion to Contemporary Political Philosophy*, Robert E. Goodin and Philip Pettit (eds.), (Oxford: Blackwell Publishers, 1993), 569.

³⁵³ Skinner, *The Foundations of Modern Political Thought*, Vol. 1: *The Renaissance*, 3. Also see *ibid.*, 6 and 12.

³⁵⁴ Rutherford, *Lex, Rex*, 178(2). According to Rutherford, Suetonius and Tacitus say, “The succeeding kings encroached by degrees upon the people’s liberty”, *ibid.*, 178(1)-178(2), and Rutherford also refers to Emperor Augustus who saw himself as the tribune of the people, *ibid.*, 178(1).

³⁵⁵ Rutherford, *Lex, Rex*, 178(1).

of the rule of law and the consequent ending of any dependence on the discretion of the king.³⁵⁶ By the time Charles I had confronted his Parliament in 1640, Roman historian authors such as Tacitus and Livy had been referred to by English political thought in presenting an explicitly anti-monarchical perspective. This nourished a new reflection on the relations between the liberty of subjects and the prerogatives of the crown.³⁵⁷ In the words of Quentin Skinner,

... one of the most potent sources of radical thinking about the English polity in the years immediately preceding the outbreak of civil war in 1642 was provided by classical and especially Roman ideas about freedom and servitude. Far more than has generally been recognised, the outbreak of the English revolution was legitimised in neo-Roman terms.³⁵⁸

During the months following May 1642, the two Houses of the English Parliament proceeded to open up a different and more radical line of attack on the government. Moving beyond their arguments in favour of *salus populi*, they began to delve more deeply into their classical heritage; more specifically, they delved into Roman ideas about freedom and servitude.³⁵⁹ Parliament and many of its supporters chose to justify their decision to go to war in neo-classical rather than in contractarian terms. The final Declarations issued by Parliament in August 1642 made no mention of the natural rights of the sovereign people; rather they spoke of the need to liberate the people from being enslaved by the ‘Malignant Party of Papists’ and ‘other ill-affected persons’ – “From the Parliamentary perspective, the civil war began as a war of national liberation from servitude. If there was any one slogan under which the two Houses finally took up arms, it was that the people of England never, never, never shall be slaves.”³⁶⁰ Rutherford also argues that slavery is something contrary to nature,³⁶¹ hereby opposing tyrannous domination by the ruler over the people.

³⁵⁶ Skinner, “Classical Liberty and the Coming of the English Civil War”, 12-13.

³⁵⁷ Skinner, “Classical Liberty and the Coming of the English Civil War”, 13-14.

³⁵⁸ Skinner, “Classical Liberty and the Coming of the English Civil War”, 14.

³⁵⁹ Skinner, “Classical Liberty and the Coming of the English Civil War”, 20.

³⁶⁰ Skinner, “Classical Liberty and the Coming of the English Civil War”, 28.

³⁶¹ See *Lex, Rex*, 51(2) and the rest of Question XIII in *Lex, Rex*. Also see 65(1) – “But to be a master, and to have a masterly and lordly power over slaves and servants, is to make use of servants for the owner’s benefit, not for the good of the slave”, “Subjects are called the servants of the king ... but they are not slaves”, 82(1) – “He who constituteth himself a slave is supposed to be compelled to that unnatural act of alienation of that liberty which he hath from his Maker from the womb, by violence, constraint, or extreme necessity, and so is inferior to all free men; but the people doth not make themselves slaves when they constitute a king over themselves; because God, giving to a people a king,

In the contribution by humanism to political theory during the Renaissance, mention is made of the fact that a type of Republican regime must be preferable to any of the ‘pure’ forms of government, including the rule of princes. In this period, the inclusive nature of Republicanism was proclaimed, an idea revived by Giannotti in *The Florentine Republic*, who emphasised that “the Republic ought to be founded on the people”.³⁶² Maurizio Viroli speaks of the free republics of Italy, between the fourteenth and the early sixteenth century that witnessed the birth of that ‘classical republicanism’ which served as the fountainhead for the many republican theories and political movements that flourished in the next centuries in both Europe and the United States.³⁶³

Peter Martyr Vermigli was most probably also influenced by Italian republican thought stemming from the Renaissance where the emphasis was on the importance of the people. Furthermore, as stated earlier, Vermigli was exposed to various Roman legal texts, which also probably assisted in his formulations in this regard. Rutherford, looking at 1 Samuel pertaining to the republican role that the people play in electing the king, refers to Vermigli’s confirmation thereof.³⁶⁴ In his interpretation of 1 Samuel 7:11,³⁶⁵ which was used by some (including Grotius) to prove the absolute power of the king, Rutherford refers to Vermigli (among others) to argue that the said text does not qualify the ruler to have absolute power.³⁶⁶ Vermigli is also referred to in *Lex, Rex* to emphasise the importance of the power of the estates.³⁶⁷ The same applies to Vermigli’s support of resistance against tyranny.³⁶⁸

Viroli refers to Matteo Palmieri in *Vita Civile* (1435-1440) who wrote, “Every good citizen placed in a magistracy in which he represents any principal component of the

the best and most excellent governor on earth, giveth a blessing and special favour ... but to lay upon his people the state of slavery, in which they renounce their whole liberty, is a curse of God”, 103(2) – “That power which maketh the benefit of a king to be no benefit, but a judgment of God, as a making all the people slaves, such as were slaves amongst the Romans and Jews, is not to be asserted by any Christian ...”, “If the king be a thing good in itself, then can he not, *actu primo*, be a curse and a judgment, and essentially a bondage and slavery to the people ...”. Also see *ibid.*, 104(1), 106(2), 118(2), 134(1), 142(1), 191(2), 196(2) and 204(1)-204(2).

³⁶² Skinner, *The Foundations of Modern Political Thought*, Vol. 1: *The Renaissance*, 159-160.

³⁶³ Maurizio Viroli, *Republicanism*, (Translated by Antony Shugaar), (New York: Hill and Wang, 2002), 21.

³⁶⁴ Rutherford, *Lex, Rex*, 8(1).

³⁶⁵ “This will be the manner of the king who shall reign over you”.

³⁶⁶ Rutherford, *Lex, Rex*, 73(2).

³⁶⁷ Rutherford, *Lex, Rex*, 98(2).

³⁶⁸ Rutherford, *Lex, Rex*, 171(2).

city considers himself before all else ... a representative of the universal interests of the entire city".³⁶⁹ The relevant texts in the *Corpus Iuris Civilis* could be read in the senses of either an irrevocable translation of power or a revocable concession. In the early thirteenth century, Azo maintained that the Roman people had conceded power to the emperor in such a way that it had not abdicated any power, with the result that the Roman people of his day retained the capacity for general legislation, the emperor being in this respect in no way superior to the people as a whole, but only to individual members of it.³⁷⁰

According to Bartolus, the relationship between the emperor and the people had changed since the *lex regia*: after this had been passed, the people initially still retained the capacity to elect and depose the emperor and consequently the ability to legislate.³⁷¹ Bartolus saw with clarity that in law making the consent of the people could act as a complete alternative to the will of the superior.³⁷² Bartolus was well aware of Aristotelian political concepts, and indeed begins his tract, *De Regimine Civitatis*, with the Aristotelian tri-partite division of forms of government: "Aristotle calls this form of government, *politia* or political. We however call it government by the people."³⁷³ Joseph Canning refers to the famous Bartolus argument that it is the common thread of consent in the people's customs and statutes, which renders the authorization of a superior unnecessary.³⁷⁴ The prime cause of the people's capacity to legislate derives from texts in the *Corpus Iuris Civilis*, notably D. 1. 1. 9 (*Digesta Iustiniani*). Raynerius' fundamental disagreement with Bartolus on this point on the grounds that jurisdiction does not lie with the people but with its superior was very

³⁶⁹ Viroli, *Republicanism*, 24.

³⁷⁰ Canning, *The Political Thought of Baldus de Ubaldus*, 55-56.

³⁷¹ Canning, *The Political Thought of Baldus de Ubaldus*, 57-58. Joseph Canning comments that the *lex regia* could be interpreted in a manner that either retained or rejected ultimate popular sovereignty. Strictly speaking the *lex regia* can stand as a model for the origins of monarchical power, *ibid.*, 62. Canning adds that Bartolus and Baldus did indeed produce theses of the sovereignty of the people in the context of independent cities; but neither used the concept of the *lex regia* to achieve this. Their proofs were in something else. Since both considered the *lex regia* to be irrevocable, it was not suitable for this purpose; thus, as we shall see, if any interpretation in terms of the *lex regia* is placed on Bartolus' and Baldus' theories of popular sovereignty it is misleading, *ibid.*, 62.

³⁷² Canning, *The Political Thought of Baldus de Ubaldus*, 96. Also see *ibid.*, 97. Cecil Woolf states that: "... Bartolus ... is of opinion that, for the majority of the Italian cities at least, government by the people is best ... this does not mean that the people itself directly conducts the government, but that it commits the government to its officials 'secundum vices et secundum circulum'", Woolf, *Bartolus of Sassoferrato. His Position in the History of Medieval Political Thought*, 180.

³⁷³ Canning, *The Political Thought of Baldus de Ubaldus*, 163.

³⁷⁴ Canning, *The Political Thought of Baldus de Ubaldus*, 107.

well known, especially through Raynerius' lengthy *repetitio* on D. 1. 4. 9 – Baldus appears expressly to support Raynerius' view.³⁷⁵

According to Baldus, popular consent is the very source of jurisdiction; its expression and the reason why the superior's authorization are not required. Baldus did not hereby enunciate a theory of popular sovereignty, but the basis was laid.³⁷⁶ Baldus like Bartolus, realised the potential of D. 1. 1. 9 as a source for the autonomy of the people. For Baldus the people's capacity to legislate was both an aspect of its jurisdiction and something permitted by D. 1. 1. 9 – It is “derived more from some permission given by the law for the immediate purposes of his argument ...”³⁷⁷ Baldus' overall opinion was therefore that peoples possessed an autonomous capacity to legislate through the exercise of their own consent, which capacity was an aspect of their power of jurisdiction derived from the *ius gentium* itself.³⁷⁸

The Roman law presents two sources of the emperor's authority. The legal construction known as the *lex regia* states that the Roman people was the original source of the emperor's jurisdiction; yet the *Corpus Iuris Civilis* also emphasises the divine source of imperial authority.³⁷⁹ Similar to Bartolus, Baldus emphasised the theocratic nature of the emperor's power, for example, “Note that everyone who takes an oath does not do so against the emperor just as he does not against God. Thus an exception is made of the emperor in every oath of fealty, because he is the emperor of the world, and so to speak a corporeal God for the world”.³⁸⁰ On the face of it, the *de*

³⁷⁵ Canning, *The Political Thought of Baldus de Ubaldus*, 110.

³⁷⁶ Canning, *The Political Thought of Baldus de Ubaldus*, 102.

³⁷⁷ Canning, *The Political Thought of Baldus de Ubaldus*, 111.

³⁷⁸ Canning, *The Political Thought of Baldus de Ubaldus*, 113. The underlying corporation of the kingdom concedes authority to its mortal king by conferring on him this immortal *dignitas*, which he puts into operation and acts thereby for the kingdom which does not act for itself. Therefore, according to Baldus, when the individual ruler acts in the role of the king, he acts not as himself but as the personification of his *dignitas*, *ibid.*, 215-216. The ruler is sovereign being given this authority by the people of the kingdom itself, *ibid.*, 217.

³⁷⁹ Canning, *The Political Thought of Baldus de Ubaldus*, 25.

³⁸⁰ Canning, *The Political Thought of Baldus de Ubaldus*, 25. Baldus is typical of mainstream juristic interpretation in habitually attributing a thoroughly theocratic origin to the power of the emperor, who is God's vicar on earth: “Note that we are all bound to the emperor because God, just as he is the emperor in heaven, has also set up the emperor on earth as his vicar and ruler in faith, truth and justice ...”, Canning, *The Political Thought of Baldus de Ubaldus*, 25. According to Baldus, “the emperor's authority depends on the *lex regia* which was promulgated at divine command; and thus the empire is said to be immediately from God”, *ibid.*, 26. In short, the people according to Joseph Canning, acted as God's agent, which suggests an important point of interpretation for medieval theories of the origins of governmental authority, *ibid.*, 26. According to Baldus, the rulership of the world was originally in the hands of the Roman people who possessed it by divine permission, and it was in this sense derived from God. Next, the people, still with divine permission, transferred their power to the emperor. The

facto and the theocratic theses appear to set forth very different sources for royal power: the one purely human and the other divine. Of course, these were ways round this, namely the divine and human sources of imperial power, and the idea that royal power derives ultimately from God, but is mediated by the people.³⁸¹ Bartolus in *De regimine civitatis* combined the human and the divine sources of kingship, with the emphasis on the human in the case of kings other than the *Rex Romanorum*:

Every king is either immediately chosen by God or by electors under the eye of God ... And note from this that rulership through election is more divine than that through succession ... And thus the choice of the emperor who is the universal king is made through the election of prelates and princes, and does not go by succession ... For God constituted this empire from heaven ... *Individual kings however are more from human constitution*, as in [D. 1. 1. 5].³⁸²

There is the tradition of political election, with roots in Teutonic and Roman custom and law, which developed an alternative theological interpretation of the community's role. This interpretation, as authoritatively set out by the civil and canon lawyers and built upon by the late-medieval theologians, presents the community as the *immediate* source of political rule, with the right to confer it on one or more chosen persons. The Protestant reconstruction of this tradition by the insertion of Old Testament covenantal ideas strongly reinforced the primacy of divine over human election (which was of course abused by the Romanist Church). At its most theologically commanding, in the writings of the French Calvinists (Huguenots), the institution of political authority entailed two distinct covenants or pacts – The two covenants leave no doubt that rulers hold their authority ‘from the people after God’.³⁸³

The Hebrew constitution in the Old Testament was, in its substance and its forms, eminently republican because of the fact that the power of the people was an essential element in the political dispensation of the time.³⁸⁴ In the Old Testament, the king

confirmation by Christ then established the rule of the emperor as the will of God, Canning, *The Political Thought of Baldus de Ubaldus*, 27.

³⁸¹ Canning, *The Political Thought of Baldus de Ubaldus*, 214.

³⁸² Canning, *The Political Thought of Baldus de Ubaldus*, 214.

³⁸³ O' Donovan, “Political Authority and European Community: The Challenge of the Christian Political Tradition”, 8-9.

³⁸⁴ E. C. Wines, *The Hebrew Republic*, 241-242, <http://www.contra-mundum.org/books/republic.pdf> (accessed 14 May 2012). For other related theorists who emphasise the republican trait of accommodating the power of the people in constitutional and political thinking see James Madison, “Republican Government”, Chapter 4, Document 24, Vol. 1, 131, *Federalist*, no. 39, 250-253, http://press-pubs.uchicago.edu/founders/print_documents/v1ch4s24.html (accessed 13 May 2012);

derives his title as ruler not from any inherent or Divine right, but from the consent of the governed. God's government is constituted and justified by His contract with the children of Israel. Helen Silving adds: "Contrary to the generally prevailing opinion, this Biblical state covenant is in every way comparable to Rousseau's 'contract social' and Jefferson's notion of 'governments ... deriving their just powers from the consent of the governed'. Indeed, if anything, it seems more far-reaching than the latter ideas."³⁸⁵ Mutual election, namely the people's choice of God as a ruler, and God's reciprocal choice of the children of Israel as His people, is indicative of the elements of contractual democracy (federal), and the notion of the chosen people finally appears not as a capricious arbitrary act of a despotic ruler, but as a constitutive part of a perfect, democratic bilateral procedure.³⁸⁶ Rutherford re-emphasised the important role of the people in a political context regarding their relationship to God. Here one finds a tangible dignity throughout the individuals within the populace, since each of them represents God and his image. The ruler has this as well, and they differ in terms of formal public authority.³⁸⁷

The civil state during the reign of the Catholic Church before the Reformation was a department of the church and therefore under ecclesiastical direction, a practice which tended to result in absolutism in Roman Catholic lands. On the other hand, the Anabaptists were often quite willing to form their own political and martial forces and then use them against the duly established government of a country, a practice that naturally lead to anarchism.³⁸⁸ The Westminster Divines postulated a resolution to the tension between Romanist and Anabaptist outlooks, which came in the form of two principles, namely: Against the Anabaptists the Westminster Confession of Faith (WCF) maintains that the office of magistracy had divine appointment and therefore, "it is lawful for Christians to accept and execute the office of a magistrate ...". Rutherford states that all interpreters such as Beza, Calvin, Luther, Bucer and Marloratus say that it is a special reproof of Anabaptists and Libertines, who at that

Hall, *The Genevan Reformation and the American Founding*, 436-437; Jacobs, *The Influence of Biblical Ideas and Principles on Early American Republicanism and History*, 64; Haakonssen, "Republicanism", 569; Nicholas Buttle, "Republican Constitutionalism: A Roman Ideal", *The Journal of Political Philosophy*, Vol. 9, 3(2001), 338; and E. C. Wines, *The Hebrew Republic*, 64.

³⁸⁵ Helen Silving, "The Jurisprudence of the Old Testament", *New York University Law Review*, Vol. 28, (1953), 1130.

³⁸⁶ Silving, "The Jurisprudence of the Old Testament", 1131-1132.

³⁸⁷ Thomas Adamo, *Lex Rex. The Law, The King*, (A Biblical primer on the purpose, place, and power of civil government), (Lakehurst, NJ: Woodbine Cottage Publications, 2010), 43.

³⁸⁸ Bahnsen, *Theonomy in Christian Ethics*, 501-502.

time maintained that we are all free men in Christ, and that there should be no kings, masters or any magistrates.³⁸⁹

Against the Roman Catholics, the Westminster Confession of Faith (WCF) adds, "... when called thereunto". Hereby the divines indicated that a Christian could not hoist himself upon a populace as their ruler by implicit ecclesiastical right – the officers of the state had to be called by the people "as Rutherford declared in *Lex Rex* (1644): The power of creating a man a king is from the people". Therefore, Chapter 23, section 2 of the WCF plainly sets forth the view that a Christian has standing in both the church and the state, meaning that the Christian, by virtue of his allegiance to Christ's kingdom, is not excluded from active participation in the affairs of the states of this world.³⁹⁰ Rutherford's views on the role of the people in the election of the ruler, as well as his emphasis on the power of the people in political activity³⁹¹ is stated in no uncertain terms in *Lex, Rex*, which is very similar to the views of Althusius on the matter.³⁹² The people according to Rutherford form part of the efficient cause of government, albeit in a secondary sense, which is understood as God being the primary cause and the people being the secondary cause – "all power comes from God and he has given the power of self-preservation to all people. They then delegate that power to their rulers. Thus the ruler's power is the people's power, the people's law-making."³⁹³ The appearance of Bishop John Maxwell's *Sacro-Sancta Regum Majestas* (The Sacred and Royal Prerogative of Christian Kings)

³⁸⁹ *Lex, Rex*, 148(2).

³⁹⁰ Bahnsen, *Theonomy in Christian Ethics*, 502. This understanding received a welcoming reception in early American history, for example, Publius, in *The Federalist*, postulates a *democratic* republic which "enables the majority to defeat [a minority faction's] sinister views by regular vote", and this must be a majority "derived from the great body of the society not from an inconsiderable proportion, or a favored class of it." William A. Schambra, *As Far as Republican Principles Will Admit. Essays by Martin Diamond*, (Washington, D. C.: The AEI Press, 1992), 43. Also see *ibid.*, 44-46, Paul Peterson, "The Meaning of Republicanism in, *The Federalist*", *Publius*, Vol. 9, 2(1979), 46, and Hall, *The Genevan Reformation and the American Founding*, 437. John Bernard in his Massachusetts Election Sermon (1734) wrote: "This voice of Nature is the voice of God. Thus this is that *vox populi est vox dei*" [The voice of the people is the voice of God], Jacobs, *The Influence of Biblical Ideas and Principles on Early American Republicanism and History*, 77.

³⁹¹ See Rutherford, *Lex, Rex*, 3(2)-4(1), 6(1)-6(2), 7(1)-7(2), 8(2), 9(1)-9(2), 11(1)-12(1), 25(2)-26(1), 27(1), 29(1)-29(2), 32(1)-34(1), 38(2), 39(2), 41(1), 42(2)-43(2), 45(1), 46(1), 47(1), 48(2)-49(1), 50(1)-50(2), 52(2)-53(2), 56(1)-56(2), 57(2)-58(1), 60(1), 63(1), 64(1), 69(2)-71(2), 80(1)-80(2), 81(2)-82(2), 83(2), 86(1)-86(2), 94(2), 96(1), 98(1), 102(1), 113(1), 115(1)-115(2), 126(2)-127(1), 128(1), 129(2), 130(1), 143(1), 173(1)-173(2), 174(1), 183(1), 185(2), 186(1)-186(2), 194(1), 201(1)-201(2), 202(2)-204(1), 205(2) and 229(2).

³⁹² See Carney, *The Politics of Johannes Althusius*, 35-38, 50, 56, 58, 66-68, 87-91, 92, 97, 109, 117-118, 120, 127, 187 and 192.

³⁹³ Field, "'Put not Your Trust in Princes'. Samuel Rutherford, the four causes and the limitation of civil government", 103.

served as a catalyst towards the writing of *Lex, Rex* also allowing Rutherford to re-emphasise the important republican understanding of placing authority in the people as well. Rutherford's title also spoke of a prerogative but, in deliberative contrast to Maxwell, Rutherford's theme concerned the 'just prerogative of King *and* People'.³⁹⁴

Rutherford's contribution regarding this line of thinking concerns insights into God's sovereignty applied through secondary causes (mediately) regarding political activity, and in this, the Divine Law is brought into play, together with the simultaneous operation of Divine sovereignty and human agency and responsibility. These are also inextricably connected to the idea of the covenant. The authority of the people was to Rutherford not because of a concern of some theory of 'proletarian rights', but a concern with a theory of how the universe worked. In this theory, the 'people' must be thought of solely as a medium through which God might work.³⁹⁵ This gains added meaning when considering the people as a secondary cause towards the attainment of Divine purpose, an understanding strongly supported by Rutherford. The spiritual upliftment across European communities and the developing religious activity among individuals during the Reformation attracted the idea that the individual had an important role to play in religion also from a political point of view. This was especially true for Reformation Scotland.

The possession and participation of the people in the affairs of the state pervaded the Old Testament Hebrew constitution in that, according to the latter, the general will, freely and clearly expressed in regularly constituted assemblies, was deemed necessary to establish the law.³⁹⁶ The Reformation aimed towards returning to this

³⁹⁴ Field, "'Put not Your Trust in Princes'. Samuel Rutherford, the four causes and the limitation of civil government", 87. *Lex, Rex*'s title begins as follows: "*Lex, rex: The Law and the Prince. A Dispute for the just Prerogative of King and People ...*"

³⁹⁵ Yeoman, *Heart-Work: Emotion, Empowerment and Authority in Covenanting Times*, 48-49. Approximately two-hundred years before, we find similar thought in the canonist Nicholas of Cues' *De concordantia catholica* (1432). Nicholas' characteristic doctrine was an assertion that the *divine will expressed itself in human affairs through community consent*. This explained in the first place, the origin of all legitimate authority – "All power, which is primarily from God, is judged divine when it arises from a common concord of the subjects." The idea that a ruler's authority *could come from God through the people* was common enough by this time, but Nicholas presented it with a new wealth of metaphor and a new range of applications, Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 66 (Author's emphasis).

³⁹⁶ Wines, *The Hebrew Republic*, 131. Also see *ibid.*, 133-136 and William J. Everett, *God's Federal Republic. Reconstructing Our Governing Symbol*, (New York: Paulist Press, 1988), 59. This participatory aspect of republicanism is emphasised by John Maynor who encapsulates republicanism within two main categories namely, the neo-Athenian and the neo-Roman version of republicanism. The former maintains that political participation is an intrinsic good, a thought that is also viewed

position. During the Reformation, the focus gradually shifted from authoritarianism in either government or the church toward the dignity, value and worth of people”.³⁹⁷ Neither the king nor the pope was the ultimate source of authority, but Scripture, which implied that kings might not be the arbiters of rights, and that priests were not the only persons who could interpret or read the Bible – the average person could do so as well.³⁹⁸ If only priests could talk to God, they had a special relationship with God. However, if everyone could talk to God, then everyone had this special relationship, and it allowed for freedom for the average person. This created a revolution in people’s minds.³⁹⁹

The very character of the Reformation was a threat to *Divine Right*, and was nothing else but a theological struggle against the pope as king. Politically, it inspired

within communitarianism. Democratic participation, fostered by a rich sense of civic virtue and strong versions of citizenship form essential parts of this Athenian version, Maynor, *Republicanism in the Modern World*, 10. In this regard, Sandel also comments: “given our nature as political beings, we are free only insofar as we exercise our capacity to deliberate about the common good, and participate in the public life of a free city or republic”, *ibid.*, 11. Although the neo-Roman approach also supports direct democratic participation, the neo-Athenian model emphasises direct participation in the governing process as a means of realising true freedom. The idea of the participatory act assists to constitute certain ultimate goods that contribute to individual well-being and self-mastery. In the words of John Maynor: “This populist and nostalgic approach involves citizens understanding their freedom as part of a certain type of community and belonging to that community as an active member. This approach also seeks to unify the good and offer a system of politics and ethics that is indivisible”, *ibid.*, 12-13.

³⁹⁷ John W. Whitehead, “Christians Under the Scripture: A Lecture by Dr. Francis Schaeffer”, Notre Dame University, April 1981, with a commentary by John W. Whitehead (12/23/03), *Oldspeak*, The Rutherford Institute, 9, <http://www.rutherford.org/oldspeak/articles/religion/oldspeak-Schaeffer2.asp> (accessed 15 September 2012).

³⁹⁸ Whitehead, “Christians Under the Scripture: A Lecture by Dr. Francis Schaeffer”, 9.

³⁹⁹ Whitehead, “Christians Under the Scripture: A Lecture by Dr. Francis Schaeffer”, 10. Martin Luther revolutionized how one visualizes form and freedom, which was the liberty of conscience. Everyone had the right to read the Bible; to believe in God, to have liberty of conscience to believe in what he or she deems fit – this was the genesis of the concept of individual freedom. This would eventually form the backbone of the Declaration of Independence and, according to Whitehead, in the American Constitution one finds the nearly perfect statement of the form-freedom concept, *ibid.*, 10. Protestantism further strengthens the existential qualities of Christianity. One need look no further than mottos now associated with the Reformation – *sola scriptura*, *sola fides*, *sola gratia*. This heightened emphasis on the Scriptures (as ‘God’s talk’) enhances the existential dimension, underscoring that God communicates directly with those made in the divine image. The emphasis on faith (*sola fides*) and grace (*sola gratia*), says Glenn Moots, underscores one’s direct relationship to God through the individual priesthood of the believer, maximizing the responsibility of the acting individual. These are states of being that are sought, won, and felt experientially. They are not merely understood rationally or doctrinally”, Glenn A. Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, (Columbia and London: University of Missouri Press, 2010), 17. Those leading the Reformation questioned the foundations of society and the bases of authority and proclaimed the elevation of the individual priest over himself, and called for the abolition of the papacy, thus ushering in the first disruption of the time-honoured hierarchies. Under Reformation influence, equality before God reinforced equality of citizenship, Berman, *Created Equal. How the Bible Broke with Ancient Political Thought*, 174. The insistence that grace could manifest in even the lowest members of society, and that it constituted a source of important authority, was truly radical, Yeoman, *Heart-Work: Emotion, Empowerment and Authority in Covenanting Times*, 275.

resistance against existing regimes and this new development (against the principle of the Divine Right of Kings), resulted in the king's accountability to God becoming paramount in the consideration of rule. The king was not only a man; he was a fallible and fallen man whose rule was conditional upon his compliance with God's law. This law not only had the potential to be grasped by the ruler and his bishops but by the Spirit that interpreted Scriptures. This made it possible for individual Christian citizens to determine whether the character and work of their ruler were good or evil.⁴⁰⁰ This has substantial implications for a republican understanding of society. This 'Spirit that interpreted Scriptures' was to be found in every individual in the Christian community and laid the foundations for such an individual to participate in political activity. Rutherford substantially accommodated and informatively articulated this understanding.

In his analysis on Rutherford's account of the origins of government, John Ford refers to the uniqueness of Rutherford's political thinking when compared to Althusius (to which Rutherford's political theory shows substantial similarity) regarding Rutherford's key distinction between *divine institution* and *human constitution*.⁴⁰¹ The ruling authority was 'instituted' by God in a *mediate* sense, whilst in an *immediate* sense, through the working of the people 'constituted'.⁴⁰² Rutherford, by arguing that the people could *constitute* in a ruler the *power* of government *instituted* by God, and by arguing that in doing so they would effectively be governing themselves, managed to maintain that both sovereignty came immediately from God and that the people had the power to transfer government to the ruler.⁴⁰³ In the words of Ford: "The solution to the legal problem lay in recognizing that although the people did not *formally* have the power of government to transfer, their power of transfer was itself a *virtual* power of government."⁴⁰⁴

Rutherford states that although royal power is in the people, it is in the people as the *principal cause*; it is in the people as in the *instrument*. Rutherford refers to the Old Testament where the people make David their king at Hebron, and in that same act,

⁴⁰⁰ Glenn A. Moots, *The Evolution of Reformed Political Thought and the Revival of Natural Law Theory*, (A Thesis for Master of Arts in Political Science: Louisiana State University, 1991), 108-109.

⁴⁰¹ John D. Ford, "Lex, rex iusto posita: Samuel Rutherford on the origins of government", 262-290 in Roger A. Mason (ed.), (Cambridge: Cambridge University Press, 1994), 282.

⁴⁰² Ford, "Lex, rex iusto posita: Samuel Rutherford on the origins of government", 270-271.

⁴⁰³ Ford, "Lex, rex iusto posita: Samuel Rutherford on the origins of government", 280-281.

⁴⁰⁴ Ford, "Lex, rex iusto posita: Samuel Rutherford on the origins of government", 281.

God, by the people using their free suffrages and consent, makes David king at Hebron.⁴⁰⁵ God made David king at Hebron by no other act than by Israel's act of freely electing him to be king and leader of the Lord's people, as God by no other act makes it rain but by his 'melting the clouds' and causing rain to fall on the earth.⁴⁰⁶ According to Rutherford, it is a weak argument to say that the Apostles were, according to their office and the designation of their person to the office, immediately and only from God, without any act of the people, and that therefore the king was immediately from God without any act from the people. "Such an argument is badly coupled with the royal power of David and Saul, who were not formally made kings but by the people at Mizpeh and Hebron."⁴⁰⁷

Returning to the Roman law, one sees that it crystallised theory, already contained in Cicero, that the authority of the ruler is derived from the people. Ulpian summed up the theory in a sentence (and there was no dissent by any of the lawyers either of the *Digest* or the *Institutes*), namely, "The will of the Emperor has the force of the law, because by the passage of the *lex regia* the people transfers to him and vests in him all its own power and authority."⁴⁰⁸ The theory of the Roman *civitas* was that the people alone were the source of all law.⁴⁰⁹ Huguenot theory refurbished the classical Roman law debate as to whether the power transmitted by the Roman people to the emperors was given irrevocably without conditions (*translatio*) or merely conceded conditionally (*concessio*).⁴¹⁰ DuPlessis-Mornay's *Vindiciae* refers to Romulus who, at the institution of the Roman kingdom, made the following agreement with the senators, namely that "the people should make laws, and he would take both for himself and others, to see them observed and kept."⁴¹¹

⁴⁰⁵ Rutherford, *Lex, Rex*, 70(1)-70(2).

⁴⁰⁶ Rutherford, *Lex, Rex*, 71(1). Also see *ibid.*, 174(1).

⁴⁰⁷ Rutherford, *Lex, Rex*, 11(1). Also, where the king is awarded the throne by means of a particular designation, as with Saul, the consent of the people is still required, although God directs them in such consent. In this regard, the office of ruler and priest plays a securing and stabilising factor, Rutherford, *Lex, Rex*, 4(1)-4(2). This theory of the mediate ordination of civil authority, asserted first in Christopher Goodman's *How Superior Powers ought to be Obeyed* (1558) and the Genevan Lambert Daneau's *Politiques Christiane Libri Septem* (1596) was accepted by all Presbyterians in the seventeenth century, Smart, "The Political Ideas of the Scottish Covenanters. 1638-88", 176.

⁴⁰⁸ Sabine, *A History of Political Theory*, 171. Also see *ibid.*, 166 and Von Gierke, *The Development of Political Theory*, 92.

⁴⁰⁹ Friedrich, *Transcendent Justice. The Religious Dimension of Constitutionalism*, 8-9.

⁴¹⁰ Salmon, *The French Religious Wars in English Political Thought*, 43-44.

⁴¹¹ Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, 149. DuPlessis-Mornay also states that: "... in the Roman kingdom, there was an agreement between Romulus, the senate, and the

George Buchanan, in his *Right of the Kingdom of the Scots* and his investigation into the history of Scotland, formulated a secular theory of popular sovereignty based especially on the contractual ‘regal law’ (*lex regia*) by which the Roman people had bestowed their sovereignty (*majestas*) on the emperor.⁴¹² On these grounds, Buchanan declared an inalienable right of resistance and even of tyrannicide on the part not just of political elite, but also of the *people* (the modern analogue of the Roman *Populus Romanus*) as a whole.⁴¹³ The view that the ‘people’ were the source of government authority traced its English roots to Scholasticism and to sixteenth-century Protestant resistance theory.⁴¹⁴ Andries Raath refers to scholastic interpretations of Roman law, which favoured the understanding that the power of peoples to make laws for themselves emanated from the *ius gentium*.⁴¹⁵ In Roman law, the *lex regia* was a legal construction used to explain the origins of the emperor’s powers and constituting the Roman people’s original grant of juristic power according to which the empire had been set up.⁴¹⁶ The *lex regia* stipulates that the emperor’s authority be derived from the government authority embodied in the people under the *ius gentium* (the source from which the Roman people ultimately drew their jurisdiction and power to institute government).⁴¹⁷

According to Roman law, when a free people makes a grant of *Imperium* to the ruler, the terms of the *lex regia* in which they announce their grant must be taken to include the stipulation that they are merely delegating rather than willing away their own original sovereignty. This form of legal argument was originally developed by Bartolus and his pupils as part of their campaign to legitimate the claims of the

people, in this manner: ‘That the people should make laws, and the king looked that they were kept: the people should decree war, and the king should manage it’”, *ibid.*, 176.

⁴¹² Kelley, “Elizabethan political thought”, 60.

⁴¹³ Kelley, “Elizabethan political thought”, 60.

⁴¹⁴ Gordon J. Schochet, “Why should history matter? Political theory and the history of discourse”, 321-357, in J. G. A. Pocock (ed.), *The varieties of British political thought, 1500-1800*, (Cambridge: Cambridge University Press, 1993), 326.

⁴¹⁵ Reference to the *Digesta*, 1. 1. 5. cited in Andries Raath’s, “Ulrich Huber’s statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)”, 7.

Also see *ibid.*, 1. 1. 9. and 1. 4. 1. The bonds for binding together the people into an entity (corporation) for exercising its law-making functions are founded upon the principle of contracting, Raath, “Ulrich Huber’s statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)”, 7.

⁴¹⁶ Canning, *The Political Thought of Baldus de Ubaldus*, cited in Raath, “Ulrich Huber’s statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)”, 9.

⁴¹⁷ D. 1. 4. 1. cited in Raath, “Ulrich Huber’s statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)”, 9. Raath however warns that there are considerable differences of opinion on the issue of the revocability of the *lex regia*. In this regard, see *ibid.*, 9.

northern Italian cities to legal independence from the Empire.⁴¹⁸ In Bartolus' *Tract on City Government*, he begins by noting that the first regime to be established in the city of Rome after the expulsion of the kings was a republican system 'founded on the body of the people'.⁴¹⁹ Bartolus and Marsiglio (Marsilius) of Padua (1275-1342) proposed that 'the ruler' should be the whole body of the people.⁴²⁰ In the words of Quentin Skinner:

The theory of popular sovereignty developed by Marsiglio and Bartolus was destined to play a major role in shaping the most radical version of early modern constitutionalism. Already they are prepared to argue that sovereignty lies with the people, that they only delegate and never alienate it, and thus that no legitimate ruler can ever enjoy a higher status than that of an official appointed by, and capable of being dismissed by, his own subjects ... This development was of course a gradual one, but we can already see it beginning in Ockham, evolving in the conciliarist theories of d'Ailly and Gerson,⁴²¹ and finally entering the sixteenth century in the writings of Almain and Mair,⁴²² passing from there into the age of the Reformation and beyond.⁴²³

⁴¹⁸ Skinner, *The Foundations of Modern Political Thought*. Vol. 2: *The age of Reformation*, 130. Also see *ibid.*, 131. Skinner states that according to Bartolus (and his pupils), all the powers committed to a ruler at the inauguration of a legitimate polity must originally have been held by the people themselves. In the act of establishing the commonwealth, the citizens never assign their ruler any powers greater than they themselves possess – they merely transfer their existing rights to be exercised on their behalf, and in this way ensure that their ruler remains *minor universis*, his legal status being that of a mere *rector* or *minister* of the community, Skinner, *The Foundations of Modern Political Thought*. Vol. 2: *The age of Reformation*, 181.

⁴¹⁹ Skinner, *The Foundations of Modern Political Thought*. Vol. 1: *The Renaissance*, 53. Also see Rob Atkinson, "Reviving the Roman Republic; Remembering the Good Old Cause", *Fordham Law Review*, Vol. 71, (2003), 1193.

⁴²⁰ Skinner, *The Foundations of Modern Political Thought*. Vol. 1: *The Renaissance*, 61. Also see *ibid.*, 62-63. Marsiglio equates the figure of the legislator with 'the people or the whole body of citizens, or the weightier part thereof. However, Marsiglio adds that the will of the legislator must be 'expressed by words in the general assembly of the citizens', which Marsiglio regards as the most authoritative forum for discussing all legal and political affairs, *ibid.*, 61.

⁴²¹ See Skinner, *The Foundations of Modern Political Thought*. Vol. 1: *The Renaissance*, 116-117.

⁴²² See Skinner, *The Foundations of Modern Political Thought*. Vol. 1: *The Renaissance*, 120-121.

⁴²³ Skinner, *The Foundations of Modern Political Thought*. Vol. 1: *The Renaissance*, 65. Marsilius' *Defensor Pacis* has been hailed as the "announcer of most, if not of all, the doctrines which were to become the creative forces of the modern era, a precursor of the Reformation, a theorist of popular sovereignty and constitutional systems, a herald of the modern sovereign state ...", D' Entrèves, *The Medieval Contribution to Political Thought*, 44. Note the different spelling-versions of this scholar's name, for example, 'Marsilius' and 'Marsiglio'. A democratic tradition existed in scholastic and reformed thought in Scotland. Boece, Major, Lindsay, Knox, Buchanan and Rutherford manifest a clear line of continuity. The Kingship established by Bruce and conditioned in the exercise by the concurrence and consent of the community is implicit in the works of all the said authors "as developed by Aquinas, Aegidius Romanus, and later by Cusanus, Gerson, William of Ockham and Marsiglio of Padua", Campbell, "Lex, Rex and its Author", 213-214.

The new emphasis given to the view that political authority is derived from and depends on the will and consent of the people was reflected in Marsilius.⁴²⁴ Marsilius' preference seems to be for some sort of limited monarchy (*regalis monarchia*), whose distinguishing features are elective origin and dependence on the law. However, this does not present something exceptionally new, as this corresponds to the normal constitutional ideas of the Middle Ages.⁴²⁵ The novelty and radicalism of Marsilius rather seems to consist in his assertion that not only the establishment of a particular type of government, but also the designation of the person (or persons) who are called to exercise it and, more importantly, the framing of law as the '*forma, secundum quam civiles actus omnes regulari debent*' (the whole structure of the body politic) depends on one supreme and creative will, the will of the *legislator humanus*.⁴²⁶ Inasmuch as this will is, according to Marsilius, the will of the community, Marsilius' doctrine has been interpreted as containing an anticipation of the doctrine of popular sovereignty.⁴²⁷ According to Marsilius, the source of legal authority is always the people or its prevailing part, even though it acts in a particular case through a

⁴²⁴ Thomas Mautner (ed.), *The Penguin Dictionary of Philosophy*, (London: Penquin Books Ltd., 1996), 339. William Campbell comments that: "The theory engendered by Cusanus and Marsiglio that the relation between the king and the people is of the nature of a contract is established. The people grant the hereditary exercise of power only on the condition that justice is done and the law administered. If the king breaks this condition, the people may depose him. But here Buchanan stops. Who exactly are to depose the king? Who shall judge him? What must be done if many subjects aid him in a bad cause? These are all left unanswered – and these were realities Rutherford had to face ... Buchanan is the political ancestor of Rutherford ... The issue of the *De Jure Regni* was the *Lex Rex*, but between them intervene Suarez, Vasquez, Hooker, Bodin, Grotius, and a host of Reformation and Renaissance political thinkers", Campbell, "*Lex, Rex, and its Author*", 215.

⁴²⁵ D' Entrèves, *The Medieval Contribution to Political Thought*, 54-55.

⁴²⁶ D' Entrèves, *The Medieval Contribution to Political Thought*, 55.

⁴²⁷ D' Entrèves, *The Medieval Contribution to Political Thought*, 55. D' Entrèves also refers to the supportive views of Gierke in this regard. It is the principle that the source of authority lies in the community that is Marsilius' starting-point (which is no doubt traditional), *ibid.*, 59. Also see *ibid.*, 62-63, where D' Entrèves comments that Marsilius' view that only the whole community can adequately value what is just and consonant to the common good, and express it in the form of law (only what the community has laid down in the form of law can and must be the supreme measure of justice), gives Marsilius' thought some overlap to that of Rousseau's rather than Bodin's). Looking at Marsilius' political thought, D' Entrèves comments that: "The traditional doctrine of the power of the community has clearly undergone a radical change at the hands of Marsilius ... Law, which the Thomist had conceived as prior to the state, as both a condition and limit of political power, now appears as the very creation of the state, as the outflow and test of its sovereignty. We are confronted, according to M. de Lagarde, with a 'positivist' conception of law; but this conception can equally well, or perhaps better, be termed 'voluntarist', for it is this emphasis upon the paramouncy of will which really breaks up the Thomist conception. One would also be tempted to speak of a 'humanization' of politics, and it is perhaps this ugly word which best succeeds in marking the dominant character of Marsilius' thought", *ibid.*, 64-65. Marsilius presented three essential principles of democracy, namely (1) that the legislative power belongs to the people, (2) that this legislative power appoints the executive power, and (3) that the people constitute the judicial power, and can judge and depose a ruler, P. Janet's, *Histoire de la Science politique dans ses rapports avec la morale* cited in Hyma, *Christianity and Politics. A history of the principles and struggles of church and state*, 51-52.

commission to which it has delegated its authority.⁴²⁸ Medieval thought understood the office of rulership as always defined and delimited by the terms and the spirit of divine appointment, which placed “the whole above the part”.⁴²⁹ Although all earthly power, including that of the rightful ruler, primarily stemmed from God, it was the divinely inspired will of the people in which the divine resolve became most apparent.⁴³⁰

According to Rutherford, Bartolus (and Ulpian) is to be understood as supporting the idea that the power remains in the people to consent themselves and that the people cannot give this power away.⁴³¹ Rutherford refers to Plutarch in Scylla, who said that he “would have kings as dogs; that is, best hunters, not those who are born of best dogs”.⁴³² Rutherford also refers to Ulpian’s support of the view that “[t]he laws of the emperor have force only from this fountain (which is the people), because the people have transferred their power to the king”.⁴³³ In the words of Rutherford, “The people being the fountain of the king must rather be the fountain of the laws.”⁴³⁴

Rutherford also refers to Plutarch’s aversion towards rulership by succession.⁴³⁵ In this, Rutherford negates the emphasis on hereditary succession as giving rise to kingship; rather that the people elect that person who is best capacitated for ruling over the people. DuPlessis-Mornay’s *Vindiciae*, observes that in the Roman commonwealth, the senators and magistrates were created by the people – “the tribune of those who were called Celeres, the praetor or provost of the city, and

⁴²⁸ Sabine, *A History of Political Thought*, 296. Also see Webb, *The Political Thought of Samuel Rutherford*, 143-144 and Von Gierke, *The Development of Political Theory*, 144. Webb refers to the fifteenth-century conciliarist Nicholas of Cusa, who joined other conciliarist authors in justifying the reforming authority assumed by the general councils in attempts to heal the split in the papacy. Cusa maintained that each of the ruling powers derives its authority from the community, not from any other ruling power, and each is to rule in consensus with the others for the welfare of the entire community, Webb, *The Political Thought of Samuel Rutherford*, 145-146. Also see Von Gierke, *The Development of Political Theory*, 145. Von Gierke adds that in like manner during the fifteenth century, in all the theoretical arguments whereby men seek to defend the rights of the estates against the growing power of monarchy, recourse is made to popular sovereignty as a first principle, *ibid.*, 145.

⁴²⁹ Chroust, “The Corporate Idea and the Body Politic in the Middle Ages”, 449.

⁴³⁰ Chroust, “The Corporate Idea and the Body Politic in the Middle Ages”, 451. Also see the rest of *ibid.*, 451.

⁴³¹ *Lex, Rex*, 82(2).

⁴³² *Lex, Rex*, 45(1). Plutarch (c. 48-c. 122) was a Greek biographer and moralist, from Chaeronea in Boeotia, *The Penguin Dictionary of Philosophy*, Thomas Mautner (ed.), 431.

⁴³³ Rutherford, *Lex, Rex*, 114(2).

⁴³⁴ Rutherford, *Lex, Rex*, 114(2).

⁴³⁵ Rutherford, *Lex, Rex*, 45(1).

others, insomuch as there lay an appeal from the king to the people”.⁴³⁶ According to DuPlessis-Mornay, after the death of Romulus, the interreign and government of the hundred senators being little acceptable to the Quirites, it was agreed that from then on, the king should be chosen by the consent of the people, and the approbation of the senate.⁴³⁷ According to DuPlessis-Mornay, Bartolus, “who was a famous lawyer who lived in an age that bred many tyrants”, concluded from the law that subjects were to be held and used in the quality and condition of the kings brethren, and not of his slaves.⁴³⁸

Beza, DuPlessis-Mornay and the other leading Huguenots turned to the “scholastic and Roman law traditions of radical constitutionalism.” They rejected the tendency to assume that God places the community in a condition of permanent submission as a remedy for all its sins. Consequently, emphasis was placed on the natural right of liberty of each individual, which “enabled them to abandon the orthodox Pauline contention that all the powers that be must be seen as directly ordained by God. Instead they inferred that any legitimate political society must originate in an act of free consent on the part of the whole populace.”⁴³⁹ Beza, Ponet and Goodman emphasised the importance of the free consent and election of the king by the people.⁴⁴⁰ Beza’s argument that the people had to elect and consent to their rulers had several ancient and medieval antecedents that propounded what Walter Ullmann famously called the “ascending theory of sovereignty” in the Middle Ages.⁴⁴¹ Samuel Rutherford was no different.

Rutherford’s idea that royal power is “in the people ... radically and virtually, as in the first subject” probably comes from Nicholas of Cusa, and his naturalist argument that “all living creatures have radically in them a power of self-preservation” was

⁴³⁶ Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, 129.

⁴³⁷ Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, 122.

⁴³⁸ Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, 156. Also see *ibid.*, 197 and 198 where DuPlessis-Mornay refers to Bartolus’ support of the important role that the people play in opposing tyranny. Interesting here is that DuPlessis-Mornay also refers to Bartolus’ student (who later became a driving force in the development of legal and political scholastic thought) namely Baldus, against the background of processes to be followed in opposing tyranny, *ibid.*, 204.

⁴³⁹ Skinner, *The Foundations of Modern Political Thought*. Vol. 2: *The age of Reformation*, 320.

⁴⁴⁰ Skinner, *The Foundations of Modern Political Thought*. Vol. 2: *The age of Reformation*, 320.

⁴⁴¹ Witte, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, 136. For Beza’s use of authority from the Romans in the time of the Kings and in the time of the Emperors see Theodore Beza, *Concerning the Rights of Rulers Over Their Subjects and the Duty Of Subjects Towards Their Rulers*, (Translated by Henry-Louis Gonin and edited by Patrick S. Poole), file:///A:/p970208.html (accessed 20 March 2013).

used by the conciliarists d'Ailly, Gerson, Almain, and Major.⁴⁴² The status of the people as having a right in the ownership of the community also is a republican principle founded in Roman law and emphasised by Cicero. The republican revolution in the history of early America refers to the popular idea of the restoration of the polity as a *res publica*, a commonwealth, the possession of its citizens, and not of some single individual or group who happened to rule it.⁴⁴³

The main object of Cicero's *De Republica* was to explain why an elected aristocracy of men of energy and judgement was the best way for a sovereign people to manage its affairs. Malcolm Schofield deals here with the parts of *De Republica*, which were lost throughout the Middle Ages and the Renaissance and rediscovered in fragmentary condition in 1820.⁴⁴⁴ The kinds of issues about the scope of popular sovereignty suggested in the present discussion recur continually in subsequent periods, whether in the medieval arguments about *lex regia*, which culminated in the rise of Bartolism, or in sixteenth- and seventeenth-century debates about the locus of sovereignty. In this regard, Cicero's treatment of *res publica* has quite a different structure from Platonic and Aristotelian political philosophy, despite his debts to them.⁴⁴⁵ What makes the difference is the conceptual framework of Roman law, for it is Roman law that enables questions to be formulated about the rights a free people has to own, lend, transfer, or place powers conceived on the model of property in trust. Schofield concludes that the Roman legal framework is the common denominator in Cicero's theory of *res populi* and in the later tradition beginning with the formulations of the jurists.⁴⁴⁶ According to Cicero, the sovereignty of the *populous*, even in the early regal period of Roman history, was emphasised insistently.⁴⁴⁷

⁴⁴² Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 229-230.

⁴⁴³ Elazar, *Covenant and Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, 50. Akhil Amar comments that a better rendering of the *res publica* would be that in a republican government, government must be the people's thing – "like *poplicus*, *publica* ultimately is rooted in a reference to 'the People'", Amar, "The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem", 760. Republican government did have a central meaning at the Founding of America and for a century thereafter. This meaning revolved around popular sovereignty, majority rule and the people's right to alter or abolish, *ibid.*, 786.

⁴⁴⁴ Schofield, "Cicero's Definition of *Res Publica*", 226.

⁴⁴⁵ Schofield, "Cicero's Definition of *Res Publica*", 226.

⁴⁴⁶ Schofield, "Cicero's Definition of *Res Publica*", 226. Also see Friedrich, *Transcendent Justice. The Religious Dimension of Constitutionalism*, 9.

⁴⁴⁷ Schofield, "Cicero's Definition of *Res Publica*", 223.

For the Romans, the state was not an impersonal power standing in opposition to the individual, and whose actions were dependent on its permission, but rather the individual citizens themselves collectively. For this reason, they knew no other name for it than the name of the community, *populus Romanus*, and this phrase was referred to for as long as the republican tradition lasted.⁴⁴⁸ One finds a reflection of this in Baldus for whom the *populus* was the most common and the major term applied by him to designate the citizen-body. To Baldus the *populus* only corresponded with the city-community as a whole when the *populus* held governmental power.⁴⁴⁹

Malcolm Schofield states: “A constitutional set-up will qualify as a *res publica* if and only if the government in conducting public affairs adequately consults the interests of the people, who form a society in virtue of agreement on justice and of common advantage”.⁴⁵⁰ What Cicero has in mind by *res populi* is “the affairs and interests of the people”. However, according to Schofield, 3.43ff (in *De re Republica*) is written as though the expression actually meant, “the property of the people”. The idea is presumably not that *res publica* is literally speaking property, but rather that the affairs and interests of the people may be conceived metaphorically as its property. When a tyrant or a faction tramples on the proper interests of the people, then it is as if there is a theft of public property.⁴⁵¹ Cicero construed the *res publica* in terms of the property metaphor. Cicero views the metaphor as an attractive means of unveiling the intimate connection between the conditions on the existence of *res publica* and the conditions of political liberty.⁴⁵²

The notion that the *populus* should *own* its own *res* is not itself the point. What Cicero had in view was an idea about *rights*, which the metaphor enabled him to express. If the *populus* possessed its own *res*, it followed that it had rights over its management and use (and the ability to exercise those rights is what political liberty consists in). Cicero was opposed to the democratic assumption that the power of the *populus* over its *res* should be unlimited, but he was clear that it should have some such power.⁴⁵³

⁴⁴⁸ Wolfgang Kunkel, *An Introduction to Roman Legal and Constitutional History*, 2nd Edition (based on the sixth edition of *Römische Rechtsgeschichte* and translated by J. M. Kelly, (Oxford: Oxford University Press, 1973), 9.

⁴⁴⁹ Canning, *The Political Thought of Baldus de Ubaldis*, 185.

⁴⁵⁰ Schofield, “Cicero’s Definition of *Res Publica*”, 218.

⁴⁵¹ Schofield, “Cicero’s Definition of *Res Publica*”, 219.

⁴⁵² Schofield, “Cicero’s Definition of *Res Publica*”, 219.

⁴⁵³ Schofield, “Cicero’s Definition of *Res Publica*”, 220.

Aristotle talked of concern for the common good as a test of a correct constitution – he operated with a notion of the city as a collection of citizens whose interests the constitution had to safeguard. By focusing his discussion on the notion of *populus* and its rights, Cicero effectively created an entirely new theory, cast in a legal vocabulary, which had no parallel in Greek generally or in Greek political philosophy in particular. Its legal inspiration made it a distinctively Roman contribution to political thought.⁴⁵⁴

For the idea that a *populus* is best advised to *entrust* itself to an elected aristocracy, Malcolm Schofield refers to Cicero's *De Officiis*, stating, "As with the office of a guardian, so management of *res publica* should be conducted in the interests of those who are entrusted to one's care, not in the interests of those to whom management has been entrusted."⁴⁵⁵ Schofield also points to the following similar statement in *De Officiis*: "It is therefore the special responsibility of a magistrate to understand that he represents the city, and ought to maintain its dignity and distinction, preserve its laws, dispense justice, and remember what has been entrusted to his good faith."⁴⁵⁶ 'Fides' (as 'good faith being the basis of justice') reflects a characteristically Roman institution and a distinctively Roman virtue. Referring to Margaret Atkins' argument in her 'Domina et Regina Virtutum', Schofield observes that *fides* is to be understood as mutual trust and trustworthiness playing a large and varied role in Roman moral

⁴⁵⁴ Schofield, "Cicero's Definition of *Res Publica*", 220-221. Schofield further explains as to how Cicero, in *De re Republica*, marries a fundamental recognition of popular sovereignty with an unshakeable and deep-seated commitment to aristocracy as the best practicable system of government. In this regard, Cicero against the background of *consilium* (meaning, "every *res publica*, which as Cicero has stated is the *res* of the *populus*, must be ruled with a certain amount of policy/deliberation") emphasises two provisions. Firstly, it must always be related to the cause, which generated the organization of the *populus* in the first place. This implies that deliberation and policy have to be focused on the common advantage and formulated in accordance with the common sense of justice prevailing in the society – they must "preserve that bond which first bound men among themselves in the society of the *res publica*", *ibid.*, 221. Secondly, the power of *consilium* has to be put in someone's hands: either one man or a chosen group; or else the mass (everybody) must take it upon itself, Schofield, *ibid.*, 221. In this regard, Schofield further elucidates on this understanding stating that if the *populus* takes the option of choosing others whom it will expect to manage them on its behalf (instead of the *populus* itself), it does not hereby throw away its rights and its freedom, since it is not transferring powers but only entrusting itself to others, *ibid.*, 223.

⁴⁵⁵ Schofield, "Cicero's Definition of *Res Publica*", 224. Schofield also points to the following similar statement in *De Officiis* namely: "It is therefore the special responsibility of a magistrate to understand that he represents the city, and ought to maintain its dignity and distinction, preserve its laws, dispense justice, and remember what has been entrusted to his good faith", *ibid.*, 224-225. Also see *ibid.*, 224 where Schofield refers to a section of Cicero's *De re Republica*, which intimates the same.

⁴⁵⁶ Schofield, "Cicero's Definition of *Res Publica*", 224-225.

and political thought about the cement of society that has no real analogue in Greek culture.⁴⁵⁷

In this regard, Schofield concludes that “the legal connotations of guardianship are exploited only by Cicero, and are peculiarly appropriate to his conception of the relation of governors and governed as they would not be to Platonic or Aristotelian theory, where the notion of popular sovereignty over *res* which is to be entrusted to the management of others finds no place – although of course government has to be in the interest of the governed.”⁴⁵⁸ *Fides publica*, which formed part of the notion of *fides* in the late Roman Republic, was regarded as a general standard of behaviour for magistrates, incorporating the expectation that they exercised their power in good faith in the promotion of the public good.⁴⁵⁹ Cicero in his *De Officiis* states that the magistrate had to bear in mind that he represents the state and that it is his duty to uphold its honour and its dignity, to enforce the law, to dispense to all their constitutional rights and to remember that all this has been committed to him as a sacred trust.⁴⁶⁰ This idea of *fides* one finds later on in the thought of, for example, Johannes Althusius who, in his discussion concerning the city, referred to the office of the superior to which the oath of fidelity to certain articles in which the functions of his office were contained stood as a surety to the appointing community, and so these general administrators of the community could never be removed from office by the city.⁴⁶¹ In this regard, Samuel Rutherford was no different.⁴⁶²

There is the view that perhaps the greatest political revolution of modernity was the republican revolution – the restoration of the idea that the polity was a *res publica*, a

⁴⁵⁷ Schofield, “Cicero’s Definition of *Res Publica*”, 225. Marc de Wilde comments that *fides* was believed to be a basic norm that made the legal system work as it should by founding it on the moral responsibility of those who participated in it. This resulted in Cicero characterising *fides* as the foundation of justice itself – “*Fides* could be presented as the very heart of justice, because it prevented the laws from becoming empty words”, Marc de Wilde, “*Fides publica* in Ancient Rome and its reception by Grotius and Locke”, *The Legal History Review*, Vol. 79, 3-4(2011), 459. For the Romans, *fides*, being both a legal and moral norm, indicated not only legal obligations, but also moral requirements such as trustworthiness, or the willingness to sacrifice one’s own interests for the public good, *ibid.*, 478. Also see *ibid.*, 483-484.

⁴⁵⁸ Schofield, “Cicero’s Definition of *Res Publica*”, 225.

⁴⁵⁹ De Wilde, “*Fides publica* in Ancient Rome and its reception by Grotius and Locke”, 458.

⁴⁶⁰ De Wilde, “*Fides publica* in Ancient Rome and its reception by Grotius and Locke”, 458. Also see *ibid.*, 475-477 for some insights regarding the reception of the public trust in seventeenth-century England.

⁴⁶¹ Carney, *The Politics of Johannes Althusius*, 35-37. Also see *ibid.*, 38, 56, 62, 88, 92, 124, and 128-129.

⁴⁶² See for example, *Lex, Rex*, 66(2), 69(1), 71(2)-72(1), 86(1), 98(2), 113(1), 126(2)-127(1), 179(1) and 208(2).

commonwealth, the possession of its citizens and not of some single individual or group who happened to rule it. The republican revolution was born out of the revolt against the Divine Right of Kings idea, in itself a heresy that grew out of the rejection of medieval constitutionalism in the middle of the previous epoch. A republic could not exist without the consent of its public, and implicit in this is some idea of covenant or contract.⁴⁶³ The distinction between Bodin and Althusius concerning sovereignty was that Bodin said that the sovereign power must belong exclusively to the ruler, while Althusius insisted that this *majestas* must belong exclusively to the people – that alongside the *majestas* of the people there could be no *majestas* in the ruler.⁴⁶⁴

While Bodin attempted to overcome the ensuing state of insecurity and conflict by establishing unitary sovereign power at the expense of all intermediate powers, Althusius (who was not a sceptic like Bodin regarding the credibility of the people) redefined sovereignty (*jus maiestatis*) as the right of the universal consociation (*lex consociationis et symbiosis*), which do not belong to the supreme magistrate, but instead to the organised body of the people associated in many smaller consociations. The supreme magistrate is only the *administrator* and not the owner of this right.⁴⁶⁵ To Althusius, the ownership of a realm by nature belonged to the people, and only the administration of it to the king. The nature and scope of legitimate government were derived from the purpose and scope of the universal association, namely, from the utility and necessity of human social life. Therefore, those who rule were not superior to those who conceded the right of sovereignty, as a conceded power was “always less than the power of the one who makes the concession, and in it the pre-eminence and

⁴⁶³ Elazar, *Covenant and Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, 50.

⁴⁶⁴ F. H. Hinsley, *Sovereignty*, 2nd Edition, (Cambridge: Cambridge University Press, 1986), 133. William Church comments that: “It was the all-important union of legislative sovereignty and the divine right of kings which caused the major distortion of Bodin’s idea of rulership and foreshadowed the major development in political theory during the remainder of the century. It would not be great exaggeration to attribute the origins of seventeenth-century absolutism to this union of concepts. But the appearance of that new theory of state was not delayed until the strong rule of the Bourbon kings; it was set forth in its essentials very soon after the publication of the *Republic* because of the immediate adoption of Bodin’s contribution by the royalist writers who turned it to account in maintaining the cause of the legitimate monarch, whether Henry III or Henry IV”, William F. Church, *Constitutional Thought in Sixteenth-Century France. A Study in the Evolution of Ideas*, (Cambridge: Massachusetts: Harvard University Press, 1941), 244-245. Also see *ibid.*, 250-251.

⁴⁶⁵ Thomas O. Hüglin, “ ‘Have We Studied the Wrong Authors?’ On the Relevance of Johannes Althusius as a Political Theorist”, *Rechtstheorie*, Beiheft 16, (1988), 231.

superiority of the conceder is understood to be reserved”.⁴⁶⁶ Rutherford similarly states that the assets of the nation belong to the people as a whole.⁴⁶⁷

Andries Raath refers to the number of references to the ‘formation of corporations’, the ‘property of corporations’, ‘municipal corporations’, the ‘sempeternity of corporations’, and ‘human associations’ in Roman law, which provided authority for the scholastic jurists to distinguish between the individual persons in the citizen body and the citizen-body having a corporate nature.⁴⁶⁸ Although law corporations did not have legal personality, the medieval scholastics extended juristic corporation theory to include citizen bodies composed of a plurality of human beings as abstract unitary entities distinct from their human members under the rubric of legal persons.⁴⁶⁹ Whilst the Glossators had almost universally identified the corporation with its members, the Commentators viewed it on the one hand as a distinct unitary entity, and on the other as the plurality of men who composed it.⁴⁷⁰

Emanating from this was the Roman idea of the Empire being constituted as the *universitas*,⁴⁷¹ an organic unity in which each member has a duty not merely under positive but also under natural law to maintain the integrity of the whole. This idea was gestured by Aquinas and influentially put into currency by William of Ockham. According to Ockham, the Empire constituted a ‘mystical body’ in which each member had a natural duty to protect the well-being of the whole. “‘Just as in a natural body, when one limb becomes defective, the rest make up the deficiency if they are able’, so in a *universitas* ‘when one part becomes defective, the other parts, if

⁴⁶⁶ Thomas Hueglin, “Johannes Althusius: Medieval Constitutionalist or Modern Federalist?”, *Publius*, Vol. 9, 4(1979), 35.

⁴⁶⁷ Rutherford, *Lex, Rex*, 234(2).

⁴⁶⁸ Raath, “Ulrich Huber’s statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)”, 29. See D. 3. 4. 7. 1. & 2. and D. 5. 1. 76; 3. 4. 9. as well as 1. 1. 9. cited in *ibid.*

⁴⁶⁹ Canning, *The Political Thought of Baldus de Ubaldis*, 186 in Raath, “Ulrich Huber’s statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)”, 30. Also see Canning, *The Political Thought of Baldus de Ubaldis*, 187 and 189-190 cited in *ibid.*, 30-31.

⁴⁷⁰ Joseph Canning, “Ideas of the State in Thirteenth and Fourteenth-Century Commentators on the Roman Law”, *Transactions of the Royal Historical Society*, Fifth series, Vol. 33, (1982), 23.

⁴⁷¹ Brian Tierney explains that legally a *universitas*, “was conceived of as a group that possessed a juridical personality distinct from that of its particular members. A debt owed by a corporation was not owed by the members as individuals; an expression of the will of a corporation did not require the assent of each separate member but only of a majority. A corporation did not have to die; it remained the same legal entity even though the persons of the members changed. In a famous phrase of the thirteenth-century canonists a corporation was described as a ‘fictitious person’”, Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 19.

they have the natural power, ought to make up the deficiency’.”⁴⁷² This suggested to Ockham that if the head of the Empire became a tyrant, he might rightfully be removed ‘by those who represent the peoples subject to the Roman *Imperium*’, and in particular ‘by the elector-princes’, who might be compared to the chief ‘limbs’ or ‘members’ of the body of the Empire.⁴⁷³ This idea is not far from Rutherford’s: “The thumb, though the strongest of the fingers, is inferior to the hand, and far more to the whole body, as any part is inferior to the whole.”⁴⁷⁴

Cicero was not the only, and definitely not the first legal and political philosopher to apply organic metaphors to the fields of political and legal theory. In ancient Greek and Latin political treatises, as well as in medieval political tracts and collections of the Humanists of later times, organic metaphors for explaining the nature of political solidarity figured prominently. For example, the organic analogy comes strongly to the fore in the descriptions of the princes as the head, reason or breath of the body, which are the people. However, it was Cicero’s use of organic metaphors to explain the political and legal relationships in the commonwealth that exerted a directive influence on later generations of legal and political theorists.⁴⁷⁵

Cicero postulated that the ideal structure within which the bonds of law, justice and benevolence could be maintained, found its culmination in the principle of the organic unity of human society. As the limbs of the individual person made up an organic whole, the individuals in society formed the social body, the health of which was determined by justice in social relationships. In a fundamental sense, the health of the social body was dependent upon the well-being of each individual limb.⁴⁷⁶ The first Western treatise on government that went beyond patristic models was John of

⁴⁷² Skinner, *The Foundations of Modern Political Thought*. Vol. 2: *The age of Reformation*, 128.

⁴⁷³ Skinner, *The Foundations of Modern Political Thought*. Vol. 2: *The age of Reformation*, 128-129. Also see Timothy D. Hall, *Rutherford, Locke, and the Declaration: The Connection*, (unpublished masters dissertation, Dallas Theological Seminary, April 1984), 93. For the important role that the medieval canonists played in developing political theories on consent see Brian Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, (Cambridge: Cambridge University Press, 1982), 40-42, 44-46, 48, 50 and 52-53.

⁴⁷⁴ Rutherford, *Lex, Rex*, 79(2). Also see *ibid.*, 162(1)-162(2). Aristotle is echoed in this as shown by Rutherford himself, namely “the part cannot be more important than the whole”, *ibid.*, 119(2). *Lex, Rex* refers to Ockham (Occam).

⁴⁷⁵ Raath, “Moral Duty and the Organic Conceptions of Moral Good in the Teachings of the Reformers”, 5.

⁴⁷⁶ Raath, “Moral Duty and the Organic Conceptions of Moral Good in the Teachings of the Reformers”, 5. Also see *ibid.*, 9-11 pertaining to the use of the organic metaphor by Medieval authors regarding the nature of society. The early Reformers also presented a similar line of thinking. In this regard, see *ibid.*, 12-17.

Salisbury's *Policraticus* written in 1159.⁴⁷⁷ *Policraticus* was the first work reflecting an organic theory of the secular political order. "[I]t was the first European work to elaborate the metaphor that every territorial polity headed by a ruler, is a body."⁴⁷⁸

John of Salisbury was, in fact, familiar with Plutarch's use of the organic metaphor, and this organic metaphor implies that political rule is natural to man.⁴⁷⁹ As is clear from a reading of *Lex, Rex*, Rutherford was well aware of Plutarch's thinking. According to medieval thinking, for the physical and social organism, "a plurality of proportionality and harmoniously adjusted and integrated parts have to be organized in such a manner that all these parts or members communicate to the whole as well as to one another the products of their diversified functions."⁴⁸⁰ Only when this state of integration has reached a level of perfection could the body natural be called healthy and could the body politic obtain, and the body politic achieve the ideal of perfect peace and order.⁴⁸¹ Marsilius (in his *Defensor Pacis*), in following on the thought of Aristotle, postulated that the state be viewed as a kind of 'living being' made up of different parts which function to give 'life' to it. When the parts performed in harmony, the state was 'healthy,' but when not in harmony, strife and 'ill health' resulted.⁴⁸²

According to Althusius, the supreme power cannot be attributed to a king or optimate, as Bodin stated. Rather the supreme power is to be attributed rightfully only to the body of a universal association, namely, to a commonwealth or realm, as belonging to it; and from this body, after God, every legitimate power flows to kings and optimates.⁴⁸³ The most important aspect of Althusius' theory was that he made sovereignty reside necessarily in the people as a *corporate body*. They are incapable

⁴⁷⁷ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 276.

⁴⁷⁸ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 286. In this regard, the prince is compared with the head, the senate with the heart, the judges and provincial rulers with the eyes and ears, and tongue, the soldiers with the hands, the tillers of the soil with the feet, *ibid.*

⁴⁷⁹ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 286.

⁴⁸⁰ Chroust, "The Corporate Idea and the Body Politic in the Middle Ages", 440.

⁴⁸¹ Chroust, "The Corporate Idea and the Body Politic in the Middle Ages", 440. Also see *ibid.*, 446.

⁴⁸² Webb, *The Political Thought of Samuel Rutherford*, 143-144.

⁴⁸³ Carney, *The Politics of Johannes Althusius*, 67. Althusius adds that the power that is conceded to another, is always less than the power of the one who makes the concession, "and in it the pre-eminence and superiority of the conceder is understood to be reserved", *ibid.*, 67-68. "For the commonwealth or realm does not exist for the king, but the king and every other magistrate exists for the realm and polity – By nature and circumstance the people is prior to, more important than, and superior to its governors, just as every constituting body is prior and superior to what is constituted by it ...", *ibid.*, 88.

of parting with it because it is a characteristic of that specific kind of association; consequently, it is never alienated and never passes into the possession of a ruling class or family.⁴⁸⁴

Althusius speaks of the estates which represent the aristocratic element; the councils, the democratic; and the head (whether one person or many in the place of one) the monarchic. According to him, this is similar to the human body where the head has the likeness of the ruling king; the heart with its five external senses the likeness of the entire people or populace; and these intermediate magistrates frequently depend immediately on the people when it predominates, in which case the people prescribe the principles of their administration, and constitute and dismiss them. In such an event the government is called a democracy, which is sometimes dependent immediately on one person who predominates, in which instance it is referred to as a monarchy. At other times they are dependent on one, two, three or four who predominate, in which instance it is referred to as an aristocracy.⁴⁸⁵ Rutherford explains that although the king is the head of the kingdom, the states of the kingdom are as the temples of the head, and therefore are essential parts of the head, just as the king is the crown of the head. These *ordines regni*, have been in famous nations: “[S]o there were fathers of families, and princes of tribes amongst the Jews: the Ephori amongst the Lacedemonians, the senate amongst the Romans; the *forum superbiense* amongst the Arragonians; the parliaments in Scotland, England, France, Spain.”⁴⁸⁶

The Senate (referred to above) was a component of the Roman constitution, together with the popular assemblies (the people) and the magistracies (the officials). During the Republic, it developed into a council of ex-magistrates. All the power and experience of the politically dominant stratum of Rome was concentrated in the Senate.⁴⁸⁷ The Senate represented the accumulated experience and wisdom of the ruling class, and the magistrates seldom dared to take steps involving questions of general policy without consulting the Senate, or to disregard its advice.⁴⁸⁸ Its

⁴⁸⁴ George H. Sabine and Thomas L. Thorson, *A History of Political Theory*, 4th Edition, (Orlando: Holt, Rinehart and Winston, 1973), 388.

⁴⁸⁵ Carney, *The Politics of Johannes Althusius*, 197.

⁴⁸⁶ Rutherford, *Lex, Rex*, 95(1)-95(2). Also see *ibid.*, 96(2) and 97(2)-98(1).

⁴⁸⁷ Kunkel, *An Introduction to Roman Legal and Constitutional History*, 19.

⁴⁸⁸ Wolff, *Roman Law. An Historical Introduction*, 43. Also see Kunkel, *An Introduction to Roman Legal and Constitutional History*, 19-20.

resolutions embodied the most important political decisions. The Senate's decline marked the decline and fall of the republican system.⁴⁸⁹ Rutherford, in *Lex, Rex*, refers to the Roman Senate on a few occasions, for example, Rutherford states that sovereignty remained in the Senate and the people.⁴⁹⁰

Medieval jurists wrote extensively about the various types of corporative association, using the Roman law term *universitas* as a generic word to describe them all.⁴⁹¹ Brian Tierney refers to the development of thought on the corporate nature of the church around the end of the twelfth century, where the doctrine of indefectibility was viewed as, among others, the church as a whole always adhering to the true faith when it acted together, as a corporate entity. This was brought to finalisation by Laurentius (c. 1210) by specifically linking the theological doctrine of indefectibility with the Roman law of corporations.⁴⁹² Baldus' conception of the people as a corporation is provided by the advances the Commentators had made in corporation theory. In this regard, a corporation was considered both a body composed of a plurality of human beings and an abstract unitary entity perceptible only by the intellect and therefore distinct from its human members.⁴⁹³ Their source for this idea was to be found in Decretalist works, certainly from Innocent IV onwards, although they were to develop this view in a way that was different from any canonist understanding. The Commentators saw the individuals not as mere isolated individuals (*singuli*), but as corporate men (*universi*), namely men viewed as united in a corporate whole.⁴⁹⁴

According to Baldus, the *populus* cannot simply be equated with the individual human beings who compose it, but is rather a collection of men into a unity.⁴⁹⁵ The *populus* acts and wills in that its members act and will as a unity that is either in assembly or through elected representative councils or magistrates. The dual nature of the *populus* as a corporational unity composed of its corporeal members is expressed in the phrase, *persona universalis* (one person composed of many). This abstract

⁴⁸⁹ Kunkel, *An Introduction to Roman Legal and Constitutional History*, 19-20.

⁴⁹⁰ Rutherford, *Lex, Rex*, 129(1). Also see *ibid.*, 72(1), 95(2), 112(1), 173(2) and 178(1).

⁴⁹¹ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 11. Also see *ibid.*, 19.

⁴⁹² Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 20. According to *Dig.* 50.17.121, "What is done publicly by a majority is held to be done by all", *ibid.*, 20.

⁴⁹³ Canning, *The Political Thought of Baldus de Ubaldus*, 186.

⁴⁹⁴ Canning, *The Political Thought of Baldus de Ubaldus*, 186-187. This was a view anticipated to some extent by Johannes Bassianus, Azo, and Accursius, *ibid.*, 187.

⁴⁹⁵ Canning, *The Political Thought of Baldus de Ubaldus*, 187.

person is distinct from the human persons who compose it as is clear from a crucial attribute it possesses, but which they conspicuously lack, it is immortal. Therefore, the city-community as a corporation is not only a *persona universalis*; it is also a *persona perpetua*.⁴⁹⁶

According to the *Corpus Iuris Civilis*, the term *persona* denotes a human being, not a legal person. It was the thirteenth-century jurists who invented the concept of the legal person, by being the first to apply the term *persona* to the corporation. Baldus identified the *populus* as a corporation with a *persona* through constructive use of fiction to create a legal entity with legal capabilities and a purely legal existence.⁴⁹⁷ Bartolus, together with Baldus, understood the *populus* to be a fictive person who acted through the instrumentality of its members who represented it.⁴⁹⁸ Jacques Almain, who was, together with George Buchanan, a pupil of John Mair, commented that the people, once politically formed, existed as a ‘community’, this community also being understood as a corporate entity. This corporate entity provided the prince with authority, an authority that was primarily in the community. This understanding was based on corporation theory, which had its roots in Roman law.⁴⁹⁹ The Spanish Jesuit Luis de Molina (1535-1600) also supported the view that a people and its power as a corporate whole were distinguishable from and greater than a mere assemblage of individuals was (with God remaining as the ultimate source of that power).⁵⁰⁰

One of the juristic arguments advanced by the *Vindiciae* was derived from the concept of the *universitas*, which was defined by its three attributes, namely legal personality, immortality, and a sphere of obligation distinct from that of its individual members.⁵⁰¹

⁴⁹⁶ Canning, *The Political Thought of Baldus de Ubaldus*, 188-189.

⁴⁹⁷ Canning, *The Political Thought of Baldus de Ubaldus*, 190.

⁴⁹⁸ Canning, *The Political Thought of Baldus de Ubaldus*, 191.

⁴⁹⁹ Lloyd, “Constitutionalism”, 259.

⁵⁰⁰ Lloyd, “Constitutionalism”, 259. According to Molina, free human actions form the basis of those areas that concern the state, society, and economy, “The people are not for the prince, but the prince is for the people”, Stone, “The Nature and Significance of Law in Early Modern Scholasticism”, 355. Rutherford refers to Molina in *Lex, Rex*.

⁵⁰¹ Salmon, *The French Religious Wars in English Political Thought*, 41-42. Salmon here refers to *Digest* 3. 4. 7. 1., *ibid.*, 41, fn. 4. In this regard, Salmon states: “These attributes proved singularly convenient to the French advocates of popular sovereignty. If the people had a corporate unity, they possessed a legal personality by means of which they might enter into a contract with their ruler. If the people were in this sense immortal, it could not be objected that rulers, having received their authority from the ancestors of their subjects, were not responsible to the living. Finally, if resistance were undertaken in face of religious persecution, it might be justified as obligatory for the whole people who had contracted with God to observe His truth, but as in no way obligatory for private individuals”,

Concerning the question whether prescription of time can take away the right of the people, DuPlessis-Mornay states that the commonwealth never dies, "... although kings be taken out of this life one after another: for as the continual running of the water gives the river a perpetual being, so the alternative revolution of birth and death renders the people immortal."⁵⁰² This was of importance for covenantal political thinking. Although there is the covenant between God and the king and the covenant between God and the people, both the king and the people are *jointly* responsible for the glory of God. It is this first covenant that God had entered into with the entire community, that the king and the people, as a corporate body acting as a single entity had obligated them within this covenant. The king's *covenanted responsibility* to ensure that the people kept the covenant, as well as the people's responsibility that the king kept the covenant, is found in this covenant.⁵⁰³ Althusius also referred to the Old Testament to confirm the compact that the people and king entered into with God.⁵⁰⁴ God does not will that the church or the responsibility for acknowledging and worshipping Him be committed to one person alone, but to the entire people represented by its ministers, ephori, and supreme magistrate. These administrators represent the people as if they corporately sustain the church as one person.⁵⁰⁵

According to Rutherford, inferior judges are found in various roles according to the constitutions of states, but in England and Scotland they are the estates of the realm, and are corporately superior to the king.⁵⁰⁶ Rutherford states that the people can never enter into a contractual obligation with a ruler in which the terms of the contract are outside the law of God. Flinn, referring to Rutherford's understanding, states: "God has given people the duty and obligation not to kill, from which we infer the duty not

ibid., 42. Regarding the role of contractual thought in this regard, Salmon adds that, "The juristic tendency to express problems of political obligation by the logic of contract theory rationalized what had seemed to thinkers trained in the Aristotelian beliefs of the scholastics to be an intuitive truth about the nature of society", ibid., 43. In this regard, the Huguenots took the Aristotelian use of politics (power) and converted it to a legal aspect.

⁵⁰² DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, 137. Compare this with Rutherford stating: "That which is eternal, and cannot politically die, yea, which must continue as the days of heaven, because of God's promise, is more excellent than that which is both accidental, temporary, and mortal. But the people are both eternal as people, because (Eccles. 1. 4) 'one generation passeth away, and another generation cometh', and as a people in covenant with God, (Jer. xxxii. 40, 41,) in respect that a people and church, though mortal in the individuals, yet the church, remaining the church, cannot die; but the king, as king, may and doth die", ibid., Rutherford, *Lex, Rex*, 78(2).

⁵⁰³ McCoy and Baker, *Fountainhead of Federalism*, 48.

⁵⁰⁴ Carney, *The Politics of Johannes Althusius*, 159, fn. 5.

⁵⁰⁵ Carney, *The Politics of Johannes Althusius*, 158.

⁵⁰⁶ J. F. Maclear, "Samuel Rutherford: The Law and the King", in *Calvin and the Political Order*, George L. Hunt, (ed.), (Philadelphia: The Westminster Press, 1965), 76.

to kill oneself. From this, we further infer that self-defense is obligatory. No people, either individually or corporately, have the power to dismiss the obligation to self-defense.”⁵⁰⁷ This understanding by the theologico-political federalists was similar to the view by the Jesuit Juan de Mariana (1536-1624) that there is an agreement of a community’s members who serves as a condition of the community’s formation, and this agreement amounted to a contractual undertaking. This undertaking sprang from men’s recognition of a need ‘to bind themselves with others in a compact of society (*societatis foedere*)’.⁵⁰⁸ Hence the origins of ‘royal princely power’ which began, as the Roman patrician Mario Salamonio declared, “by the compacts of men” whom “God created equal”.⁵⁰⁹

Republicanism is especially known for its emphasis on participatory (inclusive) citizenship. *Lex, Rex* places much emphasis on the important role that the people play in the ordering of society and refers to thinkers such as Cicero, Ulpian, Bartolus, Baldus and Marsilius who contributed towards elevating the role of the people in the affairs of the community. This line of thinking had its roots also in the Roman law for example, the *Lex Regia*, which stipulates that the emperor’s authority derives from the government authority embodied in the people. Another example is the Roman establishment of the senatorial structure, which represented the accumulated experience and wisdom of the ruling class. Although the leading cities in Northern Italy substantially promoted the idea of republican self-government towards the end of the twelfth century, the Reformations of the sixteenth and seventeenth centuries emphasised the superiority of the people and the individual in the ordering of society. In this regard, all individuals within the Christian Republic were understood to have a special relationship with God, where the role of the priests as conduit towards God was discarded. This gave an entirely new impetus to the republican idea of the relevance of the people, individually and collectively in political matters. In addition to this, the idea of the people as a collective is also closely linked to the importance of the people where the people form an organic whole, with its own legal personality, is

⁵⁰⁷ Flinn, “Samuel Rutherford and Puritan Political Theory”, 67.

⁵⁰⁸ Lloyd, “Constitutionalism”, 259.

⁵⁰⁹ Lloyd, “Constitutionalism”, 259-260. Salamonio concluded from examining the case of the Roman people and the *lex regia*, that the authority of the prince “cannot be more and stronger than what the people itself can do”, *ibid.*, 261. Even, says Salamonio, in the exercise of the power that was in fact “conceded” the king remained “not the lord (*dominus*)”, but “the minister of those who commit themselves to his charge”, *ibid.*, 261.

immortal and has a sphere of obligation distinct from its individual members. This idea also has its roots in Roman, Medieval and early Renaissance thinking in particular. *Lex, Rex* specifically emphasises these lines of thinking that are so central to the idea of republicanism and the quest towards a constitutional model.

Representative citizenship

The republican principle of representation also requires emphasis here. Rutherford is seen as heir to a body of thought on, among others, representative government from the conciliar period and earlier.⁵¹⁰ By the 1250s, even the barons of England could think of themselves not only as members of a feudal hierarchy, but also as a corporate entity, the *universitas regni*, the corporate body of the realm.⁵¹¹ Around 1200, the canonists began to discern that the legal concept of a corporation could define the structure, not only of small groups within the church, but of the universal church itself and of a general council representing the church.⁵¹² In England, a fourteenth-century common-law judge had already declared that ‘parliament represents the body of the whole realm’. A later one added, ‘The parliament of the king and the lords and the commons are a corporation.’⁵¹³ Later political thinkers would explain at length that a commonwealth, since it was conceived of as a single entity, not a mere collection of individuals, could be considered akin to a corporation and that, accordingly, any assembly representing the single personality of the commonwealth must also be a corporate body.⁵¹⁴

Plena potestas (‘full power’) or *plena auctoritas* (‘full authority’) was borrowed from Roman law, but this acquired new significance in canonistic writings. In Roman law an individual or group could appoint an agent to negotiate with a third party, but the result of the transaction was to establish an obligation between the third party and the agent. In canon law, when a corporate group established a representative with ‘full

⁵¹⁰ Webb, *The Political Thought of Samuel Rutherford*, 152. In the late Middle Ages, there was a further development, which limited absolutism in the monarch. Drawing upon canonists and glossators back to the twelfth century, fourteenth- and fifteenth-century conciliar theorists, arguing against absolute supremacy of the pope in the church, put forth important ideas of representative government, Gough’s, *The Social Contract* cited in, Webb, *The Political Thought of Samuel Rutherford*, 140-141. Also see Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 231-232.

⁵¹¹ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 11.

⁵¹² Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 20.

⁵¹³ E. H. Kantorowicz, *The King’s Two Bodies*, cited in, Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 21.

⁵¹⁴ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 21.

power’, the group was directly obligated by the representative’s acts.⁵¹⁵ The Roman law text *Quod omnes tangit ab omnibus approbetur* (‘What touches all is to be approved by all’) was adapted by the canonists to express a generalised doctrine of consent, also used by Decretus to explain the nature of general councils. In this regard, a matter that ‘touched’ a whole community could be approved by a representative assembly acting on behalf of all.⁵¹⁶ These Roman law texts reflect the assimilation of a text of Roman private law into church law, its adaptation and transmutation there to a principle of constitutional law, and then its re-absorption into the sphere of secular government in this new form.⁵¹⁷ Therefore, “Canonistic corporation law found room for two types of representation, both of which would be significant for later constitutional thought: representation as a personification of the community in its head, and representation as a delegation of authority by a community to an agent.”⁵¹⁸

After the Roman-Canonist theory of Corporations, the political theories of the Middle Ages made considerable use of the idea of representation in the construction of the church and the state. These theorists borrowed from corporation law (besides the conception of the ruler as a representative of the community, and the derivation of the principle of majority rule from the representation of all by the majority) the theoretical formulation of the idea of the exercise of the rights belonging to a community by a representative assembly.⁵¹⁹ Whenever against the right of the ruler, these political theorists set up the right of the community and affirmed the possibility that the right of the community would be exercised by an assembly of representatives. In fact, in all cases where it seemed that the gathering of the community was impossible, or that the function in hand could not be performed properly by the community, directly representative action was held to be a necessity. In the words of Von Gierke, “This idea was more precisely defined as a full power of agency, so that a proper act of the assembly of representatives had exactly the same legal effect as an

⁵¹⁵ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 23.

⁵¹⁶ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 24-25.

⁵¹⁷ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 25. Holders of delegated authority were tantamount to proctorial representatives. Given that their principals had assigned them full power (*plena potestas*), a principle which again had crept under canonist influence from private law into the conduct of public affairs, they could perform whatever those principals or constituents were competent to do as if the latter had been present, Lloyd, “Constitutionalism”, 273.

⁵¹⁸ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 27. For Baldus’ emphasis on representation see Canning, *The Political Thought of Baldus de Ubaldus*, 201-202.

⁵¹⁹ Von Gierke, *The Development of Political Theory*, 241.

act of the assemblage of all would have had.”⁵²⁰ The principle of jurisdictional limitations pertaining to power and authority was a fundamental constitutional principle underlying the new system of canon law of the late eleventh and twelfth centuries.⁵²¹ In the words of Berman:

The church rejected the Roman view that a corporation could only act through its representatives and not through the ensemble of its members. Instead, canon law required the consent of the members in various types of situations ... the church rejected the Roman maxim that ‘what pertains to the corporation does not pertain to its members.’ According to the canon law, the property of a corporation was the common property of its members ...⁵²²

Therefore, if the corporation is understood to be the totality of its parts taken as parts then it becomes easy to consider the rights and duties of the members as members, and of the head as head, and the relationships between those two sets of rights and duties. This understanding was implicit in the legislation of the late eleventh and early twelfth centuries.⁵²³

Insofar as the political rights were ascribed to the whole people, for the most part their exercise by assemblies of estates was taken as a matter of course, without further inquiry into the basis of this representative function. Only the Monarchomachi (to a certain extent) gave more attention to the principle of representation, “but even they were satisfied with somewhat vague and general propositions ... it was but seldom that any one reserved the final decision to the direct assemblage of the people; while Junius Brutus ascribed to the assembly of the *Repraesentantes populi* as an *Epitome Regni*, with the same right as that of the People, he still regarded them as dependent on the *populus constituens*, and argued in particular that the people’s representatives cannot validly impair the people’s rights, either by negligence or by positive act”.⁵²⁴

⁵²⁰ Von Gierke, *The Development of Political Theory*, 241.

⁵²¹ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 215.

⁵²² Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 219.

⁵²³ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 220.

⁵²⁴ Von Gierke, *The Development of Political Theory*, 244. Adding to the background of the principle of representation the idea of institutional restraints on royal power was associated with the rise and development in the Middle Ages, of representative estates assemblies. In these bodies, the base of the older, feudal forms of consultation was expanded to include deputations from the more important towns and sometimes other segments of society that had become politically significant so that the estates assemblies began to appear as representations of the community at large, Julian H. Franklin. “Introduction”, 11-46, in *Constitutionalism and Resistance in the Sixteenth Century. Three Treatises by Hotman, Beza, and Mornay*, (translated and edited by Julian H. Franklin, Western Publishing

In this regard, Skinner refers to DuPlessis-Mornay's emphasis of the fact that, while the people never forfeit their ultimate sovereignty, they do give up their right to exercise it directly. DuPlessis-Mornay adds that this follows from the fact that the covenant with the king, setting out the terms of his rule, is never sworn by the whole body of the people, but only by their selected representatives.⁵²⁵

Althusius viewed the estates as important institutions representing the people, but also made a point of giving the people parliamentary powers as an imprescriptible right that cannot be destroyed, in instances where there are no representative institutions.⁵²⁶ The disintegration of the theory of representative constitution came to a halt with the triumph of the absolutist movement. The strict development of the idea of "Ruler's sovereignty", which gained ascendancy from the time of Hobbes onwards, left no room for any further representation of the people apart from the perfect and exclusive representation of all by the ruler.⁵²⁷ In fact, Bodinian thought (which preceded Hobbes') assisted in paving the way towards an anti-representative political theory. Rutherford's understanding concerning representative constitutionalism did not differ much from that of DuPlessis-Mornay's and Althusius'. This line of thinking pertaining to representation emanating from Roman law, and consequently canonist corporate political and jural theory, as well as from the thought of Bartolus and Baldus and of Mornay and Althusius, was clearly reflected in theologico-political federalism.⁵²⁸

Company, Inc., 1969), 12-13. The theologico-political federalists such as Mornay, Althusius and Rutherford provided ample discussion on the importance of representation and assisted in the development of this principle, together with others such as Hottman and Beza.

⁵²⁵ Skinner, *Foundations of Modern Political Thought*. Vol. 2: *The age of Reformation*, 331.

⁵²⁶ Von Gierke, *The Development of Political Theory*, 244-245.

⁵²⁷ Von Gierke, *The Development of Political Theory*, 246.

⁵²⁸ Rutherford refers to the estates as representative of the people – "... for many represent many, *ratione numeri et officii*, better than one doth", *Lex, Rex*, 99(1). Concerning the senatorial collegium of the city, Althusius refers to such a collegium as being the representative of the whole community, Carney, *The Politics of Johannes Althusius*, 44. In his discussion on the duties of the ephori, Althusius states that the administrators and rectors of the universal symbiosis and realm represent the body of the universal association, or the whole people by whom they have been constituted, *ibid.*, 92. Althusius also states that God does not intend that the responsibility of worshipping him be given to one person alone, but to the entire people represented by its ministers, ephori, and supreme magistrate, *ibid.*, 158. The supreme magistrate bears and represents the person of the entire realm, of all subjects thereof, and of God from whom all power derives, *ibid.*, 127-128.

Rutherford refers to the parliament, senators, inferior judges, associates and magistrates as representatives of the people.⁵²⁹ The office of the king, as well as those of the estates and inferior judges was representative of the people who elected them, and were obligated to serve the interests of the people within the parameters of the Divine Law. In fact, the representative element forms part of the office of the king and that of the other inferior ruling parties, and once the obligations of such an office are not exercised, then the office of the ruler ceases as office, which automatically causes the representative element to disappear. The breaking of the covenant condition by the king results in the cessation of the king's representation of the community. The office of the king does not only contain the Divine precepts, but is also a power that is representative of the people.

3.2.2.5 *Forms of government and divisions of power*

The early Fathers in American history defined republicanism as that which opposes monarchy, aristocracy, and despotism.⁵³⁰ Republicanism, understood as opposing monarchy, was clear during the political tracts stemming from the Renaissance, where, for example, Latini was supportive of a government by peoples rather than a government as a king or an aristocracy.⁵³¹ However, republicanism was not to be reduced to a mere form of government at all. Instead, it was what Franco Venturi has called 'a form of life', ideals and values entirely compatible with monarchical institutions. Republicanism "was separated from the historical forms it had taken in

⁵²⁹ Rutherford refers to the king as the "servant of the people representatively, in that the people hath impawned in his hand all their power to do royal service", Rutherford, *Lex, Rex*, 70(1), the estates represent the people ("... for many represent many, *ratione numeri et officii*, better than one doth"), *ibid.*, 99(1), and Rutherford speaks of "... that oath given by the representative-kingdom ...", *ibid.*, 126(2). Similarly Althusius also emphasized the representative aspect of the ruling office(s). Concerning the senatorial collegium of the city, Althusius refers to such a collegium as being the representative of the whole community, Carney, *The Politics of Johannes Althusius*, 44.

⁵³⁰ Cass R. Sunstein, "Beyond the Republican Revival", *Yale Law Journal*, Vol. 97, 1548. G. Stourzh observes that the Constitution of the United States guarantees to every state 'a republican form of government'. In this regard, Stourzh comments that few provisions of the Constitution, through all the vicissitudes of American history, have been more fully taken for granted, few have been less subject to challenge or interpretation – "And yet, this guarantee was a commitment of historic significance, especially in the light of the gloomy predictions on the subject of republican government made by many of the Founding Fathers (for example, Hugh Williamson, Benjamin Franklin, and John Adams). Such gloomy predictions reflected the Founding Fathers' fear for the establishment of a monarchy as was the case on the British Continent, Stourzh, *Alexander Hamilton and the Idea of Republican Government*, 38.

⁵³¹ Skinner, *The Foundations of Modern Political Thought*, Vol. 1: *The Renaissance*, 41-42.

the past, and became increasingly an ideal which could exist in a monarchy.”⁵³² Republicanism understood as “the movement of intellectual protest which opposed the rise of the Renaissance and Baroque monarchies of early modern Europe ...”, was not to be understood in such direct terms. Worden observes, “[I]t took a political revolution to create outward and partisan republicanism in England ... The regicide was not the fruit of republican theory. Most of its organisers were concerned to remove a particular king, not kingship. They cut off King Charles’ head and wondered what to do next. In that quandary, they saw no practicable alternative to the abolition of monarchy. It was not the victory of the regicides but their failures which encouraged republican speculation”.⁵³³

Daniel Elazar, in his commentary on the political dimension of the Book of Joshua as presenting a solution to the problem of how best to reform the confederacy’s constitution, comments that the Book of Joshua’s republican nature is particularly marked, since it was developed as an answer to the monarchists, who argued that the only solution to the problem of effective government was a centralised monarchy. “It is an essentially republican solution designed to guarantee the continuation of limited, popular government along with renewed national energy, based upon the continued distribution of powers between the tribe, on the one hand, and the national authorities, on the other.”⁵³⁴

⁵³² Wood, “Classical Republicanism and the American Revolution”, 14. Herman Dooyeweerd comments that it is extremely confusing that the term republic is used to indicate a non-monarchical form of government. In common speech it is unavoidable that the same words have very different meanings. The erroneous opposition between republics and monarchies is here only caused by the fact that the rise of a real State-institution in Greece and Rome occurred in a non-monarchical form and our political terminology is of a Greco-Roman origin – “In addition, the undifferentiated conception of political authority, as the personal property of the rulers, mostly maintained itself in monarchies. But these historical facts cannot justify a scientific use of the term republic in a sense which has nothing to do with its proper meaning. A real State with a monarchical form of government is by nature a monarchical republic...”, Herman Dooyeweerd, *A New Critique of Theoretical Thought*, Vol. III, “The Structures of Individuality of Temporal Reality”, David H. Freeman and H. De Jongste (translators), (United States of America: The Presbyterian and Reformed Publishing Company, 1969), 412.

⁵³³ Lim, *John Milton, Radical Politics, and Biblical Republicanism*, 13-14. Herman Dooyeweerd states that the word ‘republic’ indicates nothing whatsoever about the form of government, and that it merely signifies that the state is a public rather than a private institution. According to Dooyeweerd, the word ‘monarchy’ does not relate to the question of whether a monarchy complies with the character of the state as a republic. The monarchical form of government is compatible with the character of a republic, Dooyeweerd, *Roots of Western Culture. Pagan, Secular, and Christian Options*, 162. In this regard, also see Haakonssen, “Republicanism”, 569 and Harry Evans, “A Note on the Meaning of ‘Republic’”, *Legislative Studies*, Vol. 6, 2(1992), 21.

⁵³⁴ Elazar, *The Book of Joshua as a Political Classic*, 8.

The Reformer John Calvin realised that, prior to Moses, most governments were either small tribal units or monarchies. All the Israelites had known was the monarchical design of government. They had no other patterns or notions about government except the extant hierarchical forms. In place of the predominating monarchical pattern of the time, Moses instituted a graduated series of administrations with greater and lesser magistrates. This early republican pattern permitted problems to be handled first by those closest to the issues. In the words of Hall, “As Samuel Langdon and others commented, the plan adopted in Exodus 18 seemed, to Calvin and his followers, to be republicanism”.⁵³⁵ Rutherford used the same Mosaic pattern in *Lex, Rex* to argue for a republican or at least an anti-monarchical form of civil polity.⁵³⁶

The theory of a mixed constitution is ancient, being found in Aristotle,⁵³⁷ Polybius,⁵³⁸ Cicero⁵³⁹ and various other classical authors. In its most characteristic form, the mixed constitution affirms that, while monarchy, aristocracy, and democracy all have their distinctive vices and virtues, the best, most stable, constitution will be one that somehow combines all three forms of government. This idea recurs in Renaissance thought, especially in Florence and Venice. It was assimilated into English

⁵³⁵ Hall, *The Genevan Reformation and the American Founding*, 103.

⁵³⁶ Hall, *The Genevan Reformation and the American Founding*, 104. William Everett refers to the fact that monarchy, aristocracy and democracy, due to their risks individually, had to be mixed (into a simultaneous, balanced interaction). It was this achievement, which Polybius claimed, was the source of Rome’s great strength and endurance. His argument for a mixed polity dependent on kings, aristocrats, and the people, became the core of republican thought down to the American Revolution (the mixed polity and republicanism became practically synonymous), Everett, *God’s Federal Republic*, 57.

⁵³⁷ Also see for example, Andrew Lintott, “The Theory of the Mixed Constitution at Rome”, 269-285, in *Cicero and Modern Law*, Richard O. Brooks (ed.), (Farnham, Surrey: Ashgate Publishing Company, 2009), 269-271

⁵³⁸ Also see for example, Lintott, “The Theory of the Mixed Constitution at Rome”, 272-280; Roderick T. Long, “Hellenistic Philosophers of Law”, 111-131, in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, Vol. 6, Fred D. Miller, Jr., and Carrie-Ann Biondi (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 6, Enrico Pattaro (ed.), (Dordrecht: Springer, 2007), 121; Buttle, “Republican Constitutionalism: A Roman Ideal”, 338, 343-344 and Inwood and Miller, “Law in Roman Philosophy”, 135. Polybius supported the system in the Roman Republic which involved separated powers with checks and balances, *ibid.*, 135. Also see Rutherford, *Lex, Rex*, 95(1)-95(2).

⁵³⁹ Also see for example, Lintott, “The Theory of the Mixed Constitution at Rome”, 280-284; Buttle, “Republican Constitutionalism: A Roman Ideal”, 344 and Inwood and Miller, “Law in Roman Philosophy”, 136. Mortimer Sellers points to Cicero’s *De Legibus*, which states that the elected ‘senate’ in the legislature moderates the swings of popular emotions, and according to the *De Republica*, the public assembly controls the usurpations of the senate, and vice versa. So the mixed republican structure of government balances magistrates against the senate and people (or their representatives) to preserve the liberty of the whole, Sellers, “Republicanism, Liberalism, and the Law”, 515.

constitutional doctrine and adopted by Charles I in 1642.⁵⁴⁰ Aquinas argued that royal government was the perfect form of rule, since monarchy most closely resembled the divine governance of the universe. However, God did not establish a king over Israel from the beginning, and therefore it seemed God gave an imperfect form of government to his ‘Chosen People’. Consequently, Aquinas, after quoting Aristotle on the advantages of popular participation in government, concluded that a mixed form was better.⁵⁴¹

John Gerson quoted Aristotle’s *Politics* on the different forms of rule and asserted that the government of the church was indeed a kind of Aristotelian mixed polity. The pope represented monarchy; the cardinals, aristocracy; and the council, democracy.⁵⁴² Rutherford continued in this legacy of mixed government.⁵⁴³ To Rutherford, neither Scripture nor reason qualifies the form of government in its rigid purity without mixture (with the other forms).⁵⁴⁴ An aristocracy is to Rutherford no less an ordinance of God than royalty is and all in authority are to be acknowledged as God’s vice-regents, the senate, the consuls and the emperor.⁵⁴⁵ John Coffey confirms that ultimately, Rutherford favoured the Aristotelian option of “a limited and mixed monarchy” in which parliaments ruled with the king. This combined the glory, order and unity of monarchy; the counsel, stability and strength of aristocracy; and the liberty, privileges, and promptitude of obedience found in democracies.⁵⁴⁶

Rutherford’s understanding that the power of political governance mainly resided in the community was accompanied by the republican view that,

... if we consult with nature, many judges and governors, to fallen nature, seem nearer of blood to nature than one only; for two, because of man’s weakness, are better than one. Now, nature seemeth to me not to teach that only one sinful man should be the sole and only ruler of a whole kingdom; God, in his word, ever joined with the supreme ruler many rulers, who, as touching the essence of a judge, (which is to rule for God) were all

⁵⁴⁰ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 87.

⁵⁴¹ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 89. By means of Aquinas’ *Summa Theologiae*, for the first time in medieval thought, the government of Moses was associated with the mixed constitution of Aristotle, *ibid.*, 88.

⁵⁴² Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 95. In the words of Tierney: “Once again, a classical, secular constitutional theory had undergone a significant transmutation in being adapted to fit the contours of medieval ecclesiology”, *ibid.*, 95.

⁵⁴³ See especially, Rutherford, *Lex, Rex*, 116(1) and 192(1)-192(2).

⁵⁴⁴ Rutherford, *Lex, Rex*, 116(1)-116(2).

⁵⁴⁵ Rutherford, *Lex, Rex*, 112(1).

⁵⁴⁶ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 174.

equally judges: some reserved acts, or a longer cubit of power in regard of extent, being due to the king.⁵⁴⁷

According to Rutherford, the king will also guarantee the safety of the people more effectively with limited power and with other judges to assist him, rather than placing absolute power in one man's hand, "for a sinful man's head cannot bear so much new wine, such as exorbitant power is."⁵⁴⁸ Rutherford's view of the magistrates is that the latter are both more natural and more necessary in society than the king is and are only superficially deputies of the crown. In fact, they are ministers of God, responsible to Him regardless of the king's commands, and they are to be obeyed by all as fathers in the Fifth Commandment. Inferior judges are found in various roles according to the constitutions of states, but in England and Scotland they are the estates of the realm, and are corporately superior to the king.⁵⁴⁹

According to Rutherford, "the conscience of the monarch and the conscience of the inferior judges are equally under the immediate subjection to God for there is a co-ordination of consciences between king and inferior judges".⁵⁵⁰ Parliaments and inferior judges are heads no less than the king is.⁵⁵¹ Parliaments have a nomothetic power with the king because they judge, and in order to prevent tyranny, parliament must keep a co-ordinate power with the king in the highest acts.⁵⁵² Parliament is to regulate the power of the king.⁵⁵³ Inferior magistrates are also immediate vicars and ministers of God as is the king, for their throne and judgement is not the king's, but the Lord's.⁵⁵⁴

⁵⁴⁷ Rutherford, *Lex, Rex*, 227(2).

⁵⁴⁸ Rutherford, *Lex, Rex*, 121(1).

⁵⁴⁹ See Rutherford, *Lex, Rex*, *ibid.*, 139(1)-139(2). Rutherford also states, "All judges, even inferior, are the immediate deputies of God, and their sentence in judgment as the sentence of the Judge of all the earth", *Lex, Rex*, 92(2).

⁵⁵⁰ Rutherford, *Lex, Rex*, 5(1).

⁵⁵¹ Rutherford, *Lex, Rex*, 164(1).

⁵⁵² Rutherford, *Lex, Rex*, 114(1).

⁵⁵³ Rutherford, *Lex, Rex*, 224(2). Also see *ibid.*, 224(2)-227(1), concerning examples given by Rutherford of kings controlled by Parliament.

⁵⁵⁴ Rutherford, *Lex, Rex*, 173(2)-174(1). Also see *ibid.*, 178(2), 180(2), 182(1), 222(2) and 227(2). Rutherford's approach concerning the form that government should take, also points towards supporting a separation of powers theory. In general, Rutherford accepted the validity of various forms of government, namely that of aristocracy (government by a selected number of persons), monarchy (government by the king), and democracy (government by many), Rutherford, *Lex, Rex*, 227(2). Other references in *Lex, Rex*, indicating Rutherford's accommodation of various forms of government are: 5(1), 29(2), 30(1), 38(2)-39(1), 44(2), 53(1), 93(2), 111(2)-112(1), 173(1), 192(1) and 193(1). Also see

4. Conclusion

Louis Yeoman states that “[i]t is a great shame ... that so far we have chosen mostly to remember the covenanters for their structure of rigid, but guiding beliefs, and not for the aim of that structure – the ravishing inner world of the spirit – to which so many of them attained, and which we find so hard to come to terms with and understand”.⁵⁵⁵ As stated above, A. D. Lindsay observes that one can hardly talk intelligently about social institutions without recognising that they exist because and insofar as men pursue goals or ideals. This chapter explained the relevance of context to provide more clarity and understanding of Rutherford’s constitutional, political and legal thinking. This chapter explained that the goals and ideals of the Scottish Divines and of the Westminster Assembly towards the middle of the seventeenth century can only be understood after having instilled an informative observation on the religious and political circumstances permeating that period in history. The metaphysical order that embodies a society lends itself to becoming inextricably connected to the works of for example, theological and political theorists. The climate of Reformation in sixteenth- and seventeenth-century Europe reflected ideological views that were aligned with the period.

The developments leading to the Westminster Assembly were carried out at a time when religion and the fear of God was still a power that ruled nations, where religion, politics and the law were inextricably connected and where theologians and political theorists such as Rutherford were driven to realise a Christian life and soteriological purpose in a society. During this period the relationship between ‘Revelation’ and ‘reason’ had a different understanding when compared to contemporary Western liberal political and legal thought. Loyal to the spirit of the Reformation, the Scottish Presbyterians and their English contemporaries (as also viewed in the proceedings of Westminster) viewed the whole of the Bible as axiom in explaining a constitutional framework by which society had to be regulated. It is against this background as well as the religious and physical repression levelled at the Protestants that Rutherford needs to be understood. The Reformations of the sixteenth and seventeenth centuries, together with Augustine, viewed the march of history essentially as a linear

ibid., 25(2), 31(1), 30(2)-31(1), 34(1), 44(1), 116(1)-116(2) and 210(2). This is similar to the views of Althusius, and in this regard see Carney, *The Politics of Johannes Althusius*, 197-198.

⁵⁵⁵ Yeoman, *Heart-Work: Emotion, Empowerment and Authority in Covenanting Times*, 279.

development, a gradual unfolding of God's purposes for the world. The eschatological connotations provided the Christian community with a rational sense of purpose, hope as well as worth, and consequently with an added sense of responsibility and accountability to a Supreme Being (in the most ultimate sense).

Many of the Reformers understood the individual and the collective as an active means to an end within a soteriological perspective. In the struggle against the Roman Catholic Church and the abuse of the ruling power, sixteenth- and seventeenth-century Europe placed much emphasis on the idea of 'divine imminence', which forms an important part of republicanism. This has implications for politics and the law. In addition, the depravity of man required the establishment of specific political, legal and ecclesiastical structures to assist with the attainment of God's ultimate purpose with Creation. This also needs to be understood together with a specific focus on what tolerance and freedom meant at the time.

In order to assist with the constitutional basis pertaining to the regulation of society, one finds that Rutherford consulted earlier works on the regulation of power and the application of the law. The ancient Hebrew, Greek and Roman scholars, Roman jurists and historians, the Church Fathers, the Commentators, the Glossators, the Spanish Catholics, and the first wave of Reformers all served as credible and reliable sources towards a constitutional model that would be required to effectively manage society towards fulfilling its Divine purposes. Social bonding and covenanting, together with the importance of the law, an active and equal citizenry, proper representation and the division of powers, served as foundational principles and formed part of the views of prominent authors spanning a period of more than one and a half thousand years of political and legal theory. Both Catholics and Protestants drew upon the same Christian heritage of political and legal thought. Rutherford's blending of the idea of the covenant with the law against the background of the importance of an active and representative citizenry, and the importance of the division of powers in governing structures presented a clear reminder of the republican model that formed part of an age-old legacy, which mainly had its origins in ancient Hebrew, Greek and Roman thinking. In this it is confirmed that Rutherford's understanding of both the importance of the law (in line with the rule of law idea) and the idea of the covenant that are pivotal to republicanism (and, in turn,

to the quest for a constitutional model), existed long before the publication of *Lex, Rex*; yet is indicative of Rutherford's informed mind.

In conclusion, what we find in all of this is the substantial role Rutherford played in providing an enduring contribution regarding a foundational model of republicanism and of constitutionalism. The idea of the covenant, the Rule of Law idea, an active and representative citizenry, the separation of ruling powers represent normative prescriptions which are required for the proper ordering and functioning of society. These republican principles have a long history of support and development over many centuries. It was especially during the Reformations of the sixteenth and seventeenth centuries that these principles were urgently necessitated to oppose the abuses of the Roman Catholic Church and absolutist monarchical power.

However, there is an additional foundational norm to republicanism, which includes the inextricable relationship of the covenant, the law, as well as a participatory and representative citizenry, which is that of resistance to oppression. David Kopel states:

Despite the ban on *Lex Rex*, the book was widely read by Protestant dissidents, and marked a major evolution in Protestant political thought. More than any other previous English-language text, *Lex Rex* developed a theory of the how, when, and why of revolution. A century later, King George III reportedly denounced the American Revolution as 'a Presbyterian rebellion.' The sentiment was correct. It was the Presbyterian ideas of *Lex Rex*, which were brought into America by the preachers, and which legitimated, and even mandated, revolution as a Christian duty against tyrants.⁵⁵⁶

Theory on resistance to tyranny, when compared to the other principles of republicanism, was probably most developed during the Reformations of the sixteenth and seventeenth centuries. In this regard, the theologico-political federal tradition

⁵⁵⁶ David B. Kopel, "The Scottish and English Religious Roots of the American Right to Arms: Buchanan, Rutherford, Locke, Sidney, and the Duty to Overthrow Tyranny", *Bridges*, Vol. 12, 3/4(2005), 299. The extent to which *Lex, Rex* was associated with the American resistance to British rule, can be seen from Stephen Case's 1783 election sermon with the appealing title "Defensive Arms Vindicated". In his sermon signed, "A Moderate Whig," dated 17 June, 1782 at New-Marlborough (and dedicated to George Washington), he explicitly mentions Samuel Rutherford as one of the real champions of American freedom. The motivation for writing the text as stated by the author is to clear up "the lawfulness of the use of defensive arms against tyrants and tyranny, whenever they shall endeavour to deprive a people of their liberty and property" (Preface to the Reader). Case states that "(t)his great truth is sufficiently made manifest by the most famous and learned patrons and champions for this excellent privilege of mankind, the unanswerable authors of *Lex Rex*, the apologetically relation *Naphtali* and *Jus Populi Vindicatum*, see Andries Raath and Shaun de Freitas, "Samuel Rutherford's theologico-political federalism in early American Society", *Journal for Christian Scholarship* (JCS), Vol. 49, 3(2012), 29-30.

played a substantial role, with specific emphasis on active resistance to tyranny.⁵⁵⁷ Bodin and Grotius vehemently opposed this idea that the people may collectively provide resistance against an oppressive ruler, which opposition was later supported by Locke and Hobbes.

Although the social contract formed an important facet of sixteenth- and seventeenth-century Western secular political theory, the emphasis on the active responsibility of the people to resist tyranny was not as emphasised as those theories emanating from theologico-political federalism. The emphasis that especially DuPlessis-Mornay, Althusius and Rutherford (and even Knox), placed on the resistance by the people to tyranny enhanced the bilateral nature of the covenantal relationship between the king and the people. It also confirmed the emphasis that was to be placed on the law as conditions of the covenant. Both in Scotland, as with Buchanan, and in France, as with Beza and his successors, they were concerned to show the impossibility of an absolute state. For this, they had to argue that princes did not have *carte blanche* to arrange the religion of the state as they pleased and that the reason for this limitation lies in the general nature of the state itself.⁵⁵⁸

The whole Monarchomachic movement points to the fact that the political liberty of the seventeenth and eighteenth centuries was the outcome of a protest against religious intolerance. Had there not been such a protest, the general condition of Europe would have been similar to that of France under Louis XIV, “an inert people crushed into uniform subjection by a centralised and unprogressive despotism.”⁵⁵⁹ Therefore, the Monarchomachs (especially DuPlessis-Mornay), must have had an influence on sixteenth- and seventeenth-century Scotland, and Rutherford was undoubtedly influenced by their constitutional thought, especially pertaining to the contract and its implications for resistance theory. The value in this understanding for contemporary political and legal theory is that gross oppression against the well-being and peace of society, and governance that defies the moral law are to be met with resistance by the people as a collective under the guidance of proper leadership under the moral law.

⁵⁵⁷ See De Freitas, *Samuel Rutherford on Law and Covenant: The Impact of Theologico-political Federalism on Constitutional Theory*, 302-341.

⁵⁵⁸ Laski, “Introduction”, 26.

⁵⁵⁹ Laski, “Introduction”, 27.

From this chapter it is therefore clear that the law is not only to be viewed as an important constituent of republicanism, but that republicanism itself represents an encompassing constitutional normative value towards what ought to be applied towards the ordering of society. This republican norm also finds relevance to the ordering of societies in general irrespective of a specific period in time. Contemporary constitutional thought is reliant on the very principles that have been so ardently expounded upon by previous centuries of thought including the works of theorists such as Rutherford. In his own unique way, Rutherford illustrates to us the importance of the covenant and the law, an active citizenry and representation, the division of powers and active resistance to tyranny. In this regard, special emphasis is placed in the following chapter on two very important facets of republicanism namely the Covenant and the Law, also with special focus on Rutherford.

CHAPTER 2

THE COVENANT, THE LAW AND MAGISTRACY IN THE ORDERING OF SOCIETY

“It is requisite that the law should postulate one or more first causes, whose operation is ultimate, and whose authority is underived ... Before there can be any talk of legal sources, there must be already in existence some law which establishes them and gives them their authority ... But whence comes the rule that Acts of Parliament have the force of law ... From any one ultimate legal source it is possible for the whole law to be derived, but one such there must be ...”¹

1. Introduction

Walter Ullman’s comment: “Nowhere is the spirit of an Age better mirrored than in the theory of law”² finds special expression in Europe, especially during the period from the latter half of the sixteenth century to the end of the first half of the seventeenth century, in which substantial developments took place pertaining to the law and constitutionalism (among others). The fears of the perpetuation of conflict, the growing allure of science, the formation of smaller independent territories and the devolution of the power of the Roman Catholic Church all contributed to specific approaches to the law and constitutional theory. Views on the law at the time reflected not only new avenues, but also efforts at re-emphasising preceding avenues. The spirit of this age included the introduction of positivist jurisprudence, the influence of the deification of reason on the law, absolute civil rule and scepticism in an informed uniform and foundational religious truth. This was inextricably connected to a renewed movement towards determining what the proper structures and parameters should be for political power, which in turn introduced efforts at determining political models for society. This consequently set the challenge for the quest towards the formulation of a constitutional model. Divine law and its Scriptural authority were receiving gradual opposition from efforts towards absolute civil authority and a deification of reason. Herman Dooyeweerd refers to the ‘creative mathematical

¹ John Salmond, *Jurisprudence*, 10th Edition, Glanville L. Williams, (London: Sweet and Maxwell Ltd., 1947), 155-156.

² W. Ullman, *The Medieval Idea of Law As Represented by Lucas de Penna: A Study in Fourteenth Century Legal Scholarship*, (New York: Barnes and Noble, 1946).

thought’ – declared the origin of all laws that regulate temporal life – that was included in the ‘new science ideal’. This formed part of the intent upon a construction of the temporal world coherence based on the ‘autonomy of scientific thought’.³ This development played its fair share in assisting in the separation between religion and the law. Samuel Rutherford’s theological, constitutional, political and legal thought was included in this period in which new meanings and models developed pertaining to politics and the law and Rutherford played a substantial and constructive role in introducing a constitutional model against the background of the Christian Republic. His ideas in this regard are also of enduring relevance to constitutional thought today. This is elaborated upon in the Epilogue.

The new developments at the dawn of modernity pertaining to politics and the law, largely led by the Dutch jurist Hugo Grotius (1583-1645) and the French political theorist Jean Bodin (1530-1596), came in stark contrast to views reflected in the many preceding centuries. These ranged from the early Church Fathers down to the Renaissance, where law and religion were understood to be more intertwined with each other, unlike contemporary Western societies. *Lex, Rex* includes references to both Grotius and Bodin. At the time that *Lex, Rex* was written, these new developments were fast gaining in popularity, making it adept to postulate that the theory of the law as reflected by Rutherford was driven, among others, by these developments that came into opposition to views that saw no distinction between law and religion.

Seventeenth-century Britain attested to a growing leniency towards scepticism in interpreting Scripture in a way that only gave rise to one version of the truth. This scepticism is, for example, witnessed in the thought of Grotius who furthered the separation between religion and reason (and whose views on sovereignty were aligned with the supporters of monarchical absolutism such as Bodin, Suárez, Barclay).⁴

³ Herman Dooyeweerd, *The Christian Idea of the State*, John Kraay (trans.), (Nutley, New Jersey: The Craig Press, 1978), 22-23.

⁴ William A. Dunning, *A History of Political Theories. From Luther to Montesquieu*, (London: MacMillan & Co., Ltd., 1938), 189. However, in the words of Dunning: “In marked contrast with the character and tendency of his doctrine as to sovereignty stood the implications of his doctrine as to the state of nature and the contractual origin of political society. On these points he was substantially one with the anti-monarchic writers ... while on the one side the work of Grotius promoted the cause of absolute monarchy, on the other side it was a source of much aid and comfort to the advocates of limited government”, *ibid.*, 189-190. According to Eric Nelson, one should probably not root out the influence of late-medieval nominalism as well in the development of separating rationality (as

Grotius did not conceal his admiration for Bodin and Grotius generally seemed to share Bodin's assumptions.⁵ This separation between religion and reason formed part of the development of the status of natural law understood as something independent of any Scriptural or ecclesiastical authority.⁶ "Grotius' hypothetical divorce of 'natural law from a divine being ... was bound to recommend his construction to a Protestant world suspicious of all doctrine carrying a whiff of the medieval Catholic world of St. Thomas."⁷ The sixteenth- and seventeenth-Spanish School (or the so-called School of Vitoria or School of Salamanca), which included Francisco Suárez (1548-1617), also came with a strong natural law approach where reason enjoyed substantial emphasis. For Suárez the natural law (as was the case with John Locke) is immutable.⁸ Rutherford was well aware of the thinking of Suárez, as *Lex, Rex* has a few references to him. Grotius was substantially influenced by the thinking of Suárez.⁹ The "Levellers" in England and Roger Williams (1603-1683) in America followed in this tradition, thereby seeking to free the civil authority from all theocratic and ecclesiastical control – the state should be guided in its action only by those moral

something universal) from doctrine (as something which differs from person to person), consequently leading to more tolerance regarding different beliefs, Eric Nelson, *The Hebrew Republic. Jewish Sources and the Transformation of European Political Thought*, (Cambridge, Massachusetts: Harvard University Press, 2010), 106. Grotius denounced the doctrine of popular sovereignty as expressed by Althusius, and he refused to allow the inferior magistrates any authority apart from that with which the ruler endowed them, J. H. M. Salmon, "The Legacy of Jean Bodin: Absolutism, Populism or Constitutionalism?", *History of Political Thought*, Vol. 17, (1996), 511.

⁵ Salmon, "The Legacy of Jean Bodin: Absolutism, Populism or Constitutionalism?", 511.

⁶ John L. Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, (A thesis submitted to the Faculty of Westminster Theological Seminary in Partial Fulfilment of the Requirements for the Degree, Doctor of Philosophy, 1995), 2. Also see *ibid.*, 85. Rutherford detected among certain royalists an incipient rationalism that favoured nature over Scripture. Chief among these was Grotius, who was a monarchist whose writings were valued by English Royalists – Rutherford also listing Grotius as "one of 'our adversaries'", *ibid.*, 98. See how Rutherford argues against Grotius pertaining to the status of inferior magistrates, Samuel Rutherford, *Lex, Rex. (or The Law and the Prince)*, (Printed for John Field, London, 1644, Reprint, Harrisonburg, Virginia: Sprinkle Publications, 1982), 89(1)-89(2). Rutherford accuses some authors of "stealing ideas" from Grotius, see *Lex, Rex*, 66(1), 99(2), 111(2) and 123(2). Grotius is also explicitly mentioned in *Lex, Rex*'s long title namely, "Lex, Rex, or The Law and the Prince ... with a Scriptural confutation of the ruinous grounds of W. Barclay, H. Grotius ..." This further attests to Rutherford's adept knowledge of Grotius' thinking (and the rationalistic influences brought about by him). Rutherford also applies Grotius in support of certain ideas, for example: that a tyrannous king should not remain king, *ibid.*, 128(2), 132(1), 200(2) and 207(1); that the people must defend themselves, *ibid.*, 143(1), 145(2) and 147(2); and that the people may be purveyors of royal power, *ibid.*, 204(2).

⁷ Stephen J. Grabill, *Rediscovering the Natural Law in Reformed Theological Ethics*, (Oak Industrial Drive N. E., Grand Rapids, Michigan, 2006), 178. Also see *ibid.*, 179.

⁸ Jerome C. Foss, "Francisco Suárez and the Religious Basis for Toleration", *Perspectives on Political Science*, Vol. 42, 2(2013), 96. In comparing Suárez with Locke, Foss adds that: "Both understand mankind as being rationally capable of forming laws based on a natural standard made known through human reason, and both have a high degree of confidence in individuals' ability to deliberate", *ibid.*, 97.

⁹ See Sergio Moratiel, "The philosophy of International law: Suárez, Grotius and epigones", *International Review of the Red Cross*, Vol. 37, Special Issue 320(1997), 539-552.

laws accessible to reason.¹⁰ Locke would further this idea in the years ahead. The contrast between Calvin's acceptance of all authority to the Divine Will and the view of Grotius that the 'Law of Reason' would still be valid even if there were no God, "throws a lurid light upon the great gulf which separates these two worlds". Grotius created the foundation of a new paganism with the emancipation of the ancient Stoic ideas from their fusion with Christian thought.¹¹ Compare this to Rutherford's view that "God may command against the law of nature ..."¹² Oliver O'Donovan *et al.* elevate Grotius, stating that:

... there is much to be said for the old view that something dramatically new came to pass in the mid-seventeenth century, something of which Hobbes is a symbol, and which, for all its undeniable antecedents, marks a decisive break between the theological and the rationalist tradition. The key to this interpretation lies in the reading of Hobbes and Grotius side by side. Grotius, for all his embrace of the program of a humanist science, was a true heir of the theological tradition; Hobbes, for all his wealth of theological opinions, broke with the structure of Christian political thought ... he [Grotius] is the last great figure in whose thought a unity of theology, law, philology, and history is effective

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¹⁰ E. L. Hebdgen Taylor, *The Christian Philosophy of Law, Politics and the State*, (Nutley: The Craig Press, 1966), 510. In the words of Taylor, "In the absence of a truly Christian theory of politics, law and government, men like Williams had recourse to the traditional political doctrine of Stoicism as this was being revived by Grotius, Pufendorf and Locke", *ibid.*, 521. Also see *ibid.*, 520; and M. D. A. Freedman, *Lloyd's Introduction to Jurisprudence*, 7th Edition, (London: Sweet & Maxwell Ltd., 2001), 111. Grotius also accompanied Bodin in defending absolutism, see *ibid.*, 111. Rutherford refers to Grotius' reluctance to support resistance against a tyrannous king, Grotius stating that, "the people oppressed with injuries of a tyrannous king have nothing left them but prayers and cries to God; and therefore there is no ground for violent resisting", *Lex, Rex*, 72(1). Also see *ibid.*, 128(2). Rutherford refers to Grotius as a 'great adversary', see *ibid.*, 143(1).

¹¹ Ernst Troeltsch's *The Social Teaching of the Christian Churches* cited in, Andrew Beck, "Natural Law and the Reformation", *The Clergy Review*, Vol. 21, (1941), 80. In Christian Europe during the eleventh Century, St. Anselm already came with this promotion of the separation between reason and revelation, Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, (Cambridge Massachusetts: Harvard University Press, 1983), 197. David Estrada states that: "Rutherford did not go along however, with Grotius' idea that nations, independently of God are bound by a natural law inherent in man's own nature", David Estrada, "Samuel Rutherford as a Presbyterian Theologian and Political Thinker. The Question of Religious Tolerance", *Christianity & Society*, Vol. 13, 4(2003), 10.

¹² Rutherford, *Lex, Rex*, 110(2). Rutherford refers to Grotius being called a "reconciler and an apostate", *A Free Disputation Against Pretended Liberty of Conscience*, (Printed by R.I. for Andrew Crook, London, 1649), 216 (original version). Rutherford also states: "To say the light, and law of nature is the Judges only compass he must sail by, and that he must punish no sins, but such as are against the law of nature, 1. It pulls the book of the law of God, yea, the Bible out of the Kings hand ... For the King, as the King, should have the book of the law with him on the throne, to be his rule ...", *ibid.*, 225.

¹³ Oliver O'Donovan and Joan O'Donovan (eds.), *From Irenaeus to Grotius. A Sourcebook in Christian Political Thought 100-1625*, (Grand Rapids, Michigan & Cambridge, U. K., 1999), 787.

Grotius' *De Jure Belli et Pacis*, (of 1625) probably did not make him the 'last great figure in whose thought a unity of theology, law, philology, and history is effective', as stated by O'Donovan *et al.* It is more apt to place Rutherford, whose *Lex, Rex* was published in 1644,¹⁴ as probably the last political and legal figure in Europe who substantially represented the unity of theology, law, philology and history (in a strict sense). This also makes Rutherford a closer contemporary to the contrasting ideology of Hobbes, as witnessed especially in his *Dei Cive* (of 1642) and his *Leviathan* (of 1650).¹⁵

Bodin also far preceded Hobbes in 'a contrasting ideology' where the power of the ruler and the negation of religion received much emphasis. Grotius may have addressed the unity of theology, law, philology, and history, but his deification of reason in the Stoic tradition actually resulted in a split between theology and the law, also having approached Christianity from an understanding that supported the minimisation of a detailed Christian doctrine. The uniqueness of Rutherford's position in the history of Scriptural political and legal thought was that he was not only the last theorist (before the monopolisation of Western society by enlightened religious, liberal and humanist thought) to represent the unity of theology, law, philology and history substantially, but also the last fully-fledged theologico-political federalist who authored a concise and coherent polemic argument for the establishment of a constitutional model for the ordering of the Christian Republic in a predominantly Christian Europe at the time. In the words of John Marshall, "In the ever widening gap between the authority of Scripture and the authority of nature stood Samuel Rutherford."¹⁶

George Sabine talks of the "modernizing and secularizing of the ancient theory of natural law, in order to find if possible an ethical and yet a not merely authoritarian

¹⁴ Kingsley Rendell observes that *Lex, Rex* was republished in 1648, at the time of 'The Engagement', with a new title namely, *The Pre-eminence of the election of Kings*. A further publication took place in 1657 concurrently with the 'Humble Petition and Advice', when it was entitled, *A Treatise of Civil Polity*, Kingsley G. Rendell, *Samuel Rutherford. A New Biography of the Man & His Ministry*, (Fearn, Ross-shire, Scotland: Christian Focus Publications, 2003), 93-94. Also see *ibid.*, 123.

¹⁵ Approximately 130 years after the first publication of *Lex, Rex*, there appeared a work on Presbyterian insights of magistracy which is probably the first substantial Presbyterian source on the matter since *Lex, Rex*, namely John Thorburn's, *Vindiciae Magistratus*, (Edinburgh: Printed by D. Paterson, 1773). That Thorburn knew of Rutherford's legacy is clear, although confirmed with only limited reference to Rutherford (see for example, *ibid.*, 120. Also see *ibid.*, 207, Thorburn referring to the "...argument of the acute Mr Rutherford ...").

¹⁶ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 6.

foundation for political power”, as postulated by Bodin. Sabine includes Grotius in this ‘modernization and secularization’ project.¹⁷ When Grotius remarked that just as God could not make twice two anything but four; therefore, he could not make the intrinsically bad to be good, he laid the foundations of a new anthropocentric view of Natural Law.¹⁸ Natural Law became less a grand universal order in which man shared in part the rationality of his Creator, and more a system of rules containing nothing the unaided reason of the individual man might not comprehend. In the words of Salmon, “Toleration, then, became not only expedient but reasonable. Such an attitude promoted respect for the individual rather than for the cause.”¹⁹ This in turn led to a minimalist approach towards a specific and uniform framework regarding religious doctrine for society. Then there was also the watering down of the encompassing nature of the idea of the Biblical covenant. In the words of John Marshall:

Despite Rutherford’s efforts to unite all human activity within the theocentric framework of God’s covenant, others of this period were seeking their divorce. A growing secularization of life that had been set in motion in the sixteenth century and was gaining rapid momentum in the seventeenth worked to liberate the human mind from the theology of the covenant. Its representatives retained the Puritan emphasis on human effort and appealed to natural law, but their aim was to replace confidence in God with confidence in man.²⁰

By presenting the developments on both the political and legal fronts and the roles that both Grotius and Bodin had in this regard, the challenges and concerns facing Rutherford are better understood, including the importance of his views on the law against the background of a constitutional model for society. Rutherford’s views on the law are properly understood when cognisance is taken of the new avenues taken regarding political and legal thought at the time.

As described in Chapter 1, ‘covenantal’ theory and thought on the importance of the ‘law’ serve as two important elements of republicanism. This chapter expounds on the

¹⁷ George H. Sabine, *A History of Political Theory*, 3rd Edition, (London: George G. Harrap & Co. Ltd., 1948), 414.

¹⁸ J. H. M. Salmon, *The French Religious Wars in English Political Thought*, (Oxford: Clarendon Press, 1959), 13.

¹⁹ Salmon, *The French Religious Wars in English Political Thought*, 13.

²⁰ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 82.

importance of the covenant and the law, especially through the lens of Reformed theologico-political federalism with special focus on Rutherford. Rutherford continues in the traditions of Scotland and theologico-political federalism, and provides a unique argument for the relevance of the law and the covenant, the inextricable overlap between the law and the covenant, as well as for the active role of the magistracy and the people in the ordering of the community. This was only applicable to those societies that were already Christian. The office of magistracy was understood to be synonymous with the law and linked to the Covenant, implying duty and accountability pertaining to the salvation of man. As mentioned earlier, Bodin and Grotius played influential roles in allowing for the gradual separation of law from religion, and assisted in giving to the law an overwhelmingly positivist slant where reason was to play a fundamental role. Added to this, the secularisation of the idea of the Covenant was starting to gain in momentum. As was also stated earlier, these were the challenges Rutherford was confronted with. Regarding the active role that the magistrate and the people, as well as the law and political structures were understood to play, Rutherford deals with the relationship between God's sovereignty and human agency in much detail, unlike any Reformed theorists at the time.

The above also needs to be understood against the background of the depravity of man, an understanding that was elaborated upon in Chapter 1. The corruptible character of nature was accompanied by a non-corruptible aspect that, by grace, leant itself towards acting towards the fulfilment of God's will. According to Rutherford, it was precisely this that allowed for magistracy, the church and the law to act positively and externally towards the maintenance, protection and furtherance of a Christian society, and consequently as a portal to grace. On the other hand, it was the corruptible nature of man that required external means towards the accomplishment of salvation, all understood as encompassed within God's absolute providence. Furthermore, the Covenant not only had a collective side, but also an individual (personal) one, which has implications for how one understands both the covenant and the law. The individual is in covenant with God, which entails obedience to God's laws and God awards His favour in return. This is to be understood as an intensely personal and intimate relationship. This takes place together with the covenanted community's obligation as a moral entity in covenant with God based on the fulfilment of His laws. However, there was more to the Covenant in that the

Covenant itself was understood by Rutherford as having a normative dimension based upon Scripture and natural law.

2. Background to the covenant and the law

2.1 The Covenant

Thomas Hueglin comments that (according to Proudhon) all political order is determined by the inescapable antagonism of *authority* and *liberty*. Both principles are inherent in any political system, and one of them can never completely be replaced by the other. ‘Authority’ stands for man’s natural attraction to, among others, hierarchy and centralization, whereas ‘liberty’ is the rational category aiming at individualism, choice, and contract. History then is a permanent conflict between the two principles, and the appropriate political system is not the one that pretends to achieve the impossible, that is, a final synthesis ending all conflict, but a system of federalism, in which both principles are balanced in a constitutional system of law and contract.²¹ Republicanism also plays an important role in this balancing act, as it includes the ideas of the interrelationship between agreement, the law, political participation, representation, devolution of power and opposition to political oppression.

As elaborated upon in Chapter 1, the idea of the Covenant not only constitutes an important facet of republican and constitutional thinking, but also formed part of a valuable heritage stemming from ancient Hebrew, Greek and Roman political thought. For example, Plato in the second book of his *Republic* puts in the mouth of Glaucon the theory that men found that the evil of suffering injustice was greater than the advantage of doing it and, therefore, made a contract that they would not do or suffer it. The notion of consensus lies at the heart of Cicero’s own political thought. Aquinas refers to the pact between king and people, and that breach of the covenant by the king qualifies the termination of such a covenant by the people. Medieval authors appealed to both Scriptures and the authority of the Jurists to establish a contractual basis for limiting the sovereign’s power. Looking at the Church Fathers, Irenaeus hinted at a conditional covenant. The idea of the Covenant also necessitated

²¹ Thomas Hueglin, “Johannes Althusius: Medieval Constitutionalist or Modern Federalist?”, *Publius*, Vol. 9, 4(1979), 13-14.

postulations related to the ‘office’ of the ruler. Cicero in his *De Officiis* speaks of the management of *res publica* being similar to the office of the guardian. With the revival of Roman and canon law in the twelfth century, the doctrine of allegiance to a person and allegiance to an office came to the fore. This idea of the office of the ruler was also emphasised by the Italian jurist and Commentator, Baldus. The development towards binding the ruler to the fundamental duties of his office received a strong impetus from scholastic jurists. This moral bond with the community was a political principle expounded in much detail in Reformed political theory, which received much emphasis in the tradition of theologico-political federalism.

The enlightened political theory emanating from prominent theorists such as Grotius²² and Bodin,²³ who assisted in the reduction of political theory to insights on the good and of contractual political theory to basically a secular dimension, also contributed to the unique developments within early modernity. It was not that the modern world was unaware of Reformed Protestantism and its contribution, but that they had lost their understanding of its covenantal character in their pursuit of other lines of thought. This in turn served to hinder attempts to reconstruct that covenantal character and the relationship of covenant in the pursuit of the idea of the commonwealth, which in time became the idea of modern constitutional democratic republicanism.²⁴

²² *Lex, Rex* has many references to Grotius.

²³ Samuel Rutherford was well aware of Bodin’s works. *Lex, Rex* includes at least eight references to Bodin’s *De Republica*. Rutherford, so as to strengthen his arguments, refers to Bodin on matters such as the voluntary nature of the manner of union in a political body, that sovereignty remained in the senate and people, that limited monarchy is better than aristocracy or democracy, and that the king swears by oath to do the duties expected from kingship, see *Lex Rex*, 2(1), 74(1), 127(2), 129(1), 178(1) and 200(1). However, Rutherford must have known of the threats that Bodin’s views on sovereignty posed to federal and republican thought. The immediate reason for *Lex, Rex* was the publication (in January 1644) of John Maxwell’s *Sacro-Sancta Regum Majestas* (or *The Sacred and Royal Prerogative of Christian Kings*), and in this regard Maxwell had written this book because he felt that it was appropriate for a divine to put the case for absolutism, since it had already been convincingly argued by “eminent lawyers like Bodin and Barclay”, John Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, (Cambridge: Cambridge University Press, 1997), 148. Coffey adds that: “Rutherford clearly could not let this go unchallenged”, *ibid.*, 149. John Maxwell was the first in Britain’s mid seventeenth-century resolutions to place Bodin’s concept of sovereignty at the centre of royalist theory in a published work, David Stevenson, “The ‘Letter on sovereign power’ and the influence of Jean Bodin on Political Thought in Scotland”, *The Scottish Historical Review*, Vol. LXI, 171(1982), 43. Also see *ibid.*, 35. For more than a century after the publication of *République*, it was not only widely read but also seriously studied and commented upon, and that in England, the *République* was more potent in the seventeenth century, J. W. Allen, *A History of Political Thought in the Sixteenth Century*, (London: Methuen & Co. Ltd., 1977), 441. This further confirms Rutherford’s awareness of Bodin’s political thought.

²⁴ Daniel J. Elazar, *Covenant and Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, Vol. II, New Brunswick, USA and London, UK: Transaction Publishers, 1996), xii.

The Grotian and Bodinian influence in this regard is clear. To Grotius, the binding element of the promise on which the social contract is based is found in the law of nature. The social contract is binding in terms of a rule of the law of nature. As Grotius states, “As the social contract is the mother of positive human law, so the law of nature is its grandmother.” This implies that the social contract is binding in terms of the law of nature, an understanding that was a progenitor of liberal enlightenment in political and jurisprudential theory.²⁵ Grotius therefore played a substantial role in popularising an exclusively anthropocentric dimension regarding the covenant, which in turn removed the emphasis of the Divine law from political and legal thinking. This has implications for the form a constitutional model should have. The same applies to the purpose attached to such a model.

Bodin’s covenantal thought was also mainly limited to society and its common concerns, which negated the view that the covenant is the basis of society’s relationship with God.²⁶ This formed part of the growth towards extracting religion from the public domain, a development that had been set in motion during the sixteenth century and gained in momentum during the seventeenth century. Then there was the emergence of the European nation states and the upcoming wave of non-religious sovereignty in political systems. Bodin emphasised that “the people has renounced and alienated its sovereign power in order to invest him [the ruler] with it and put him in possession, and it thereby transfers to him all its powers, authority, and sovereign rights ...”²⁷ Bodin, not greatly concerned with the specific content of legally defined rights as authority, emphasised the abstract concept of power and the element of command. Instead of showing the royal prerogative to consist of certain specific rights, Bodin represented it simply as an absolute, undivided, perpetual body of power that was, responsible only to God.²⁸ This was in line with Machiavellian

²⁵ A. W. G. Raath and S. A. de Freitas, “The Covenant in Ulrich Huber’s Enlightened Theology, Jurisprudence and Political Theory”, *Acta Theologica*, Vol. 26, 2(2006), 224.

²⁶ Raath and De Freitas, “The Covenant in Ulrich Huber’s Enlightened Theology, Jurisprudence and Political Theory”, 201.

²⁷ Bodin, *Six Books of the Commonwealth*, Book 1, Chapter 1, 13, http://www.constitution.org/bodin/bodin_1.htm (accessed 10 July 2012).

²⁸ William F. Church, *Constitutional Thought in Sixteenth-Century France. A Study in the Evolution of Ideas*, (Cambridge, Massachusetts: Harvard University Press, 1941), 226-227. J. W. Allen cautions against the view that Bodin was purely absolutist, Allen stating that: “In modern times Bodin has been very variously interpreted. Some have seen in him an asserter of the sovereignty of the people and some a champion of monarchic absolutism. He was the latter rather than the former; but he was not exactly either”, Allen, *A History of Political Thought in the Sixteenth Century*, 443. Also see *ibid.*, 422.

thinking as well.²⁹ Although Bodin protested against Machiavelli's atheism and immorality, he revisited many of Machiavelli's themes.³⁰

Medieval theorists leaned towards an understanding of the sovereign as a limited executive power existing within the parameters of the laws. Bodin, however, viewed the sovereign as an absolute law-making power which served as the pivot of all order within the state.³¹ Support of the Bodinian line of thinking even came from Scottish origin, where for example, John Corbet, a Scottish minister deposed by the covenanters, denounced their ideas on grounds based on Bodin, arguing that tyranny was better than anarchy. In the words of Corbet, "It's no question, but great hurt may fall out to both Prince and people, which the Prince, pressing upon his authority, abuseth the same and makes himself liable to the wrath of God. But much more hurt would follow upon the other hand, if the Prince's power were subject to the inferior subjects; that would breed great confusion, and turns all upside down".³² Bodin therefore went a step further than Grotius did in ridding the idea of the covenant by dismantling the mutualistic dimension of the covenant based on Divine precepts. Rutherford's political and legal thinking found itself within these new streams of ideas and presented a call for the maintenance of the covenantal idea as supported by the federal theologico-political tradition of thought. Whereas Rutherford's understanding of the idea of the covenant strictly adhered to the Divine law as condition of the covenant, the influences of Grotius and Bodin on covenantal thought

²⁹ Harold J. Berman, *Law and Revolution II. The impact of the Protestant Reformations on the Western Legal Tradition*, (Cambridge, Massachusetts & London, England: The Belknap Press of Harvard University Press, 2003), 43. What is interesting is that Rutherford, who staunchly opposed absolutist theories pertaining to political power and who postulates active resistance towards such power does not refer to Machiavelli in *Lex, Rex*. Althusius in his *Politica*, however refers to Machiavelli.

³⁰ Noah Dauber, "Anti-Machiavellism as constitutionalism: Hermann Conring's commentary on Machiavelli's *The Prince*", *History of European Ideas*, Vol. 37, (2011), 105.

³¹ D. Engster, "Jean Bodin, Scepticism and Absolute Sovereignty", *History of Political Thought*, Vol. 17, 4(1996), 469. Bodin shifted the source of universal right from the idea of a universal law to the idea of a law-making sovereign, *ibid.*, 491. Also see *ibid.*, 492. Engster adds that, "While still arguing that politics required a divine and natural foundation, he no longer associated this foundation with the laws. He claimed the principles of divine and natural right resided not inherently in the laws, but instead in the sovereign's will. He thus emphasized the sovereign's will rather than the laws as the basis of all right and order in the state", *ibid.*, 499.

³² Stevenson, "The 'Letter on sovereign power' and the influence of Jean Bodin on Political Thought in Scotland", 33. Both the Catholics of the Holy League and the Huguenots had produced religious justifications for resistance to kings who persecuted true religion. As a result of the disastrous civil wars which such theories helped to justify, some turned back to providing the monarch with absolute power so as to prevent anarchy, Stevenson, "The 'Letter on sovereign power' and the influence of Jean Bodin on Political Thought in Scotland", 31.

lead to a dilution of the Divine law, which eventually allowed the law to follow a more exclusivist humanist meaning.

However, how should the idea of the covenant be understood in the context of pre-modern thinking? Clarity on this leads to clarity on how the law was to be understood at the time. The contrasts between contract and covenant must be studied through the experience of a particular historical reality and not be tempted to yoke variations of consent together and look at them ‘backward’ through the lens of liberal theory.³³ The ancient Hebrew and biblical view of the universe was not astronomical at all; rather, it was religious. This resulted in an understanding of the universe in terms of man’s covenantal relationship with God, rather than viewing the universe as a vast system of stars spread out in aeons of space.³⁴ The high watermark of Calvinist constitutional theorising was reached in the 1570s among the French Protestant intelligentsia. The theoretical substance for this came from legal traditions in England and France, earlier Renaissance thought, and from Zwinglian and theological sources.³⁵ Two themes ran through this theorizing, namely a system of law that provides true public service of God as required by the first Table (together with the divinely ordained distribution of authority to ensure universal obedience to God’s commands), and the view that the fundamental law of any Christian polity originated in a divine-human covenantal agreement, to which both ruler and people were parties on the model of the covenant made between God and Old Testament Israel.³⁶

As stated at the outset of this section, the idea of the covenant played a foundational role in the effective application of authority and an experience of liberty for both the

³³ Glenn A. Moots, “The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar”, 391-412, in *The Ashgate Research Companion to Federalism*, Ann Ward & Lee Ward (eds.), (Surrey, England: Ashgate Publishing Limited, 2009), 394.

³⁴ Taylor, *The Christian Philosophy of Law, Politics and the State*, 84-85. Taylor refers to John Wren-Lewis’ *Return to Roots*, which among others, states: “We do not know the Universe in experience as a system of stars spread out in aeons of space, or as a space-time continuum, or anything of that sort. We know it first and foremost as an encounter with other persons, a network of persons in relationship ... Even the stars and galaxies are known to us, first and foremost, as parts of the background against which we meet our friends under the night sky ... The truth is that the Universe is, as far as we can ever know, a personal reality, a system of encounters between people, and all the stars and galaxies and vast distances spoken of by the astronomer are just as much contained within the universe of persons as are the vast numbers of molecules and atoms and electrons which make up the air that carries our speech”, *ibid.*, 86.

³⁵ O’ Donovan *et al.*, *From Irenaeus to Grotius. A Sourcebook in Christian Political Thought 100-1625*, 556.

³⁶ O’ Donovan *et al.*, *From Irenaeus to Grotius. A Sourcebook in Christian Political Thought 100-1625*, 556.

individual and society. According to Rutherford, covenant is the binding together in one body politic of persons who assume through unlimited promise responsibility to and for each other and for the common laws, under God. It is government of the people, for the people and by the people, but always under God. It is not natural birth into natural society that makes one a complete member of the people, but always the moral act of taking upon oneself, through promise, the responsibilities of a citizenship that binds itself in the very act of exercising its freedom. The covenant concept represents the commonality of the individual's good and the public good against the background of the law. The individual is in covenant with God, which entails obedience to God's precepts and in return God bestows His favour (in whatever form or in whatever period in time) upon the individual. This takes place simultaneously with the covenanted community's obligation as a community and moral entity in covenant with God, and based on the fulfilment of God's precepts. In this regard, the covenant idea is understood as inextricably connected to republicanism. In addition, the republican element of the covenant is brought to the fore against the background of the twofold, but ordered efficiency of God according to which God and man make kings.³⁷ Divine Right royal absolutism is a consequence of separating the ruler's relationship with the people and placing everything in his (the king's) relationship with God. On the other hand, secular majoritarianism flows from separating the government's relationship with God and placing everything in its relationship with the people.³⁸ Grotius assisted this influence in propagating at a time, considered the dawn of modernity. To Rutherford in contrast, the republican idea of the relevance of the people is not merely a secular notion but is inextricably connected to God's underlying involvement and conditions (laws). Both God and man can be efficient causes to civil government, with God as first cause and the people as secondary cause.³⁹

How can the idea of the covenant also be understood as not forcing the individual members, to adhere to its conditional precepts? Did the idea of public covenanting

³⁷ David Field, "'Put not your Trust in Princes'. Samuel Rutherford, the four causes and the limitation of civil government", 83-151, in *Tales of Two Cities. Christianity and Politics*, Stephen Clark (ed.), (Leicester, England: Inter-Varsity Press, 2005), 108.

³⁸ Field, "'Put not your Trust in Princes'. Samuel Rutherford, the four causes and the limitation of civil government", 108.

³⁹ Field, "'Put not your Trust in Princes'. Samuel Rutherford, the four causes and the limitation of civil government", 107.

assume that all the individual participants in it were in agreement with such conditions? These questions are important to counter views that Rutherford's political and legal theory proclaimed the enforcement of the law on a society that would include those individuals who do not support certain norms and beliefs placed on society by the covenant. It would not make sense for a person to profess a zeal for public covenants with God, but who has never entered into a personal covenant with Him in a religious and spiritual manner.⁴⁰ In other words, the attainment of personal faith, multiplied by the number of people of a nation where many of the latter have attained a personal covenant with God, calls for a public covenant between God and community. According to Stephen Marshall:

When people have declared themselves to be a willing people, and professe to embrace the Lord and his waies, then may the Magistrates engage them by *Covenants*, stirring them up in a Moral way: thus did the godly Kings of *Judah*, though they Compelled none to become proselytes, yet when they were become such, they engaged them as well as other Israelites, by Oaths, Covenants, Curse, to walke worthy of the Lord ...⁴¹

The political dimension of the covenant became possible due to the spirit of the times, because of the many individuals who professed the faith, hereby most probably reflecting a substantial number of hearts that were turned to Christ. For such individuals, living in opposition to the precepts that are in the hearts and minds of both the individual and the community, results in an inherent resistance to anything which is contrary, which in turn gave the experience of true liberty. As contrasted to freedom from both a utilitarian and classical republican sense, freedom in the biblical sense means freedom from sin, especially the selfish bias of 'original sin', which delimits love to one's own kind (whether kin, class, race, or nation). It means freedom to do God's will and love all of God's children, accepting responsibility for them and to them. Steven Tipton adds:

True moral freedom to do 'that only which is good, just and honest,' in John Winthrop's words, is defined by reference to a biblical covenant between humankind and God. It consists of reciprocal duties and constitutive virtues based on divine command first of all, to love God, and then to love one's neighbor as oneself. It is a covenant, too, to seek

⁴⁰ Archibald Mason, *Observations on the Public Covenants, Betwixt God and the Church. A Discourse*, (Glasgow: E Miller, 1799, Still Waters Revival Books), 100-101.

⁴¹ Stephen Marshall, *The Power of the Civil Magistrate In matters of Religion, Vindicated* (In a sermon preached before the First Parliament on a Monthly Fast day), (London: Printed for Nathaniel Webb, and William Grantham, 1657), 8.

God. To this end, it makes of life a pilgrimage – not a free pass to go wherever one wishes, but a venturing forth guided by God, a journey like that of the people of Israel to the Promised Land.⁴²

Similarly, according to Rutherford (and in line with Calvin) the liberty of man is, in all respects, determined by the divine will as revealed in the Bible.⁴³ Far from supporting the liberty of a person to act in an unlimited fashion on the pretext of a broad subjective appeal to individual conscience, Rutherford presents an understanding of freedom that is connected to that freedom achieved by the atoning work of Christ.⁴⁴ The legal outcome of this is that the believer is freed from guilt and condemnation and the spiritual outcome is that the nature of the believer undergoes a radical transformation. Whilst man was previously bound to transgress the Decalogue because of the Fall, he is now imbued with the desire and the freedom to uphold the Decalogue with joyful obedience.⁴⁵ This implies the relevance of politics and the law in the external influence of the believer to guide, maintain and protect this desire and freedom, especially when taking man's propensity towards sin into consideration.

The idea of the covenant solidified the 'love-relationship' between God and the individual, and consequently the relationship between God and society. This enhances a theistic undertone in the individual and society pertaining to the relationship between God and Creation. Joshua Berman enquires against the background of the 'covenant' what it means to 'love God' as Deuteronomy⁴⁶ mandates. Medieval thinkers such as Maimonides understood that one was required to yearn for God even as a man yearns for a woman who is beyond his attainability. The term 'love' (root ' - *h -b*), however, plays an important role in the language of ancient Near Eastern political treaties – to love, in the political terms of the ancient Near East, is to demonstrate loyalty.⁴⁷ To love God then may be understood not as an emotional or

⁴² Steven M. Tipton, *Public Pulpits. Methodists and Mainline Churches in the Moral Argument of Public Life*, (Chicago: The University of Chicago Press, 2007), 35. Also see John Witte Jr, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, (Cambridge: Cambridge University Press, 2007), 295-296.

⁴³ Andrew Muttitt, "The Conception of Liberty in Samuel Rutherford's *Lex, Rex*", *The New Southern Presbyterian Review*, Vol. 3, 2(2005), 19-44.

Muttitt, "The Conception of Liberty in Samuel Rutherford's *Lex, Rex*", 39.

⁴⁴ Muttitt, "The Conception of Liberty in Samuel Rutherford's *Lex, Rex*", 41.

⁴⁵ Muttitt, "The Conception of Liberty in Samuel Rutherford's *Lex, Rex*", 41.

⁴⁶ Deuteronomy 6:5 and 11:13.

⁴⁷ Joshua A. Berman, *Created Equal. How the Bible Broke with Ancient Political Thought*, (Oxford: Oxford University Press, 2008), 34.

numinous disposition, but simply as a noble command for steadfast loyalty. The converse applies as well: ancient Near-Eastern treaties speak of breach of covenant as an act of hate.⁴⁸ Berman states:

Love and hate in the Decalogue bear these precise meanings, as in the references to those who ‘hate Me’ (Exod 20:5) and those who ‘love Me’ (Exod 20:6). Those who are said to love God are not necessarily those who reach an ecstatic and numinous experience of God’s presence. To love God is simply to demonstrate fealty to Him through steadfast performance of His commandments. To violate those commandments is to breach the terms of the treaty or, in other words, to display disloyalty, here called ‘hate’.⁴⁹

The Biblical covenant provides a sense of hope and a promising incentive to aim at, in that God’s blessings will be bestowed upon a society that endeavours the fulfilment of the Divine Will. Daniel Elazar states:

The covenant idea has within it the seeds of modern constitutionalism in that it emphasizes the mutually accepted limitations on the power of all parties to it, a limitation not inherent in nature but involving willed concessions. This idea of limiting power is ... of first importance in the biblical world view and for humanity as a whole since it helps explain why an omnipotent God does not exercise His omnipotence in the affairs of humans. In covenanting with humans, God at least partially withdraws from controlling their lives. He offers humans freedom under the terms of the covenant, retaining the covenantal authority to reward or punish the consequences of that freedom at some future date. By the same token, the humans who bind themselves through the covenant

⁴⁸ Berman, *Created Equal. How the Bible Broke with Ancient Political Thought*, 34.

⁴⁹ Berman, *Created Equal. How the Bible Broke with Ancient Political Thought*, 34. Berman adds: “... the notion of a ‘historical prologue’ that precedes the actual covenant itself suggests that the relationship between God and man in the Bible is founded on gratitude and moral obligation for the salvation that He granted, and not merely as a function of His power over man. By invoking the language of ‘love,’ ‘hate,’ and ‘jealousy,’ these passages educate toward seeing God not just as a power *but as a personality...*”, *ibid.*, 38 (Author’s emphasis). This established love within the covenanted mechanism also was of fundamental importance to political authority. Ellis Sandoz’s understanding of Republicanism states that the lines of religious development undergirded and fostered a shared sense of the sanctity of the individual human being living in immediacy to God and associated the Christian calling to imitate God in their lives with political duty, capacity for self-government based on consent, *salus populi*, and the ethic of aspiration through a reciprocal love of God – “from this fertile ground emerged the institutions of civil society and republicanism so admirably devised in the American founding”, Ellis Sandoz, *Republicanism, Religion, and the Soul of America*, (Columbia, Missouri: Missouri University Press, 2006), 47-48. This captures the Reformed and especially the Puritan reflection of Republicanism. Here we find Republicanism’s capacity for self-government based on consent (covenant), an ethic of aspiration through a reciprocal love of God (covenant), and a calling towards the imitation of God in the lives of members of society as well as of the life of society itself (law). The significance of the covenants that God enters with man lies especially in the fact that it is the design of the ultimate ruler and ultimate commonwealth that government should be not only by consent of the governed but with their participation in it, Richard Niebuhr, “The Idea of Covenant and American Democracy”, *Church History*, Vol. 23, 2(1954), 132.

accept its limits in Puritan terms, abandoning natural for federal liberty – to live up to the terms of their covenants. Beyond that, the leaders of the people are limited in their governmental powers to serving the people under the terms of the covenant. Thus, the idea of constitutional or limited government is derived from the idea of covenant.⁵⁰

The Scottish National Covenant of 1638 was more than opposition to the abuses by the Roman Catholic Church; it also included an appeal to the rule of law, against the king's arbitrary rule.⁵¹ Theorists used the paradigm of the 'covenant' to support their theories of the rule of law and the limitation of power in the ordering of society. It was through the doctrine of covenants, modelled in part on the biblical covenants of ancient Israel, that early modern Calvinists were able to constitutionalise the many safeguards in society; safeguards such as popular election, limited tenures and rotations of ecclesiastical and political office, separation of church and state,⁵² separation of powers within church and state, checks and balances between these powers, federalist layers of authority, open meetings in congregations and towns, codified laws, courts and councils.⁵³ Here, too, one finds traits of republican thought.

The important role that covenanting played was also indicative of the Ciceronian emphasis on covenanting and oath taking as a moral concept emanating from reason. Cicero understood a commonwealth as not being a collection of people brought together in any sort of way, but an assemblage of people in large numbers associated

⁵⁰ Elazar, *Covenant and Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, 3.

⁵¹ Ian M. Smart, *Liberty and Authority. The Political Ideas of Presbyterians in England and Scotland During the Seventeenth Century*, (Presented in fulfilment of the requirements for the degree of Doctor of Philosophy in the Department of Politics, University of Strathclyde, 1978), 31.

⁵² As well as co-operation between the two.

⁵³ Witte, *The Reformation of Rights*, 333-334. The idea of having parties enter into an agreement with one another accompanied by specific conditions, responsibilities and consequences, formed an integral facet of political theory throughout history. J. W. Gough's, *The Social Contract. A Critical Study of its Development*, (Oxford: Clarendon Press, 1936), provides an informative study on the importance of social contractual thought through the history of political theory. Also see Michael Lessnoff (ed.), *Social Contract Theory*, (Oxford: Basil Blackwell Ltd.: 1990). Daniel Elazar's, *Covenant & Polity in Biblical Israel. Biblical Foundations & Jewish Expressions*, Vol. 1, (New Brunswick, New Jersey: Transaction Publishers, 1995), and his *Covenant & Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, provides an informative biblical exposition on the political dimensions of covenantal thought. According to Stanton Evans, social contract theory was not the work of secular theoreticians, M. Stanton Evans, *The Theme is Freedom*, (Washington D.C.: Regnery Publishing, Inc., 1994), 168, and that the feudal order was, in a legal context, an intricate network of contracts within a political era that was saturated with its precepts, *ibid.*, 169. Robert Arnold observes that the earliest social contract theories in the British Isles which involved monarchical accountability existed in the Scottish Wars for Independence in the fourteenth century, Robert Arnold, "Was Samuel Rutherford a Source for John Locke's Political Theories?", (unpublished hard copy in possession of the author. Article was later published in the *Global Journal of Classical Theology*, Vol. 7, 1[2009]), 9-10.

in an agreement with respect to justice and the partnership of the common good.⁵⁴ Cicero in his *De legibus* states: “Rulers who formulate wicked and unjust statutes for their people, break their promises and agreements”.⁵⁵ What are rather striking in Cicero’s covenantal thought are the references to covenanting with the gods (God).⁵⁶

The new comprehensive Reformed vision was inspired by the view of corporate accountability under the covenants. Societies, and the corporate bodies that comprised them, were in a covenant with God.⁵⁷ The centrepiece of Reformed theology is the ‘covenant’ – Reformed theology’s attention to covenanting distinguishes it from other Christian theologies.⁵⁸ As a political concept, the biblical narrative of covenants and covenanting is the most significant innovation in Western political theory outside

⁵⁴ Marcus Tullius Cicero, *De Re Publica*, (with an English translation by Clinton Walker Keyes, London & Cambridge, Massachusetts: Heinemann Ltd & Harvard University Press, 1928 (reprint 1943), The Loeb Classical Library, T. E. Page, E. Capps, L. A. Post, W. H. D. Rouse, and E. H. Warmington (eds.)), I. xxv. 39. The cause of this binding together for purposes of justice is not so much the weakness of the individual as ‘a certain social spirit which nature has implanted in man’, because man is not a solitary or unsocial creature, but born with such a nature that not even under conditions of great prosperity of every sort is he willing to be isolated from his fellow men, *ibid.*, I. xxv, 39. Through agreements and covenants, a scattered and wandering multitude had, in a short time, become a body of citizens, *ibid.*

⁵⁵ Andries Raath, “Moral Duty and the Organic Conceptions of Moral Good in the Teachings of the Reformers”, 4 (unpublished). See what Malcolm Schofield states regarding Cicero namely: “A constitutional set-up will qualify as a *res publica* if and only if the government in conducting public affairs adequately consults the interests of the people, which forms a society in virtue of agreement on justice and of common advantage”, Malcolm Schofield, “Cicero’s Definition of *Res Publica*”, 207-227, in *Cicero and Modern Law*, Richard O. Brooks (ed.), (Farnham, Surrey: Ashgate Publishing Company, 2009), 218.

⁵⁶ Alluding to oath-taking as the mechanism for invoking the ‘higher’ authority of the gods, Cicero makes social covenanting the means for assuring man’s well-being in civil society, *De Re Republica*, II. vii. 16. The social covenant of men is only binding and enforceable if a vow to God binds the covenanting parties. The vow to God is in effect a contract, *ibid.*, II. xvi. 41. Cicero states that without man’s propensity to love his neighbour, man’s consideration for his neighbour and his observance of the religious rites and ceremonies employed in the worship of the gods would be lost. Cicero adds that these rites and ceremonies should be maintained not by the prompting of fear, but by the bond between man and God, D. H. van Zyl, *Justice and Equity in Cicero. A Critical Evaluation in Contextual Perspective*, (Pretoria: Academia, 1991), 56. Note the similarity of this idea with Richard Niebuhr’s comment that: “The view of man associated with these ideas about the world and about society was one that set his will, in the sense of his ability to commit himself by means of promise, at the centre of his being. To be sure man was a rational being; he was a being with many interests; he was a happiness-seeker; but above all his distinguishing characteristic was moral. As moral man he was a being who could be trusted or ought to be trustworthy because he had given his word, pledged himself to be faithful to the cause and the fellow-servants of the cause. All the perversion which has entered into man’s relationships to God and to his fellow-men through his distrust of divine faithfulness and his breaking of his own promises cannot change the fundamental fact that the moral requirement and ability of promise-keeping is central to human existence”, Niebuhr, “The Idea of Covenant and American Democracy”, 133.

⁵⁷ Glenn A. Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, (Columbia and London: University of Missouri Press, 2010), 133.

⁵⁸ Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, 3. Moots adds: “Because of its emphasis on revealed theology, human conscience, and lateral and vertical relationships (person to person and person to God, respectively), covenanting is a political theology par excellence. It is the most intensely ethical and political expression of biblical religion”, *ibid.*, 21.

Rome and Greece. Yet, it remains almost completely ignored when compared to the contributions of Greece and Rome, and comments that perhaps the most significant attribute of the covenant, both theologically and politically, is its emphasis on *relationships*. A covenantal politics is *relational* above everything else – these relationships are ethical rather than natural, as well as freely chosen in time and place (they are not simply a function of some superintending and mechanistic *phusis*). The covenant stands in contrast to its theoretical competitor, the Graeco-Roman emphasis on harmony and order.⁵⁹

Plato and Aristotle offer impressive studies of these ruling principles. However, even in their insightful discussion of the virtues necessary for these relationships, one sees the same emphasis on relationships. According to Glenn Moots, “the virtues do not exist for the sake of relationships – one may even say that relationships exist for the sake of the virtues!” As witnessed in Paul’s treatment of the Stoics (Acts 17), their god is not only unknown in the sense of being incomprehensible, but also incapable of a relationship with persons.⁶⁰ Moots provides a refreshing and powerful insight, namely:

Divine revelation does more than reveal something intelligible, however. It also calls one into a relationship with that Self-Existence through covenants. Of note are the biblical virtues: faith, hope and love. These provide not only intellectual support in the face of what would otherwise be intellectually and metaphysically overwhelming; they invite a

⁵⁹ Glenn A. Moots, *Whither Political Covenanting Now?*, For the Panel, *Covenant and Religion* (Eric Voeglin Society), 2006 meeting of the American Political Science Association, Philadelphia, PA, *Paper presented at the annual meeting of the American Political Science Association, Marriott, Loews Philadelphia, and the Pennsylvania Convention Center, Philadelphia, PA*, Not Available. 2013-12-16, http://citation.allacademic.com/meta/p153562_index.html, 3.

⁶⁰ See Moots, *Whither Political Covenanting Now?*, 3. Moots adds: “In the biblical account, God speaks to Moses to reveal that he is the ‘I Am Who I Am’ (Exodus 3:14) ... This is a God who deliberately speaks to persons in order to provide moral imperatives, not simply a being existing for inspiration or contemplation. The biblical moral imperatives are not just appeals to absolutes or immaterial forms. God is not presented co-discoverer of truths above God and humankind ... The visions of divine reward and punishment in Plato’s *Republic* or *Gorgias* are argued inductively from the nature of justice. They do not claim divine inspiration in the same way the Christian texts do. Plato seems to point us to the gods for the sake of what is true and rational. He is not pointing us to what is true and rational for the sake of the gods. The emphasis is on grasping truth, not establishing a deliberate relationship with the Divine Person who is the source of that truth. This is a substantial difference from biblical religion”, Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, 14-15.

relationship with the Creator. These biblical virtues are relational virtues. They enhance the existential dimension of biblical religion and give force to its eschaton.⁶¹

This covenantal relationship with God was very real and personal to the individual and the community in Rutherford's time, especially pertaining to the political and social context of late sixteenth-century and early seventeenth-century Scotland. Referring to Johannes Eisermann (a law professor in the sixteenth century and founder of the Marburg school), John Witte states that:

'God has always lifted up wise men' who have undertaken such 'careful study' of these 'inborn sparks' of natural law. Led by these wise men, the Egyptians, Greeks, Romans, and other ancient peoples of the West all saw that 'man is by nature sociable and aspires to society and community of life, in order to curb vice and to embrace virtue, to help others, and to find a way to help himself and his community. Accordingly, each of these ancient peoples has formed 'a covenant of human society (*foedus humanae societas*) wherein men are trained by a discipline of laws and manners to do things for others and to live well'.⁶²

In this regard, a commitment to the *rule of law* was the most essential of all these early social covenants, and in this regard, Eisermann proclaimed that without law there could be no commonwealth – law was essential to curbing the depraved instincts of natural persons and driving them to greater orderliness, goodness, and even happiness. In this regard, Eisermann cited various ancient Greek and Roman writers to the effect that 'the good of citizens, the safety of cities, and the quietness and happiness of man's life is much advanced by the establishment of laws.'⁶³ In this, Eisermann expressed an important understanding of the inextricable relationship between covenantal thought and the law.

⁶¹ Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, 16. Similarly, Joshua Berman observes that, as Yohanan Muffs puts it, the new idea in the Bible is the idea of God as a personality who seeks a relationship of mutuality with human agents. In the neighbouring cultures of the ancient Near East, man was merely a servant of kings. In the Bible, man is transformed into a servant king in relation to a beneficent sovereign, a wife in relation to her benefactor-husband. God seeks from Israel 'love,' in both the political sense of loyalty between parties to a treaty and in the sense of a faithful, intimate relationship between man and wife – God's interest in each and every member of the Israelite polity is expressed in the Sinai narrative of Exodus 19, which refers to the Israelites as a 'kingdom of priests' (Exodus 19:6), Berman, *Created Equal. How the Bible Broke with Ancient Political Thought*, 46. Also see William J. Everett, *God's Federal Republic. Reconstructing Our Governing Symbol* (New York: Paulist Press, 1988), 25-26.

⁶² John Witte, Jr., *Law and Protestantism. The Legal Teachings of the Lutheran Reformation*, (Cambridge: Cambridge University Press, 2002), 144.

⁶³ Witte, *Law and Protestantism. The Legal Teachings of the Lutheran Reformation*, 145.

Not only the importance of the covenant as a foundational medium by which there can be a relationship with the Creator, but also the biblical virtues of faith (in God), hope (of salvation) and love (for God and one's neighbour – in other words, the law of God) give rise to or inherently point to a relationship with God. The virtues that enhance the existential dimension of biblical religion and give force to its eschaton also represent a more specific *normative element*, which does the same. James Willson states that, “covenanting was no peculiarity – *it is a moral duty. It was exemplified in the covenant of works*”.⁶⁴

One can therefore postulate that the covenant is inextricably linked to God's law, and both the covenant and the law enhance the existential dimension of biblical religion and give force to its eschaton. Of importance is that the sixteenth-century Swiss Reformer Heinrich Bullinger saw the Commandment of Love as the summary of both the conditions of the covenant and of all law. Bullinger, therefore, viewed the conditions of the covenant or the Commandment of Love, not simply as a personal ethic, but also as the basic law for the social, political, constitutional and ecclesiastical organisation of Christian society. The foundation for all law was God's law, and the conditions of the covenant written in the Scripture as the records of the covenant. God's law was the basis for the laws of the Christian magistrate.⁶⁵

The Italian Reformer, Peter Martyr Vermigli (1499-1562), and the successor to Calvin and member of the Monarchomachs, Theodore Beza (1519-1605), formed part of this revitalisation of the idea of the biblical covenant. Not long after his move to Zurich in August 1556, Vermigli began lecturing on 1 Samuel and thereafter on Kings. His commentaries on the ‘covenantal books’ of the Old Testament strongly reflect Bullinger's theologico-political thought.⁶⁶ Vermigli's work on the double nature of

⁶⁴ James M. Willson, *Social Religious Covenanting*, (Philadelphia: William S. Young, 1856), 13 (Author's emphasis). Willson states: “We are aware that the notices of covenanting are neither so frequent nor so express in the New Testament as in the Old. This is not necessary. It is a moral duty. It arises out of the necessary and unchangeable relations in which man stands to God Most High. The Sabbath, for the same reason – we mean because it is a moral institution and of course not requiring re-instituting – is only incidentally referred to in the New Testament. But is it the less obligatory? Certainly not”, *ibid.*, 15.

⁶⁵ J. Wayne Baker, *Heinrich Bullinger and the Covenant*, (Ohio: Ohio University Press, 1980), 116. More will be said on the ‘Covenant of Works’ later on in this Chapter.

⁶⁶ Andries Raath and Shaun de Freitas, “From Heinrich Bullinger to Samuel Rutherford. The Impact of Reformation Zurich on Seventeenth-Century Scottish Political Theory”, 853-879 in *Heinrich Bullinger. Life – Thought – Influence*, (Zürich, Aug. 25-29, 2004, International Congress, Heinrich Bullinger (1504-1575), Vol. II, Emidio Campie & Peter Opitz (Hrsg.), Theologischer Verlag Zürich, [2007]), 858-859. Vermigli, together with Bullinger, Goodman, Knox, and Buchanan formed the hub of the

the political covenant served as the blueprint for the French monarchomachs in the development of their theories of resistance to the king, and a major step in the development of the political theory of covenanting.⁶⁷ The political influence of Vermigli exerted itself along four distinct avenues. The first of these proceeded along the German line of influence, from Vermigli to Althusius via Ursinus, Pareus and Olevianus. The second was the French line, which took place via Beza and Hotman to the author of the *Vindiciae Contra Tyrannos*.⁶⁸ Then there was the English line of influence from Ponet and Goodman to Milton⁶⁹ and the political views of New England. Fourthly, there was the Dutch route, which made it felt through Daneau and Grotius.⁷⁰

Beza's main new argument was a covenant, compact, or contract that bound the people, rulers and God. This idea was built in part on ancient Hebrew and classical Stoic ideas that were echoed by several medieval Catholic writers, especially Marsilius of Padua and Nicholas of Cusa.⁷¹ Although Beza did not offer a comprehensive covenantal theory of law, politics and society, his *Rights of Rulers* assisted to turn the Calvinist tradition permanently in that direction.⁷²

The office of magistracy, implying two central constitutional principles namely that of *duty* and *accountability* regarding the attainment and maintenance of the safety of the people (*salus populi*), may not deviate from these covenanted conditions. By providing the people with a covenant responsibility in the election of the ruler, they not only confirmed what Scripture states, but also prevented any arbitrary appointment of a ruler, as found, for example, in the principle of the 'Divine Right of Kings'. Therefore, Rutherford emphasised the role of the community not only in the election of the ruler but also that it was the community's covenanted responsibility to elect a godly ruler that would protect them. This 'godly' characteristic was understood

political dimension of the Biblical covenant that underwent a most powerful reception in seventeenth-century Britain, *ibid.*, 878.

⁶⁷ Raath and De Freitas, "From Heinrich Bullinger to Samuel Rutherford. The Impact of Reformation Zurich on Seventeenth-Century Scottish Political Theory", 859.

⁶⁸ Raath and De Freitas, "From Heinrich Bullinger to Samuel Rutherford. The Impact of Reformation Zurich on Seventeenth-Century Scottish Political Theory", 859-860.

⁶⁹ Rutherford should also be added to these names.

⁷⁰ Raath and De Freitas, "From Heinrich Bullinger to Samuel Rutherford. The Impact of Reformation Zurich on Seventeenth-Century Scottish Political Theory", 860.

⁷¹ Witte, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, 135-136.

⁷² Witte, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, 137.

as being synonymous to the dictates represented in the ‘office’ of the ruler. Submerging into a more refined investigation concerning a better understanding of the term ‘office’, H. E. van Runner states,

Office means therefore limitation; for the person in office is not himself The Sovereign, but stands under the absolutely sovereign authority. We conclude that office expresses the fact that man is placed to a certain task with a divine calling to perform it ... Office is not merely service; it is also administration: it is service of God and an administering of God’s love and solicitude to the creature at the same time. Office as administration (preserving and orderly form-giving) includes the idea that the future weal or woe of what is being administered depends upon whether the office-bearer does or does not serve God. Scripture speaks of a number of such offices that are both service and administration: of prophet, teacher, priest, judge, king, father, husband etc. The authority of a father over his children does not really lie in his having begotten them but in his having been charged by God himself with that responsibility. This is a divine ordinance. And that is what is meant by office.⁷³

The application of this to governmental authority entails that authority (as one person having a say over one (or more) person(s) in the state as community sphere) does not find its basis in man, but in the nature, vertical structure and the destination of the government as a covenantal structure. It is a fundamental principle of the arrangement of order without which the state (government) cannot function. It further implies that the covenantal office of government in its ultimate capacity is an image of the absolute covenantal authority of God. The person in governmental authority exercises his covenantal authority on behalf of God, as servant of the Almighty, who does not receive his authority from the subjects, but from his covenantal office as determined by God, and who is accountable to God for his covenantal service or covenantal neglect.⁷⁴ Acting on behalf of God by means of the ‘office’ of governance also meant acting in accordance with the Divine precepts. With this doctrine of office of the ruler, some of the problems of the secular consent theories are immediately removed. Richard Flinn explains this by stating that one does not call upon either citizens or

⁷³ Andries W. G. Raath, Deel II: “Staats- en regsfilosofiese oopheidsperspektiewe” (Open constitutional and jurisprudential perspectives), *Journal for Juridical Science*, Vol. 22, 1(1997), 60-61.

⁷⁴ Raath, “Staats- en regsfilosofiese oopheidsperspektiewe” (Open constitutional and jurisprudential perspectives), 61. It is because of this understanding that those constitutional theories on the authority that supports the idea of subjects as a mere substance of the community and that transfer their authority to the government, must be rejected. Both government and subject are subordinate to God’s Will and authority (which forms the content of the office of magistracy), *ibid.* What comes to mind here is the progression in Bodin and then Hobbes, which assisted in this understanding of subjects as mere substance of the community and who transfer their authority to the government.

rulers to act selflessly for an amorphous “good of the community”: one call upon rulers to be God’s deputies on earth.⁷⁵ This implies God’s law as measure for the ordering of society. According to Rutherford,

The law is *ratio sive mens*, the reason or mind, free from all perturbations of anger, lust, hatred, and cannot be tempted to ill; and the king, as a man, may be tempted by his own passions, and therefore, as king, he cometh by office out of himself to reason and law; and so much as he hath of law, so much of a king; and in his remotest distance from law and reason he is a tyrant.⁷⁶

According to Rutherford, God works through the Parliament and the Westminster Assembly to restore the state.⁷⁷ However, more than this, God uses the idea of the Covenant as primary agency or instrumentality to maintain, protect and further the Christian Commonwealth. For Rutherford (being part of the Reformed tradition of theologico-political federalism), ideas related to the social contract therefore represented something different than J. W. Gough’s general take on social contractarian theory as ‘quite imaginary’ when it comes to finding a motive for the obedience to the laws. Gough is sceptical about the proposition that contractarian thought can be used to explain principles that ‘contractarians have striven to uphold’ and, according to Gough, respect for individuality (and not the idea of the social contract) can be held to justify belief in what one might call natural rights.⁷⁸

The idea of the covenant forms an important part of the understanding of the Divine and moral law as superior to political power, as also included in the constitutional and republican model for society and for Rutherford, the covenant played a foundational part in the Christian Republic. The covenant introduced a real and personal context to the individual and the community’s relationship with God, and gave a sense of both liberty and responsibility (duty) towards the individual and the community. The constitutional and republican idea of inclusive political activity and representation

⁷⁵ Richard Flinn, “Samuel Rutherford and Puritan Political Theory”, *The Journal of Christian Reconstruction*, (Chalcedon Foundation, 1978-9), 61. *Lex, Rex* abounds with references to this understanding for example, see: *Lex, Rex*, 6(1), 7(2)-8(1), 34(1), 47(2), 56(2), 62(1)-62(2), 72(1), 79(1)-79(2), 83(1), 103(2), 104(2), 107(1), 120(1), 129(1), 137(1), 143(2), 145(1)-146(1), 148(2), 164(2), 184(2)-185(1), 193(2) and 198(1).

⁷⁶ Rutherford, *Lex, Rex*, 101(2).

⁷⁷ J. P. Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, (Unpublished Ph.D. dissertation, University of Chicago, 1986), 44-45.

⁷⁸ Gough, *The Social Contract*, 230. Gough refers to the Kantian view of contractarian thought as fictional “although valid as an ‘idea of reason’”, *ibid.*, 224.

based upon a given set of foundational Divine norms formed an important part of Rutherford's thinking with special relevance to *Lex, Rex*. This political activity and representation as well as the normative dimension were housed in the covenant. Vestiges of this were found in the many centuries preceding *Lex, Rex*, which especially came to fruition in theologico-political federalism. Accompanying the idea of the covenant was the understanding related to the office of the ruler, which distinguished between the ruler as a person and the ruler as a ruler. The office of the ruler entailed the ruler to operate in his capacity as ruler, according to the laws expected from the office of such a governing position. This was in contrast to the Grotian and Bodinian line of thinking, Bodin largely being responsible for separating the Decalogue from the functions expected for governance. Grotius, as stated in this section, did not ascribe relevance to the idea of the Covenant and, together with his dilution of the Divine precepts of the Covenant (and his tendencies towards absolute rule, although not quite like Bodin did), also assisted in steering away from the Divine law which acted as conditions of the Covenant. The covenant also provided a moral aspect on the side of the community that pointed to a collective subservience to the law of God. This blended with the idea of the community as a corporate entity and which formed part of constitutional and political thought in especially Roman, Medieval and early Renaissance thinking. This was elaborated upon in Chapter 1. The law was inextricably connected to the idea of the covenant. This will be elaborated upon in the next section.

2.2 The law

The previous chapter described the attention given to the important status of the law through the centuries prior to the seventeenth century. In this regard, it was confirmed that to Aristotle the rule of law was preferable to that of a person, and that persons should be made guardians and servants of the law. Cicero's *Republic* clearly refers to the basis of all human authority as that of the true law of right reason, which is in accordance with nature, applies to all men, and is immutable and eternal. Roman law included the idea that the prince should rule under the law and that 'what touches all should be approved by all'. The *Corpus Iuris Civilis* states that it is fitting for the Emperor to be bound by the *leges*, specifically because his power derives from the law. According to Baldus, the king should be seen as the living law. Lactantius

considered Rome, when properly governed, to be a *res publica*, and therefore its primary function was to uphold justice, a responsibility made possible since natural law should provide the foundation for its laws.

Ulpian and other intellectuals in his time were becoming dissatisfied with the view that whatever is traditional in a society is inherently right. Marcian (in the early part of the third century) appealed to the Stoic philosopher Chrysippus, who stated that, “Law is king over all divine and human affairs. It ought to be a standard of justice and injustice and, for beings political, by nature a prescription of what ought to be done and a proscription of what ought not to be done”. There was general agreement among the political scholars of the Middle Ages regarding the understanding that the State rests on no basis of mere law, but on moral or natural necessity, and is itself the creator of law. The view that “the king is the living law” formed part of the famous texts of the *Digest* and the *Institutes*. John of Salisbury referred to the *princeps* as the *lex animata* (the breathing law). Bracton, in the early thirteenth century stated that, “The king must not be under man but under God and under the law, because law makes the king.” There was similarity to this line of thinking in Roman law.

W. Friedmann speaks about the social disorders and tyranny, which served as external stimulus to thinking on the relation of higher justice to positive law.⁷⁹ Early seventeenth-century Britain presented an environment conducive to inviting remedial views for the abuses of political power, leading to a renewed and revitalised scrutinisation of, among others, the relationship between justice and the law, as well as the origin and primordial authority of this relationship. This was no new phenomena when considering the challenges the classical Greek and Roman thinkers were confronted with. As part of the reactions to the abuses emanating from especially the Papacy and the principle of the Divine Right of Kings during sixteenth- and seventeenth-century Europe, concerns arose regarding the nature of political sovereignty and the parameters of contractual and covenantal thinking. For the Reformers these developments were cause for much concern, no less for Rutherford.

Although Bodin admitted that all rulers are subject to the laws of God and of nature, he emphasised that, “... it is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another, for it is he who makes law for the

⁷⁹ W. Friedmann, *Legal Theory*, 5th Edition, (London: Stevens & Sons, 1967), 5.

subject ... the prince is above the law, for the word *law* in Latin implies the command of him who is invested with sovereign power.”⁸⁰ This belief overrode Bodin’s view that the ‘law is king’⁸¹ (since the prince obeys the laws of nature and the people the civil laws).⁸² Bodin’s legislator is the legislator of the jurist, not of the theologian or of the moral philosopher. He assumed, but nowhere closely defined, the *leges divinae, naturae et gentium*. The sovereign, like the subject, is bound by the law of God and of nature, *but his obligation in this respect is to God*, by whom it will be enforced. This is similar to the principle of the Divine Right of Kings.⁸³ As to the civil law – the law

⁸⁰ Bodin, *Six Books of the Commonwealth*, Book 1, Chapter 1, 14. Also see *ibid.*, 15-16, 22, and Book 3, 8. Bodin’s principle of sovereignty is the assertion that there must exist, in every ordered commonwealth, a single centre of supreme authority and that this authority must necessarily be absolute, Julian H. Franklin, *Jean Bodin and the Rise of Absolute Theory*, (Cambridge: Cambridge University Press, 1973), 23, 28, 50, 68, 92 and 103. Also see Lee Cameron McDonald, *Western Political Theory: The Modern Age*, (New York & Burlingame: Harcourt, Brace & World, Inc., 1962), 15 and 35; Brian P. Levack, “Law, Sovereignty and the union”, 213-237, in *Scots and Britons. Scottish political thought and the union of 1603*, Roger A. Mason (ed.), (Cambridge: Cambridge University Press, 1994), 233, and Stevenson, “The ‘Letter on Sovereign Power’ and the influence of Jean Bodin on Political Thought in Scotland”, 36. Thomas Hobbes (1588-1679) would further Bodin’s views on state sovereignty and take it to a more absolutist level. In this regard see for example, Dunning, *A History of Political Theories. From Luther to Montesquieu*, 301. The foundations were already established for Hobbes’ later construction of ‘that great Leviathan’ as a ‘mortal God’ to whom ‘we owe under the immortal God our peace and defence’, by Bodin, Quentin Skinner, *The foundations of modern political thought. Vol. 2: The age of Reformation*, (Cambridge: Cambridge University Press, 1978), 287.

⁸¹ Here Bodin refers to Pindar.

⁸² Bodin speaks of “the testimony of the law of God which ought to be regarded as holy and inviolate by all peoples”, *Six Books of the Commonwealth*, Book I, 6; “It is far otherwise with divine and natural laws. All the princes of the earth are subject to them, and cannot contravene them without treason and rebellion against God. His yoke is upon them, and they must bow their heads in fear and reverence before His divine majesty. The absolute power of princes and sovereign lords does not extend to the laws of God and of nature. He who best understood the meaning of absolute power, and made kings and emperors submit to his will, defined his sovereignty as a power to override positive law; he did not claim power to set aside divine and natural law”, Book I, 14-15; “Marcus Aurelius also observed that the magistrate is the judge of persons, the prince of the magistrates, and God of the prince ... Those who say without qualification that the prince is bound neither by any law whatsoever, nor by his own express engagements, insult the majesty of God, unless they intend to except the laws of God and of nature, and all just covenants and solemn agreements ... For just as contracts and deeds of gift of private individuals must not derogate from the ordinances of the magistrate, nor his ordinances from the law of the land, nor the law of the land from enactments of a sovereign prince, so the laws of a sovereign prince cannot override or modify the laws of God and of nature”, Book I, 17; and “If justice is the end of the law, the law the work of the prince, and the prince the image of God, it follows of necessity that the law of the prince should be modelled on the law of God, Book I, 18. Despite this, see *ibid.*, Book 3, 7, regarding Bodin’s opposition to resistance against the ruler. In this regard, also see Franklin, *Jean Bodin and the Rise of Absolutist Theory*, 50-51. Bodin’s emphasis on absolute sovereignty, together with his emphasis on God’s law and the law of nature, as well as his anti-resistance sentiments provides a sense of familiarity with the principle of the Divine Right of Kings. In this regard, also see Berman, *Law and Revolution II. The impact of the Protestant Reformations on the Western Legal Tradition*, 236.

⁸³ With the union of the Bodinian claim that an absolute form of legislative sovereignty needs by definition to be located at some determinate point in every state, and the originally Protestant belief that all such powers are directly ordained of God so that to offer any resistance to the king is strictly equivalent to resisting God’s will, the distinctive concept of the ‘divine right of kings’ was finally articulated, Skinner, *The foundations of modern political thought. Vol. 2: The age of the Reformation*,

of the land – the sovereign’s will is the ultimate source of its every precept, and the will is free.⁸⁴ Harold Laski comments, “It is true that reference is made by Bodin to laws of nature, of God, and of nations by which the ruler is bound; but, as Hobbes was later to point out, since the prince is the only person who can, in this context, enforce obedience to them, the essence of the theory is the unlimited nature of the sovereign power.”⁸⁵

It was this understanding that started receiving opposition regarding the settling of constitutional disputes towards the end of the sixteenth century.⁸⁶ William Church refers to other authors in sixteenth-century France whose over-emphasis on the sovereignty of the ruler formed part of Bodinian political thought. Examples in this regard are; Simon Marion,⁸⁷ Charles De Moulin,⁸⁸ and Charondas Le Caron.⁸⁹ Bodin’s former emphasis on the sovereign as the supreme executive power was replaced with an emphasis on the sovereign as the sole legislator. From this, it was clear that it was Bodin’s intention to refute those Huguenot arguments, which subordinated the king to the legislative power said to be inherent in the representatives of the community.⁹⁰ In addition, the *Politiques*⁹¹ were among the first

301. Bodin believed in the divine right of Kings only in the sense in which almost every one of his time believed in it. God created all things; but sovereignty and sovereigns were, to Bodin, created by no special act of God. Sovereignty was to Bodin, of man’s creation – it arose from the nature of man and of human needs and aspirations, Allen, *A History of Political Thought in the Sixteenth Century*, 415.

⁸⁴ Dunning, *A History of Political Theories. From Luther to Montesquieu*, 98. Bodin was the first major author to develop a systematic theory of an indivisible sovereignty – “not merely a superiority but a total supremacy, a single ultimate human law-making authority from which all other human law-making authority is derived; and he was the first major writer to develop a systematic theory of the total absolutism of the sovereign authority”, Berman, *Law and Revolution II. The impact of the Protestant Reformations on the Western Legal Tradition*, 235.

⁸⁵ Harold J. Laski, “Introduction”, 1-59, in Junius Brutus, *A Defence of Liberty Against Tyrants* (A translation of the *Vindiciae Contra Tyrannos* by Junius Brutus) (London: G. Bell and Sons, Ltd., 1924), 45.

⁸⁶ Franklin, *Jean Bodin and the Rise of Absolutist Theory*, 104. During the latter half of sixteenth-century England, theory on ‘mixed’ government pursued by authors such as John Ponet and John Aylmer formed part of the opposition against the ‘political heresy’ of Bodin, Donald R. Kelley, “Elizabethan political thought”, 47-79, in J. G. A. Pocock (ed.), *The varieties of British political thought, 1500-1800*, (Cambridge: Cambridge University Press, 1993), 72-73. In Rutherford we find a perpetuation of this opposition also with special emphasis on the *preference* towards mixed government. In this regard, see for example, *Lex, Rex*, 192(1)-192(2).

⁸⁷ Church, *Constitutional Thought in Sixteenth-Century France. A Study in the Evolution of Ideas*, 121 and 180-194.

⁸⁸ Church, *Constitutional Thought in Sixteenth-Century France. A Study in the Evolution of Ideas*, 123.

⁸⁹ Church, *Constitutional Thought in Sixteenth-Century France. A Study in the Evolution of Ideas*, 195-213.

⁹⁰ Salmon, *The French Religious Wars in English Political Thought*, 22-23.

⁹¹ The *Politiques* represented a growing body of moderate thinkers during the sixteenth century, who saw in the royal power the mainstay of peace and order and who therefore sought to raise the king, as a

who envisaged the possibility of tolerating several religions within a single state. Accordingly, the policy they advocated was to save what might still be saved from the wreck of religious strife; to permit religious differences, which could not be healed and to hold together French nationality even though unity of religion was lost.⁹² In the words of George Sabine,

... they perceived that religious persecution was in fact ruinous and they condemned it on this utilitarian ground. In a general way Bodin was related to this group, and he intended by his book to support their policy of toleration and also to supply a reasoned basis for enlightened policy in respect to many practical questions that arose in a distracted age.⁹³

This confirms the developing challenges with which Rutherford was confronted. Rutherford's political and legal thought can undoubtedly be categorised within the main stream of thought emanating from the sixteenth century and which belonged to the Monarchical opposition to political suppression. The sixteenth century provided two main forms of political doctrine, of which Bodin's *République* and DuPlessis-Mornay's *Vindiciae* are perhaps the best examples. According to Bodin, the root of political wisdom is an unlimited sovereignty that makes a command into law by the mere supremacy of the person from whom it emanates.⁹⁴ To DuPlessis-Mornay, the crucial point is not the willer, but the substance of the thing willed – “If this

center of national unity, above all religious sects and political parties, Sabine, *A History of Political Theory*, 399.

⁹² Sabine, *A History of Political Theory*, 400.

⁹³ Sabine, *A History of Political Theory*, 400. To Bodin, natural reason given by God to every man equips him with the ability to worship God, Marion Leathers Kuntz, “The Concept of Toleration in the *Colloquium Heptaplomeres* of Jean Bodin”, in John Christian Laursen and Cary J. Nederman, (eds.), *Beyond the Persecuting Society. Religious Toleration Before the Enlightenment*, (Philadelphia: University of Pennsylvania Press, 1998), 136. Harmony in the state and harmony among religions depend on general principles that find the greatest common agreement and respect for the particular opinions and beliefs which are different from the majority, *ibid.*, 138. In Bodin's view of toleration each opinion must be blended with another to obtain a true harmony as a foundation for a toleration which endures, *ibid.*, 139. In the structure of Bodin's *Colloquium Heptaplomeres* it is demonstrated that all views are important in arriving at the truth – “the tolerance expressed in Bodin's great dialogue resulted from the mutual respect for the knowledge and opinions of each man in Coronaeus's home ... The beauty of the enharmonic mode and the awe which it inspired leave the seven speakers with no need to discuss religion again ... Their souls were joined in the world of musical modulation which produced the most beautiful harmonies, based on the contrariety of tones in which dissonance is part of harmony. This realization lead them to a more profound understanding of God, who in His multiplicity is the perfect Unity that reconciles in Himself and in nature all contrarieties. This was the great lesson learned from the discussions by each participant”, *ibid.*, 141. Also see *ibid.*, 142. It is highly unlikely that Rutherford was aware of Bodin's *Colloquium Heptaplomeres* which was written at least by 1588, due to its “clandestine circulation”, see *ibid.*, 126.

⁹⁴ Laski, “Introduction”, 44. Bodin supported the view that the law be understood as ‘command’, Allen, *A History of Political Thought in the Sixteenth Century*, 444.

substance, when it contradicts divine law, is maintained, it must be resisted at all costs.”⁹⁵ Laski adds that therefore, in the *Vindiciae* there is not really such thing as sovereignty at all – “Power does not carry with it any political connotation. It is there because God and the people will it; but the people who created it are morally obliged to scrutinise its operation, and they must overthrow it in the event of abuse.”⁹⁶

In the older tradition preceding the ideological disputes towards the seventeenth century, there was the assumption that the king would always yield to reasonable protests, and that all disagreements could be settled without appeal to some ultimate locus of authority (beyond that of the king).⁹⁷ However, the abuses committed by the monarchy reached critical mass during the first half of seventeenth-century Britain. James I derived many of his ideas from Bodin, who argued that as in nature God rules the universe as an absolute monarch, so in human society sovereignty should be exercised in each political territory by an absolute monarch.⁹⁸ The late sixteenth-century Scottish lawyer, Sir Thomas Craig of Riccarton (1538-1608) (who served as authority to Scottish lawyers) was strongly influenced by Bodin; the latter’s thought having “done so much to popularize the idea of the sovereign law giver, not just in Europe but in Britain as well”.⁹⁹

Bodin’s as well as King James’ absolute monarch was not supposed to be a despot. However, what made him absolute, according to Bodin (and later to King James), was his lack of accountability to anyone other than God himself. It was this insight that was ‘modern’ in Bodin’s constitutional theory.¹⁰⁰ In addition, to James, just as for Bodin, the ordering of society was prioritised above that of a transcendental set of Divine norms. The behaviour of men like King James seemed to be more orientated towards a fear of anarchy and not towards a fear of contamination (and hence ultimate and eternal death). For James, astute management, and not the raising of the spiritual consciousness of the community, was a primary concern. The fears of the covenanters

⁹⁵ Laski, “Introduction”, 46.

⁹⁶ Laski, “Introduction”, 46.

⁹⁷ Franklin, *Jean Bodin and the Rise of Absolutist Theory*, 104.

⁹⁸ Berman, *Law and Revolution II. The impact of the Protestant Reformations on the Western Legal Tradition*, 235.

⁹⁹ Levack, “Law, sovereignty and the union”, 228-229. Levack adds that it is possible to locate Graig within a tradition of emerging absolutist Scottish thought, one which served as a counterweight to the constitutionalist tradition of George Buchanan, *ibid.*, 229.

¹⁰⁰ Berman, *Law and Revolution II. The impact of the Protestant Reformations on the Western Legal Tradition*, 236-237.

on the other hand, were of spiritual damnation, and they saw James' hierarchy with its expensive habits and its general reluctance to encourage the kind of self-reflective piety as supporting a movement towards the negation of a soteriological purpose.¹⁰¹ The Covenanters viewed the law as superior to mere utilitarian and pragmatic purposes.

In this regard, *Lex, Rex*, by reversing the traditional *rex lex* ("the king is law") to *lex rex* ("the law is king"), was among the pioneering early modern works to give the Rule of Law-principle a firm theoretical foundation, consequently serving as a strong voice in opposition to the abuses of political power. Although much has been written on the influence of Roman jurisprudence on the development of European political thought, there is little consensus regarding what its precise effects have been. This is understandable, since the civil law contains many texts of potential political significance, and these texts can sustain radically different interpretations.¹⁰² Brian Levack then points to the following text as forming part of the famous texts of the *Digest* and the *Institutes*, namely, "the king is the living law".¹⁰³ Without question, this statement could be, and quite frequently was, interpreted in an absolutist light – "the prince is the living law ... because he is the sole source of that law".¹⁰⁴ *Lex, Rex* provided a reminder that King James is subservient to the law, "That he is called absolute prince not in any relation of freedom from law, or prerogative above law, whereunto, as unto the *norma regula ac mensura potestatis suoe, ac subjectionis meoe*, he is tyed by fundamental law and his own oath..."¹⁰⁵

¹⁰¹ Louis Anderson Yeoman, *Heart-Work: Emotion, Empowerment and Authority in Covenanting Times*, (A Thesis Submitted for the Degree of Ph.D at the University of St. Andrews, 1991), 105. James VI was king of Scotland for 35 years and became James I of England in 1603. James wrote a number of pamphlets one of them being *The trew law of free monarchies* (1598) in which he wrote on a theory in support of the divine right of kings. James told parliament in a speech on 21 March 1610 that the king is, even to God Himself, called a god, Graham E. Seel, *Regicide and Republic. England 1603-1660*, (Cambridge: Cambridge University Press, 2001), 11.

¹⁰² Levack, "Law, sovereignty and the union", 230.

¹⁰³ Levack, "Law, sovereignty and the union", 230-231.

¹⁰⁴ Levack, "Law, sovereignty and the union", 233. Hans Wolff states: "Rulers were prone to take a friendly attitude toward Roman law because it provided them with powerful arguments in support of their claims to political supremacy. In classical and postclassical times, Roman law had been the legal order of a centrally-governed authoritarian monarchy. The assertions of imperial authority found in several statements by Roman jurists were a welcome support to those who strove to establish their own full sovereignty", Hans Julius Wolff, *Roman Law. An Historical Introduction*, (Norman, Oklahoma: University of Oklahoma Press, 1951), 195.

¹⁰⁵ Rutherford, *Lex, Rex*, 218(1)-218(2).

Rutherford refers to the king as ‘the breathing law’.¹⁰⁶ *Lex, Rex* makes it clear that the interpretation that is apt in this regard is similar to George Buchanan’s view that the king is the living law because he should embody that law (or live that law). According to Buchanan, the king could not expect the people to obey the law if the king himself did not do so.¹⁰⁷ Rutherford gave the law a substantial Divine character, unlike Buchanan’s political works. *Lex, Rex* served as an important reminder that the Bodinian-like view of the king ‘as the breathing law’ was not the correct interpretation to follow. Although the ideas associated with theologico-political covenantalism had already surfaced in the works of Heinrich Bullinger, Peter Martyr Vermigli, John Knox, and other biblical federalists, *Lex, Rex* gave added impetus towards a strong commitment to the idea of the Rule of Law,¹⁰⁸ countering in the process Bodinian temptations towards absolute rulership.¹⁰⁹ Two of the major goals of the Papal Revolution, namely rule by law and rule of law,¹¹⁰ were relatively new to Western society.

Law was not to be subservient to political power but rather the inverse. The king as king can do no more than that which upon right and law he may do.¹¹¹ Rutherford frequently refers to the importance of ‘law and reason’, for example, he states: “Caesar is great, but law and reason are greater; by an absolute monarchy all things are ruled by will and pleasure above law; then this government cannot be so good as

¹⁰⁶ See for example, *Lex, Rex*, 98(2), 101(2), 111(1), 116(2), 146(1) and 190(1). This answers the question as to the formal cause, the essence of government, and implies in some respects that it is the law that is the real ruler, Field, “‘Put not your Trust in Princes’. Samuel Rutherford, the four causes and the limitation of civil government”, 121.

¹⁰⁷ Levack, “Law, sovereignty and the union”, 233-234. William Campbell states that, “Buchanan’s theory of the origin of the State is a scholastic blend of Aristotle and Aquinas. Men have the instinct to association implanted by nature or rather by God. Self-interest as a contributory cause is admitted (a more typical Renaissance thought), but by itself it might rather dissolve than keep social unity. The medicinal element essential to a state’s continuous existence is justice, which is to be maintained by laws rather than by kings. The king is the servant of the law whose creator is the people acting through a council of representatives chosen from all classes. The body of judges and not the king is the interpreter of the law”, William M. Campbell, “*Lex, Rex* and its Author”, *Scottish Church History Society*, (1941), 215.

¹⁰⁸ Also see, Crawford Gribben, “Samuel Rutherford and Liberty of Conscience”, *Westminster Theological Journal*, Vol. 71, 2(2009), 363.

¹⁰⁹ It was Johannes Althusius that provided one of the first counter arguments to Bodin’s right of sovereignty by postulating that, “the right to sovereignty is ‘neither supreme and perpetual, nor above the law’”, Thomas Hueglin, “Federalism at the Crossroads: Old Meanings, New Significance”, *Canadian Journal of Political Science*, Vol. 36, 2(2003), 278. Rutherford’s approach, as is evident throughout this thesis, substantially paralleled the political theory of Althusius.

¹¹⁰ In other words that rulers must seek to effectuate their policies systematically through legal institutions and that they are themselves to be bound by the legal institutions through which they govern, Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 527.

¹¹¹ Rutherford, *Lex, Rex*, 106(2).

law and reason in a government by the best or by many”.¹¹² Rutherford confirms the understanding of the superiority of the law by referring back to the *Magna Carta*, which stated that kings might only act under laws.¹¹³ Rutherford also states, “Justice is more perfect than a just man, whiteness more perfect than the white wall; so the nearer the king comes to a law, for them which he is a king, the nearer to a king, *Propter quod unumquodque tale, id ipsum magis tale*”.¹¹⁴

Bodin’s sovereignty not only provided the foundation for absolute monarchy; its essential traits were rediscovered in Jacobin nationalism. With Jacobinism, sovereignty was severed from natural law, and was no longer embodied in the king. Instead, it was transferred to the nation. In the words of Antoine Winckler, “The stage was set for centuries to come: monopoly of law, transparency of the social space to political power, total centralization of the exercise of power ...”¹¹⁵ While Bodin realised the moral weight of traditional natural law, he confronted a practical problem of seemingly irresolvable religious and political conflict with a theory on a new understanding of the ruler, which was much more far-reaching than he probably realised.¹¹⁶ Bodin, by having given absolute competence to the state, gave rise to the assumption that the state, as the wellspring of positive justice, is itself above the law.

¹¹² Rutherford, *Lex, Rex*, 191(2). Rutherford corrects Arnisaeus’ erroneous interpretation of Aristotle, Rutherford stating that Aristotle supported the idea that a true and absolute king is someone who rules by laws, *ibid.*, 204(2).

¹¹³ Rutherford, *Lex, Rex*, 111(1). David Hall refers to the *Magna Carta* (1215) as a British landmark and as one of the highlights of medieval government. The *Magna Carta* expressed the idea that the king is under the law and served as a catalogue of liberties, rights, and safe-guards from statist intrusion, David W. Hall, *Savior or Servant? Putting Government in its Place*, (Oak Ridge, Tennessee: The Kuyper Institute, 1996), 199-200.

¹¹⁴ Rutherford, *Lex, Rex*, 101(2)-102(1).

¹¹⁵ Alain de Benoist, “The First Federalist: Johannes Althusius”, (Originally published in *Krisis* 22 (March 1999), 2-34. Translated by Julia Kostova), 44, http://www.alaindebnoist.com/pdf/the_first_federalist_althusius.pdf (accessed 10 June 2013). The progression of the Bodinian aim towards countering religious strife that we find in Hobbes surely was not as successful as initially expected. John de Gruchy observes that: “In response to the European revolutions, conservative European intellectuals and Christians, from Edmund Burke to Joseph de Maistre and F. J. Stahl, called for the restoration of Christendom, a rediscovery of those common values which bound society together in the past. All of them shared the conviction that the Enlightenment had been a disaster, an apostasy, which had led inexorably to revolution and now threatened to destroy the social fabric of Europe”, John W. de Gruchy, *Christianity and Democracy. A theology for a just world order*, (Cambridge; New York: Cambridge University Press, 1995), 108. Also see *ibid.*, 235. In addition, see Douglas Farrow’s opening remarks to the ‘Pluralism, Politics and God?’ conference, 13 September 2007, McGill University, 1-6, <http://www.mcgill.ca/files/prpp/GreatSeparation.pdf> (accessed 10 November 2013). Also see Michael J. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts*, (Cambridge: Cambridge University Press, 2007), 3-4 and Carter, *Civility. Manners, Morals, and the Etiquette of Democracy*, 252.

¹¹⁶ McDonald, *Western Political Theory. The Modern Age*, 15.

The government, in this regard, is given a status above that of the law.¹¹⁷ David Stevenson states that,

The authors of the two major Scottish political treatises of the period, on the other hand, took ideas from Bodin directly as well as indirectly ... The other major Scottish writer of the period, Samuel Rutherford, wrote his *Lex, Rex* (1644) specifically to refute John Maxwell, but he also sought to discredit William Barclay and Arnisaeus. Thus those whom he saw as his main opponents were all men who had relied much on Bodin; but the same is true also of Rutherford himself, for his work is based on Althusius' adaptation (or distortion) of Bodin's doctrines in order to uphold popular sovereignty, and Althusius too had singled out Barclay and Arnisaeus for denunciation ...¹¹⁸

Lex, Rex was written to counter, among others, Barclay's support of royal absolutism, which followed in the thinking of Bodin.¹¹⁹ Bodin, with his new absolutist views and emphasis on the will, and DuPlessis-Mornay, with his concern with the limitations of power and the importance of the substance of the thing willed, reflects the view that Bodin was the innovator and DuPlessis-Mornay the guardian of traditional doctrine.¹²⁰ This was because of DuPlessis-Mornay's understanding that the ground of

¹¹⁷ Dooyeweerd, *The Christian Idea of the State*, 43. According to Bodin, the concept of positive law must be fined 'without any other addition' as 'the command of a sovereign concerning his subjects' and that the laws of the sovereign ruler depend upon nothing but his mere and frank good will, Quentin Skinner, *The foundations of modern political thought. Vol. 2: The age of Reformation*, 289.

¹¹⁸ Stevenson, "'The Letter on sovereign power' and the influence of Jean Bodin on Political Thought in Scotland", 35. Stevenson states: "In royalist Oxford John Maxwell's *Sacro-sancta* was printed, only to be promptly countered by the appearance of Rutherford's *Lex, Rex* in parliamentary London, both works being, as already noted, founded on the thought of Jean Bodin", *ibid.*, 43. Stevenson also avers that Althusius' work was based on Bodin, although, according to Stevenson, Althusius developed Bodin's ideas in order to use them to counter the absolutist theories Bodin had upheld, *ibid.*, 34. Stevenson refers to Althusius' thought being useful to the covenanters, *ibid.*, 34 and refers to the following works so as to confirm this namely, Skinner, *The foundations of modern political thought. Vol. 2: The age of Reformation*, 341-342; Salmon, *The French Religious Wars in English Political Thought*, 40-50; and Frederick S. Carney, "Translator's Introduction", xiii-xxxvii, in Frederick S. Carney, *The Politics of Johannes Althusius, (An abridged translation of the Third Edition of *Politica Methodice Digesta, Atque Exemplis Sacris et Profanes Illustrata* (The digest on political method and illustrating examples of the sacred and the secular), including the prefaces of the first and second editions and with a preface by C. J. Friedrich, London: Eyre and Spottiswoode, 1964), xv-xxx. Of these sources it is especially F. S. Carney that confirms the important influence Bodin had on Althusius. Bodin's procedure of surveying history, as well as contemporary experience, for insight into the nature and processes of political community, was of interest to Althusius, Carney, "Translator's Introduction", xxviii-xxix. Of greater importance was Bodin's doctrine of sovereignty that Althusius took over and systematically developed, but with the difference already noted concerning the place where it properly resides in the commonwealth, *ibid.*, xxix.*

¹¹⁹ Otto von Gierke states: "Bodin's idea of sovereignty was received without hesitation by the champions of absolute monarchy. It was followed out with slight moderations by Gregorius Tholosanus, and was used by Barclay in the struggle against the Monarchomachi. Even in Germany it found favour, and was elaborated with logical precision by Bornitz", Otto von Gierke, *The Development of Political Theory*, (New York: Howard Fertig, 1966), 159.

¹²⁰ Laski, "Introduction", 46-47.

obedience sprang full-grown from the noble medieval concept of the world as governed by natural law. What DuPlessis-Mornay did for his readers was to refer the actions of the state to the test of an eternal reason, which sprang from God and was conterminous with his will. All other laws were therefore secondary, because they sprang from fallible men.¹²¹ In the words of Laski: “When Bodin and later Hobbes were striving to make of law simply the command of a sovereign power, they were running counter, as their opponents at once recognised, to the whole burden of medieval notions.”¹²²

Lex, Rex perpetuated this medieval understanding of the world as governed by natural and Divine law. Rutherford, mainly in his *Lex, Rex*, may be understood as one of the last substantial postulations arguing for the perpetuation of the medieval emphasis on the superiority of the law. At nearly the same time that *Lex, Rex* was published, Hobbes’ denegation of this medieval emphasis on law as the highest principle of society¹²³ (and the law as representing an objective content) was published. Grotius and Bodin, whose major works preceded *Lex, Rex* (as discussed earlier), were part of the precursors to these views of Hobbes, and remind one of the important role played by Rutherford in his efforts at promoting an understanding of the law as superiorly authoritative. Needless to say, this has implications for the form and substance of a constitutional model.

Francisco Suárez, having propounded the Bartolist thesis that it is possible for a community ‘to retain essential power itself’ and ‘merely to delegate this power to its prince’, who ‘may not in turn sub-delegate the power assigned to him’, since he is not its ultimate possessor, but ‘only holds it as a delegate’ in order to wield it ‘according to the will of the community’, responded that if this referred to kings or emperors, then it constituted a false doctrine.¹²⁴ Suárez’s reason for this was that in all cases ‘the

¹²¹ Laski, “Introduction”, 47.

¹²² Laski, “Introduction”, 47. Albert Hyman comments that, “although ... Bodin was partly in agreement with the political theories of leading thinkers in the Middle Ages, his conception of a supreme power in the state which is above the law, because it makes the law, is ‘profoundly different from that of the Middle Ages ...’”, R. W. and A. J. Carlyle cited in Albert Hyma, *Christianity and Politics. A history of the principles and struggles of church and state*, (New York: J. B. Lippincott Company, 1938), 197.

¹²³ See Friedmann, *Legal Theory*, 105. Hobbes removed all that was left of medieval thought regarding authority and the law, and negated the primacy of the authority of divine law and natural law. To Hobbes the protection of the individual was primary and this is what determined the law, making him an individualist, utilitarian and absolutist, *ibid.*, 122.

¹²⁴ Skinner, *The foundations of modern political thought*. Vol. 2: *The age of Reformation*, 183.

power of the community is transferred absolutely' to its ruler so that 'it can never be said to be held in a merely delegated form'.¹²⁵ According to Suárez, while monarchic government is overall the best, the monarch's power is in all cases derivable, not from any divine grant, but from the consent of the people. However, once given, this consent binds the givers to subjection indefinitely, except for instances of tyranny.¹²⁶ To Suárez, no ruler can ever said to be bound by the laws of the community over which he rules.¹²⁷ Suárez rounded out a conception that was closely analogous to sovereignty in Bodin's theory. Also, like Bodin, Suárez, while fully recognising the legitimacy of popular and aristocratic governments (in which the supreme power is exercised by the whole or a part of the people in whom it naturally inheres) was chiefly interested in the monarchic form and often tended to confound prince and legislator – "his ideal is the absolute monarchy of the times".¹²⁸

Referring to the sixteenth-century Spanish theologians Francisco de Vitoria, Domingo de Soto, Luis de Molina and Francisco Suárez; Bernice Hamilton comments that these theologians greatly respected royal dignity. According to these theologians, the prince stood out above all members of the community because royal dignity was of divine origin and not created by a pact of men.¹²⁹ These four theologians differed considerably from the Jesuit Mariana (1536-1624), the former postulating that once power had been transferred to the ruler he was greater than the whole community put together was. (Although Soto, for example, supported opposition by the people against a tyrant even though the king who had not turned to tyranny, according to De Soto, could not be deprived by the community of his right of ruling.) For Mariana the

¹²⁵ Skinner, *The foundations of modern political thought*. Vol. 2: *The age of Reformation*, 183.

¹²⁶ Dunning, *A History of Political Theories. From Luther to Montesquieu*, 144.

¹²⁷ Skinner, *The foundations of modern political thought*. Vol. 2: *The age of Reformation*, 183. Also see *ibid.*, 184. Both Molina and Suárez attacked Vitoria for having argued that the power of a sovereign over his people is a natural unitary power, transferred by them to him, Richard Tuck, *Philosophy and Government 1572-1651*, (Cambridge: Cambridge University Press, 1993), 141.

¹²⁸ Dunning, *A History of Political Theories. From Luther to Montesquieu*, 145. However, "Suárez, resting on his consensual theory as to the constitution of a supreme legislator, more logically finds the limit in the form and condition under which the transfer of power was made by the community. There is, he says, a virtual contract between prince and people, through which the character of the grant is determined, and the terms of this contract may be expressed either in written documents, or in the custom of the land. This explanation is much more satisfactory than Bodin's, though it places Suárez fully in line with the contract theorists of the anti-monarchic school, with whose spirit and methods he manifests in general little sympathy", *ibid.*, 146.

¹²⁹ Bernice Hamilton, *Political Thought in Sixteenth-Century Spain, A study of the political ideas of Vitoria, De Soto, Suárez, and Molina*, (Oxford: Clarendon Press, 1963), 162.

community always remained greater than the king who therefore could not make laws without their consent.¹³⁰

It was the view on political sovereignty presented by Bodin that most probably served as an important catalyst (together with Barclay and Suárez) towards Rutherford having to address the importance of the moral or Divine law and the sovereignty of the people (Althusius having experienced the same) more substantially. Althusius and Rutherford can be understood as able critics against the threats presented by Bodinian thought.

Althusius's concept of sovereignty is the opposite of Bodin's in that, according to Althusius, the state is under the law, which emanates from the social dimension, which is why a sovereign or a magistrate cannot have absolute sovereignty.' In this regard, De Benoist states: "While for Bodin, the state is a personal attribute of the sovereign, with which he is identified and by means of which he expresses himself, for Althusius it is the 'integral community,' i.e., the sovereign people." According to Althusius, sovereignty belongs to the symbiotic community which is the people as proprietor, and the king merely as administrator¹³¹ In this regard (and as stated earlier), *Lex, Rex*'s arguments gave added impetus to the covenantal political theory of Althusius and was highly relevant to the societal, political and religious (covenantal) context of the day. Commenting on Rutherford's *Lex, Rex*, J. F. Maclear states that the time of its appearance was propitious when argument, both royalist and

¹³⁰ Hamilton, *Political Thought in Sixteenth-Century Spain, A study of the political ideas of Vitoria, De Soto, Suárez, and Molina*, 41.

¹³¹ De Benoist, "The First Federalist: Johannes Althusius", 46. This idea of sovereignty as a symbiotic relationship between the people and the ruler involving the active participation of the people as well, received much emphasis in the thinking of the Huguenots, making the latter important supporters of an essential trait of republicanism. The early modern Huguenots' principle of popular sovereignty was qualified by a historical contract between the people and the king, the terms of which could change by mutual agreement. The rights of the community were, in this regard, "overstated, and those of the king inevitably slighted". According to Julian Franklin, "there was thus a 'republican' component in the thinking of the Huguenots", Franklin, *Jean Bodin and the Rise of Absolutist Theory*, 103. *Lex, Rex* (and the whole Scottish Presbyterian representation at the Westminster Assembly during the middle of the seventeenth century) furthered this idea in the context of covenantal thinking. Charles McCoy and J. Wayne Baker state that Bodin, during the latter half of the sixteenth century, wrote against resistance to rulers, and had defended the absolute right of kings, also having affirmed that sovereignty requires centralized absolutism. Althusius can be understood as writing his *Politics* with Bodin as his main opponent and with the clear intention of drawing together into a coherent whole the varied views of those favouring resistance, Charles S. McCoy and J. Wayne Baker, *Fountainhead of Federalism. Heinrich Bullinger and the Covenantal Tradition*, (with a translation of the *De testamento seu foedere Dei unico et aeterno*, 1534 by Heinrich Bullinger, Louisville: Westminster/John Knox Press, 1991), 54, and on *ibid.*, 62, the authors state: "Althusius is carrying forward the teaching of the federal tradition calling for resistance to tyrants". Rutherford, like Althusius did the same.

parliamentarian, turned from appeal to immemorial custom to more radical speculations, especially concerning the proper locus of sovereignty.¹³²

Lex, Rex gave classic Reformed answers to questions concerning, among others, the community's ultimate authority, and helped familiarise the English public with pertinent Continental traditions respecting authority and rebellion, especially those of the French Monarchomachists.¹³³ John Ford comments:

Within a few months of the appearance of Maxwell's book a response was published by Samuel Rutherford, professor of divinity at St. Andrews. If the short title of his *Lex, Rex: the law and the prince* can be read as a forthright disclaimer of the antinomian principle, the long title suggests that his purpose was to supply at last the large treatise considered essential by the covenanters for an adequate treatment of royal authority. Where Maxwell had given his book the English title *The sacred and royall prerogative of Christian kings*, Rutherford gave his the subtitle *A Dispute for the just prerogative of king and people*. He would try to show that both king and people had political power, that one prerogative could be reconciled with the other.¹³⁴

John Coffey observes that to Rutherford, Thomas Hobbes' use of voluntarist language, arguing "that like the Almighty the earthly sovereign should rule by his own will and pleasure", would be blasphemous, for the king was a sinful man with a

¹³² J. F. Maclear, "Samuel Rutherford: The Law and the King", 65-87, in *Calvinism and the Political Order*, George L. Hunt (ed.), (Philadelphia: The Westminster Press, 1965), 68.

¹³³ Maclear, "Samuel Rutherford: The Law and the King", 68. *Lex, Rex* rested much on Scottish political and religious tradition, and it is this background from which Rutherford's book emerged. Unlike England with its substantial inheritance of strong central government, Scotland's monarchy had continually struggled to establish even limited monarchy. This is as a result of the nobles checking the crown, sometimes through the Estates, later through the General Assembly, and frequently through extra-legal political alliances and military action. Opposed by Mary of Guise and Mary Stuart, Reformation leaders set the pattern of looking beyond the crown to nobility and parliament as to "little nurse-fathers". Even at James's VI death, Scottish political experience remained predominantly that of a pluralistic society with diffused political power, suspicious of royal centralization, and "emotionally committed to the defence of 'true religion' against the political manipulations of the crown", *ibid.*, 69. Adding to this it is contended that Rutherford's theory on the limitation of central government was, in essence, the product of the physical and religious hardships that the Scottish Protestants were experiencing during the seventeenth century British monarchy, resulting in a Scriptural justification in support of limited rule and just resistance. See especially the previous chapter.

¹³⁴ John D. Ford, "*Lex, rex iusto posita: Samuel Rutherford on the Origins of Government*", in *Scots and Britains. Scottish political thought and the union of 1603*, Roger A. Mason (ed.), (Cambridge University Press, 1994), 266. The influence of George Buchanan requires emphasis in this regard – See Roger A. Mason, "George Buchanan, James VI and the presbyterians", 112-137, especially 124-125, in *Scots and Britons. Scottish political thought and the union of 1603*, Roger A. Mason (ed.), (Cambridge: Cambridge University Press, 1994). *Lex, Rex* has at least nine references to Buchanan against the background of the sovereignty of the people, see for example, 34(2), 51(1), 75(1), 84(1)-84(2), 98(2), 143(2), 184(1), 224(2) and 225(2).

will as corrupt as that of anyone else.¹³⁵ Hobbes' point was that everyone else was as short-sighted as the king was; no-one could penetrate the divine will. It was the height of presumption for anyone to think they knew God's will and then resisted the king based on this dubious knowledge (as the Scots and English Puritans had done in 1638 and 1642), for God's commands were, according to Hobbes, not as perspicuous as they imagined. According to Hobbes, when men realised this they would see that in order to have peace and freedom from bitter ideological conflict they had to submit to the arbitrary will and commands of an earthly sovereign.¹³⁶

This Hobbesian scepticism was already visible in Bodin. Bodin made a radical break with the past in that he, in recognising that the main problem of political authority in the post-Reformation world lay in that men claimed to be doing God's will, but could not agree on what God's will was, largely separated politics from religion and sought to justify submission to the 'sovereign power' in the state, on the grounds of practical necessity, as revealed through the detailed study of the actual working of states.¹³⁷ To Bodin, it must have seemed that religious dissensions might be the most terrible of all dangers to public peace.¹³⁸ It is easy to understand the attractiveness of the Bodinian line of thinking during the sixteenth century – “The medieval prince was only a greater noble whose power was limited on every side by the special immunities of church and feudalism. The age of the Renaissance brought changes so swift and catastrophic that men welcomed any authority which guarded, or seemed to guard, the possibility of order against the flood tide of anarchy”.¹³⁹

The republican characteristic namely the *bonum publicum* (common good), was as much theological as it was political, representing a society that provided liberty in both a physical and spiritual sense. Robert Gilmour, in referring to Rutherford, speaks of the “passion for liberty that animated Rutherford in the composition of the *Lex, Rex*.”¹⁴⁰ Opposition to tyranny was, in addition to the physical preservation of society,

¹³⁵ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 172.

¹³⁶ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 172.

¹³⁷ Stevenson, “‘The Letter on sovereign power’ and the influence of Jean Bodin on Political Thought in Scotland”, 31-32.

¹³⁸ Allen, *A History of Political Thought in the Sixteenth Century*, 428.

¹³⁹ Laski, “Introduction”, 45.

¹⁴⁰ Robert Gilmour, *Samuel Rutherford. A Study. Biographical and somewhat Critical, in the History of the Scottish Covenant*, (Edinburgh and London: Oliphant Anderson & Ferrier, 1904), 180. Gilmour adds that “there is in *Lex, Rex* the passion of a man who strikes on behalf of liberty, because liberty is the thing he most dearly loves”, *ibid.*, 181.

inextricably linked to man's theological purpose in this world and the next. The quest for political and societal freedom included the theological prospects of salvation. Liberty and theology were not viewed as separate from each other, and God whose authority encompassed all of society, and whose will was stated in the whole of Scripture, was real and personal. The written revelation of God was the point of departure and all of reality was determined and maintained by God. This context¹⁴¹ sheds more light as to the reason for *Lex, Rex* (and many other political works by prominent Reformers at the time).

Lex, Rex went further than opposing arbitrary and limitless power, by arguing against the late-scholastic nominalist distinction between 'nature'¹⁴² and 'grace'.¹⁴³ The pioneer of this school of thought was the English Franciscan, William of Ockham. Rutherford, in the tradition of Calvin (and many other Reformers) viewed nature as *a portal towards grace*. This had everything to do with how politics and the law were to be understood and applied. Omri Webb states, "Like Calvin, he [Rutherford] believes that both church and state are given by God to guide and nourish man's life ... he [Rutherford] is at one with the Genevan Reformer on the issue of the magistrate's duty to enforce both tables of the law. But the point of emphasis here is that for Rutherford, as for Calvin, the need of the state under God is in the first place the ethical one of making men good."¹⁴⁴ This in turn had a soteriological purpose to it.¹⁴⁵

The scepticism that was believed to be in nature as postulated by late-medieval scholasticism was also reflected in Bodinian sentiments of an underlying distrust in religion because of the conflicts that arose from religion in the realm of nature. The same can be said of Grotius. This led to a view on the covenant and the law that was far removed from the Scriptural version formulated so lucidly and ardently within especially the tradition of theologico-political federalism. This scepticism was similar to the Anabaptistic scepticism in biblical truth that was so strongly represented in

¹⁴¹ Which is discussed in more detail in Chapter 1.

¹⁴² This being 'the nature of God's Creation'. In this regard, see Dooyeweerd, *The Christian Idea of the State*, 5

¹⁴³ This being 'the redemption in Christ Jesus'. In this regard, see Dooyeweerd, *The Christian Idea of the State*, 5

¹⁴⁴ Omri K. Webb, *The Political Thought of Samuel Rutherford*, (A dissertation submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the Department of Religion in the Graduate School of Arts and Sciences, Duke University, 1963), 42. This is dealt with also in the previous chapter.

¹⁴⁵ See especially Chapter 1 and 3.

seventeenth-century Britain. According to this line of thinking, the law loses its authority in the external regulation and protection of both the first and second Tables and merely becomes a mechanism for the physical preservation of society, bringing with it a so-called ‘tolerant’ characteristic regarding all kinds of religions and beliefs. This results in the materialisation of the humanistic idea of tolerance in the old-liberal sense. This approach seeks complete separation of church and state, and constructs the temporal church-institute as a private organisation, again with the help of a uniform social contract – “an organisation where the individual is the sovereign authority (collegial or congregational type of church government). There is no room for a truly Christian idea of the state. The Christian religion has been relegated to the inner chamber.”¹⁴⁶ Rutherford comments that: “Anabaptists and Libertines maintain that all are free men in Christ and that there should not be kings nor magistrates”.¹⁴⁷ Rutherford believes that a logical consequence of scepticism in religion is the notion that the magistrate must be independent or neutral toward all religions and sects.¹⁴⁸ For Rutherford nature and grace are connected to each other. This understanding was not foreign to Reformers such as Bullinger, Vermigli, Beza, Bucer and Calvin, as well as the supporters of the major Confessions of Faith stemming from the sixteenth and seventeenth centuries.

This scepticism in nature also led to a negation of the covenant, and positive ordinances were only understood as being within the context of horizontal societal bonds, which, more specifically was understood in terms of the arbitrary will of individuals united in a social contract.¹⁴⁹ Grotius and Bodin played a major role in furthering this idea. Protestants on the one hand, argued that every person was created in the image of God and was called to a distinct vocation, which stood equal in dignity and sanctity to all others. Every person is a prophet, priest, and king, and responsible to exhort, to minister, and to rule in the community. This is in line with the idea of Divine imminence elaborated upon in Chapter 1. On the other hand, Protestants understood that every person was sinful and prone to evil and egoism, which resulted in every person requiring the association of others to exhort, minister

¹⁴⁶ Dooyeweerd, *The Christian Idea of the State*, 25.

¹⁴⁷ Rutherford, *Lex, Rex*, 148(2).

¹⁴⁸ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 203. According to Marshall, Rutherford would argue that this is opposed to Isaiah 49:23, *ibid*.

¹⁴⁹ Dooyeweerd, *The Christian Idea of the State*, 23.

and to rule him or her with law and with love.¹⁵⁰ The idea of the covenant was instrumental in activating and maintaining this individual's call to duty along the lines of God's precepts, as well as the limitation of violations of God's law in society due to the continuous presence of sin.

A substantially damaged and arbitrary religious, political and societal context gave rise to *Lex, Rex*,¹⁵¹ and it makes sense that the abusers of political power so eagerly ordered the burning of *Lex, Rex* "by the hand of the common hangman at Edinburgh".¹⁵² A consequence of such necessity to seek an improvement for such political and societal turmoil is the search for foundational ideas that might provide improvement to a dire situation, and implies the importance of jurisprudential and political thinking. This resulted in Rutherford's quest in seeking a constitutional model. History has repeatedly witnessed that it is in such challenging times that renowned and courageous theorists are born. It was the unjust consequences of the political turbulence that must have challenged Cicero's thought regarding the establishment of an ideal state, based on just and equitable laws.¹⁵³ In addition, Cicero's reliance on natural law (applicable to all, regardless of status or political influence)¹⁵⁴ was reflective of the yearning towards transcending the mere attainment of order as a first principle. Justice, according to Cicero, emanates from this natural law.¹⁵⁵

¹⁵⁰ John Witte Jr., *God's Joust, God's Justice. Law and Religion in the Western Tradition*, (Grand Rapids, Michigan: William B. Eerdmans Publishing Co., 2006), 40.

¹⁵¹ It has been noted that the appearance of *Lex, Rex* caused great sensation, and according to Bishop Guthrie, every member of the assembly "had in his hand that book lately published by Mr. Samuel Rutherford, which was so idolized, that whereas Buchanan's treatise (*de jure Regni apud Scotos*) was looked upon as an oracle, this coming forth, it was slighted as not anti-monarchical enough, and Rutherford's *Lex Rex* only thought authentic", "Sketch of the Life of Samuel Rutherford", (anonymous) in *Lex, Rex*, (Harrisonburg, Virginia: Sprinkle Publications, 1982), xix.

¹⁵² It is also noted that *Lex, Rex* was met with similar treatment at St. Andrews, and also at London; and a proclamation was issued, that every person in possession of a copy, who did not deliver it up to the king's solicitor, should be treated as an enemy to the government, *ibid.*, xix. David Hall comments that: "Perhaps the ultimate compliment was that his works were ordered to be burnt because they contained dangerous ideas ...", hereby implying the importance of Rutherford's works (especially *Lex, Rex*) for the opposition Rutherford gave against the abuse of monarchical power and for the furtherance of constitutional ideas, see David W. Hall, *The Genevan Reformation and the American Founding*, (Lanham, Maryland: Lexington Books, 2003), 253.

¹⁵³ Van Zyl, *Justice and Equity in Cicero. A Critical Evaluation in Contextual Perspective*, 16.

¹⁵⁴ See for example, Van Zyl, *Justice and Equity in Cicero. A Critical Evaluation in Contextual Perspective*, 75.

¹⁵⁵ See for example, Van Zyl, *Justice and Equity in Cicero. A Critical Evaluation in Contextual Perspective*, 144 and 216.

According to Deon van Zyl, “For Plato and Aristotle the primary thing was order, and beauty was the consequence of it, while for Cicero the primary thing was morality and beauty, with order as a consequence. For Plato and Aristotle it was the beauty of order, for Cicero it was the order of beauty”.¹⁵⁶ Divinity, natural law and justice (which emanates from natural law) are primary whilst order is secondary.¹⁵⁷ Cicero’s contribution in this regard was an extension of Stoicism. The Stoic felt his own life as a calling, a duty, assigned to him by God. A life according to nature meant for them resignation to the will of God, “co-operation with all the forces of good, a sense of dependence upon a power above man that makes for righteousness, and the composure of mind that comes from faith in the goodness and reasonableness of the world”.¹⁵⁸

According to Cicero, “In so far as justice recognises the divinity, guidance and will of God, and true reason (*vera ratio*), together with the supreme law (*summa lex*), is in harmony with the nature of God, *ius, lex, recta* (or *vera*) *ratio* and *iustitia* (right, law, right reason) may all be regarded as having emanated from nature, which may be characterised as divinely inspired. The moral and religious aspects of justice in its legal connotations are inescapably confirmed in this way.”¹⁵⁹ Rutherford, having to live in tumultuous and challenging times, also leaned strongly towards the natural law, prioritising the beauty in justice, morality and the Divinity (‘order’ itself being of secondary origin and importance). To Rutherford, as it was for Cicero,¹⁶⁰ the law was

¹⁵⁶ A. Litman, *Cicero’s Doctrine of Nature and Man*, in Van Zyl, *Justice and Equity in Cicero. A Critical Evaluation in Contextual Perspective*, 81.

¹⁵⁷ This also runs parallel to the order sought after by Jean Bodin and Thomas Hobbes during the early part of modernity, hereby diminishing the Medieval (and later Reformed) emphasis on religious truth as active participant in the public sphere. The Reformers (including Rutherford) aimed at maintaining and furthering the public role that Divinity had to play, with order as a secondary branch. In this regard, see for example, Koos Malan, “Godsdiensvryheid as prototipiese mensereg: Op die breuklyn tussen *republica Christiana* en *staatsoewereiniteit*”, *THRHR*, Vol., 66, 3(2003), 416-418.

¹⁵⁸ Sabine, *A History of Political Theory*, 149.

¹⁵⁹ Van Zyl, *Justice and Equity in Cicero. A Critical Evaluation in Contextual Perspective*, 146.

¹⁶⁰ See what Cicero states in his *De Legibus*, (London: William Heinemann Ltd, Cambridge, Massachusetts: Harvard University Press, 1928, with an English translation by Clinton Walker Keyes): “The wise men have been accustomed to say that law is the primal and ultimate mind of God, whose reason directs all things either by compulsion or restraint”, Book II. iv. 8. The power that the commands and prohibitions of nations have to summon righteousness (Book II. iv. 9-10) is not merely older than the existence of nations and states, it is coeval with that God who guards and rules heaven and earth (because the divine mind cannot exist without reason, and divine reason cannot but have this power to establish right and wrong, Book II. iv. 10. God’s will reflected in nature, distinguishes between things just and unjust, Book II. v. 13. Because the gods are the lords and rulers of all things, and that which is done, is done by their will and authority, the virtue of justice is reflective of the divine will, Book II. 15-vii. 16. All human life is subject to the decrees of the supreme divine law, Book II. 1. 2-3. The true and primal law, applied to command and prohibition, is the right reason of

something more than Bodin's command of the sovereign – the law originated from that 'higher dimension' that represented awe and beauty and which served as universal authority for the ordering of society.¹⁶¹ The need for a constitutional model that represents the prominence of the 'higher' (moral) law and principles was what Rutherford was so interested in postulating. *Lex, Rex*'s substantial reliance on natural law thinking attests to this line of thought. This was accomplished without diluting the natural law to a limited number of precepts, which were exclusively based on humanist laws conducive to relativism, utilitarianism and pragmatism. Furthermore, bearing in mind that *Lex, Rex* was substantially influenced by Philippe DuPlessis-Mornay's, *Vindiciae Contra Tyrannos* of 1579 (which represented sixteenth-century Huguenot [Monochomarchical] theory in opposition to political tyranny in general),¹⁶² DuPlessis-Mornay's reference to Cicero's natural law thinking and view that kings were established to administer justice,¹⁶³ surely was of importance to Rutherford.

God, Book II. iv. 10. Therefore, the citizens must be persuaded that the gods are the lords and rulers of all things, and that what is done, is done by their will and authority; that they are benefactors of man, taking note of the pious and impious, Book II, vi-vii. This 'law' that transcends the community was also supported by Aristotle, F. H. Hinsley commenting that although the political community was the highest form of human association, it was still subject to the law enshrining the rational principle which the gods handed down to men. The law remained superior to the community, the law "embodying the dictates of the gods or universal reason", F. H. Hinsley, *Sovereignty*, 2nd Edition, (Cambridge: Cambridge University Press, (1989), 30. Hinsley adds: "Aristotle suggested that the human community was a natural organization in its own right and that its government must be set over the positive law; but it was no less easy to use him in support of the medieval argument that the government should be subject to the law – to the superior law of God or to the basic rules of customary right, according to whether men equated Christendom or one of its component political communities to his *polis*", *ibid.*, 75.

¹⁶¹ Rutherford for example states: "... no law as a Law, doth oblige the Conscience, but that which hath from the matter morall equity, and not from the intention of the Law giver ... all obligation of Conscience, in humane commandments commeth from God's will and law, that is, from the just and necessary matter of the law, not from the will of man", Samuel Rutherford, *The Divine Right of Church-Government and Excommunication* (or *A peacable Dispute for the perfection of the holy Scripture in point of Ceremonies and Church Government*), (Printed by John Field for Christopher Meredith, London, 1646), 205. Also see *ibid.*, 208. The importance of this moral dimension to magistracy is also emphasised in John Thorburn's *Vindiciae Magistratus*, Thorburn stating that, "... the essential parts and ingredients of the constitution of society and magistracy be moral, or adjusted in agreeableness to the moral preceptive will of God ... And that the power which essentially belongs to any particular magistracy be moral, or such as are warranted by the divine law, in respect of its nature, - ends, - subject, - manner of acquisition – and in respect of the terms and conditions upon which it obtained and held ...", 29.

¹⁶² Laski, "Introduction", 54.

¹⁶³ Philippe Duplessis-Mornay, *A Defence of Liberty Against Tyrants* or *Of the lawful power of the Prince over the People, and of the People over the Prince* (Harold J. Laski [ed.]. A translation of the *Vindiciae Contra Tyrannos* by Junius Brutus, with a historical introduction by Harold J. Laski), (London: G. Bell and Sons, Ltd., 1924), 142. DuPlessis-Mornay adds that, according to Cicero, the kings' institution, and that of the laws, had one and the same end, which was, that equity and right might be duly rendered to the community, *ibid.*, 142.

2.3 Conclusion

As stated in Chapter 1, early seventeenth-century Britain brought with it challenging circumstances that necessitated proposals for, amongst others, the abuses of power and the protection as well as the maintenance of the true religion. The Reformation brought about the realisation that structures of law and authority were essential to protecting order, even as guarantees of liberties and rights were essential to preserving the message and momentum of the Reformation. In addition, law and authority were required for soteriological purposes. In the words of Witte: “the challenge for Protestants was to strike new balances between authority and liberty on the strength of cardinal biblical teachings.”¹⁶⁴ The Reformed believer viewed liberty as the liberty to do good, as defined by Divine law, not as liberty to define his own standards and aims. In *Lex, Rex*, liberty is not opposed to God, government *per se*, or obligation, but to the prerogative of rulers set forth by Maxwell, Arnisaues, and other theorists of royal absolutism. Rutherford does not question God’s ownership of His human creatures, but questions whether any human holder of power possesses such a God-like mastery over his fellow men.¹⁶⁵ Rutherford in this sense presented an argument against the Bodinian line of absolutist rule and against the threats facing religion.

In addition, the rise in Bodinian and Grotian thinking which, due to its scepticism in religion as a role player in politics and the law, brought about a completely new direction of thinking on the law, which included an understanding of the law as separated from its covenantal moorings. The potential risks as a result of this line of thinking were countered by Althusius’ emphasis on the covenant, which implied loyalty to the Divine Law as condition and which viewed ultimate sovereignty as resorting in the people instead of the king regarding earthly political structures. In Rutherford was found the perpetuation of this Althusian line of thinking. To Rutherford, as it was for Cicero and Althusius (only to name a few), the law was something more than Bodin’s command of the ruler. The law, according to Rutherford, originated from a dimension transcending mere consensus and in this

¹⁶⁴ Witte, *God’s Joust, God’s Justice. Law and Religion in the Western Tradition*, 39. As will be discussed in Chapter 3, this ‘lawlessness’ can also be connoted to the fear of having religious doctrine be exposed to a myriad of views.

¹⁶⁵ Peter J. Herz, *Covenant to Constitutionalism: Rule of Law as a Theological Ideal in Reformed Scotland*, (A dissertation submitted in partial fulfilment of the requirements for the Doctor of Philosophy degree, Department of Political Science in the Graduate School, Southern Illinois University at Carbondale, 2001), 190.

regard, the covenant played an important role. Rutherford formed part of the long tradition of theologico-political federalism (which already had strong roots in Scotland towards the beginning of the seventeenth century and of the rich legacy of political and legal thought spanning many centuries).

What follows, is a concerted look at Rutherford's inputs pertaining to the covenant and the law. An added understanding of Rutherford comes to the fore regarding his concern pertaining to the viability of a sceptical outlook on religious truth. In Rutherford, the Bodinian, Grotian and Antinomian scepticism directed towards religious truth and consequent inclusion in the terrain of politics and the law was countered. The covenant idea presents certain strengths in this regard (also pertaining to the law), which is clearly reflected in Rutherford's thought, together with his belief that human agency (responsibility) plays an integral role in the ordering of society (against the background of God's sovereign plan for Creation). Rutherford's contribution to qualifying political activity and the ordering of society in the context of the interrelationship between Divine sovereignty and human agency has not received the emphasis that it deserves. To Rutherford it was important to reconcile Divine sovereignty and human agency as well as nature and grace, with one another, and it is the personal (relational) and legal nature of the covenant that assisted in this regard. In this is also accomplished an understanding of the reason for a constitutional model as part of the agency of nature in fulfilling God's grace and ultimate goal with society. Although this would be an apt section of the thesis to present a more detailed account of Rutherford's understanding of the encyclopaedic and superior status of the law, the author has thought it best to do this in the Epilogue.

3. Samuel Rutherford, the covenant and the law

3.1 Reformation Scotland and the covenant

Sixteenth-century Zurich revived the idea of the Biblical covenant, which entailed, on the one hand, the covenant, which expresses God's universality and his involvement in human affairs, and on the other, the provision of the form for man's communal involvement in, and response to, God's promises and blessings, with the focus on man's obedience to God.¹⁶⁶ Philippe DuPlessis-Mornay's *Vindiciae Contra Tyrannos* (A Defense of Liberty Against Tyrants – published anonymously in 1579), lucidly presents the political dimension of covenantal thinking by referring to the covenant between God and man; and the covenant between ruler and the ruled. DuPlessis-Mornay speaks of the covenants between God, the king and the people.¹⁶⁷ The *Vindiciae* underwent eight different translations (or reprints) in England in the one hundred years following its first publication. The dates of its English printings provide clear evidence that it was used in England in the seventeenth century, appearing in all the critical years of that period, including 1581, 1588, 1589, 1622, 1631 and 1648.¹⁶⁸

The twofold contract fits well with the medieval belief in society as a *corpus Christianum*, obligated to rule itself according to the laws of God. Under this idea of contract theory, society is said to have made a legal covenant with a ruler to rule so that the God-given ends of society should be attained.¹⁶⁹ Specifically, the ruler pledges to uphold true religion and to administer the law equitably. Rutherford followed this line of thought and worked out the details in a manner similar to that of

¹⁶⁶ Different from Calvin's conception of the covenant (attached to his views on predestination – in terms of which the covenant consists mainly of the relationship between an austere deity and his elect), the Zurich view of the covenant reflects man's dynamic partnership in the covenant: God promises what He will do for his confederates; man undertakes to "be upright", which "uprightness is gotten by faith, hope and charity; in which three are contained all the offices of saints, which are the friends and confederates of the Lord", Heinrich Bullinger, *The Decades of Henry Bullinger*, (translated by H. I. and edited for the Parker Society by Thomas Harding, Cambridge: Cambridge University Press, 1849-1852, Vol. 3), 171.

¹⁶⁷ For more on these covenants see Brutus, *A Defence of Liberty Against Tyrants*, 39, 70-75, 89-92, 96, 175-181, 189-190, 199, 202 and 212.

¹⁶⁸ Laski, "Introduction", cited in Douglas H. Worthington, *Anti-Erastian Aspects of Scottish Covenanter Political Thought 1637 to 1647*, (A Doctoral Dissertation presented to the Graduate Faculty of the University of Akron in Partial Fulfilment of the Requirements for the Degree Doctor of Philosophy, 1978), 236-237.

¹⁶⁹ Webb, *The Political Thought of Samuel Rutherford*, 155.

the *Vindiciae*.¹⁷⁰ The same can be said of the influence of Johannes Althusius' contractual theory on the Rutherford.

The shift from understanding politics as related to God took place in Enlightenment Europe, where man usurped the place of God; and where the social contract and the will of the majority assisted in attempting to justify state power through various theories of consent. The influence of Bodin, as explained earlier, was substantial in this regard. These theories try to allay the community's repulsion at being commanded by the 'distant and cold' power of the state by pretence that authority can be legitimated by consent.¹⁷¹ However, there is the risk that consent can never legitimise a fundamentally unjust law. Therefore, Aquinas believed that the legitimacy of law and government could ultimately only come from God and could not be produced by humankind alone.¹⁷² Rutherford supported this idea. Bodin can therefore be viewed as a catalyst to Enlightenment thinking,¹⁷³ especially pertaining to politics and the law.

The theory that the monarch, ruling by Divine law ('divine right') was the final source of positive laws, and that at the same time he himself was ultimately absolved from them, was closely linked with the scientific and philosophical thought of the time. A substantial characteristic of that thought was its assumption that the entire universe was based on a single explanatory model – that all phenomena such as, for example, stars, billiard balls, forms of government, followed the same basic principles, and that Bodin, Francis Bacon and Thomas Hobbes (as well as others) were obsessed by this reductionist view.¹⁷⁴ Already from Medieval times there was the fascination with the vision of hierarchy, which perceived the whole universe as a great hierarchical chain of being – authority flowed from God to an "angelic hierarchy in heaven and to an ecclesiastical hierarchy on earth according to the neo-Platonic doctrine of pseudo-Dionysius. According to this understanding, the legitimacy of the ruler did not depend

¹⁷⁰ Webb, *The Political Thought of Samuel Rutherford*, 155.

¹⁷¹ David M. Smolin, "The Enforcement of Natural Law by the State: A Response to Professor Calhoun", *Dayton Law Review*, Vol., 16, (1990), 408.

¹⁷² Smolin, "The Enforcement of Natural Law by the State: A Response to Professor Calhoun", 408.

¹⁷³ Here understood as representing a move away from pure religious thinking, placing the emphasis more on rationalistic pragmatism and a sceptical attitude towards religious insights on matters political and jural.

¹⁷⁴ Berman, *Law and Revolution II. The impact of the Protestant Reformations on the Western Legal Tradition*, 236.

on consent from below but on a position in a hierarchy of being ordained from above.¹⁷⁵

John Coffey refers to the fact that Rutherford did not refer to ‘the group associated with Descartes who are now credited with paving the way for the Enlightenment’.¹⁷⁶ Coffey adds that “only with hindsight can it be said that Rutherford was largely blind to the most important intellectual movement of his day”.¹⁷⁷ Whether this ‘blindness’ alludes to an intentional or accidental (ignorant) activity might never be known, and whoever takes the one or the other side will be guilty of substantial speculation. However, Rutherford’s detection of the rise (and threats) of Enlightenment thinking in political and legal theory is confirmed in his explicit reference to Bodin and Grotius.

For the Puritans, covenants were not simply contracts “in the prudential, expedient, business usage, the final confirmation of a deal, a practical means of holding people to account, but rather the ordination of a *sacred* obligation shadowed over by the countenance of God himself”.¹⁷⁸ The idea of the covenanted Christian community made sense to sixteenth- and seventeenth-century Britain due to the religious context of that period, in the same manner that irreligious views on the covenant made sense to the irreligious. This understanding was also elaborated upon in Chapter 1. In the biblical pattern, covenants brought people together around a common purpose involving mutual self-sacrifice and conscientious fidelity. Covenants were ultimately grounded in a response of thanks and praise for the gracious power that had sustained and liberated the people in the past. Covenants reflected a basic trust that this sustenance would extend into the future through the medium of a life lived according to covenant. Archibald Mason refers to the covenant in a public sense as God’s means of promoting more effectually the ends of the law among men, together with His

¹⁷⁵ Brian Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, (Cambridge: Cambridge University Press, 1982), 42-43. This line of thinking was further enhanced by the view that there is abundant evidence that the whole of nature was hierarchically ordered. Everyone believed that celestial bodies controlled the motion of lower ones; and that dominance hierarchies could be discerned in animals; and among the social insects, all the bees of a hive were seen to serve one ruler, *ibid.*, 43.

¹⁷⁶ Coffey, *Politics, Religion, and the British Revolutions. The mind of Samuel Rutherford*, 76. For example, Thomas Hobbes, Francis Bacon, and René Descartes. Whether Rutherford was to attend to the political views of Hobbes might be expecting a bit much, bearing in mind that Hobbes’s *Leviathan* was published some years after *Lex, Rex*, and Hobbes’ *De cive* was published maybe less than two years before the publication of *Lex, Rex* (Hobbes’ *The Elements of the Law* was already published in 1640).

¹⁷⁷ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 76.

¹⁷⁸ McDonald, *Western Political Theory: The Modern Age*, 45.

Word, vowing and swearing unto Him. In fact, God in His law, has required these exercises from the people, as the latter's indispensable duty.¹⁷⁹

Regarding the Puritan leaders in early American history, the responsibility for securing compliance with the terms of the covenant was connected to their theory of sin. The Puritan theory of sin, influenced as it was by Augustine and Calvin, located depravity within the human heart through original sin, but simultaneously sought to create an environment in which godliness could be promoted and sinfulness mitigated.¹⁸⁰ Calvin agrees with Augustine that man's natural talents have been corrupted by the Fall – “the image of God, in which man was created, has been deformed but not entirely destroyed. What has been left of the divine endowment is often treated as of great value for wise and just conduct in our social relationships.”¹⁸¹ In this regard, the mind indicates a natural love for truth and this remnant of our original nature explains why it is natural to men to cherish and preserve an orderly society governed by laws, and why nations and individuals alike show a perpetual consent to laws.¹⁸² ‘Nature’ was not viewed as being dysfunctional, and had to act as a means towards the attainment of ‘grace’. In this regard, the covenant served as an important tool, and was a central component to the constitutional model presented by Rutherford.

The real representatives of Protestantism in England, both in its political and religious aspects, were the Puritans.¹⁸³ Scripture moulded their speech, their thoughts and their

¹⁷⁹ Mason, *Observations on the Public Covenants, betwixt God and the Church. A Discourse*, 31.

¹⁸⁰ Andrew R. Murphy, *Conscience and Community. Revisiting Toleration and Religious Dissent in Early Modern England and America*, (University Park, Pennsylvania: The Pennsylvania State University Press, 2001), 43.

¹⁸¹ John T. McNeill, “Natural Law in the Teaching of the Reformers”, *The Journal of Religion*, Vol. 26, 3(1946), 179.

¹⁸² McNeill, “Natural Law in the Teaching of the Reformers”, 179.

¹⁸³ The Puritans were best known for emphasising pure, scripturally-regulated worship and biblical church government. Also see George J. Gatis, ‘Puritan Jurisprudence: A Study in Substantive Biblical Law’, *Contra Mundum*, Vol. 12, Summer, (1994), 4. The Puritan theorists worked out a substantial addition to the theology of Calvinism which in New England was quite as important as the original doctrine. Embedded in the term “Covenant Theology” or the “Federal Theology”, the Puritans held that after the fall of man, God voluntarily condescended to treat with man as with an *equal* and to draw up a *covenant* or *contract* with His creature in which He laid down the *terms* and *conditions* of salvation, and pledged himself to abide by them – “The covenant did not alter the fact that those only are saved upon whom God sheds His grace, but it made very clear and reasonable how and why certain men are selected, and prescribed the conditions under which they might reach a fair assurance of their own standing”, Perry Miller and Thomas H. Johnson, “Introduction”, 1-79, in *The Puritans. A sourcebook of their writings*, (An unabridged reprint of the work, originally published by Harper and Row, Publishers, Inc. in a two-volume Harper Torchbook edition, in 1963, Perry Miller and Thomas H. Johnson (eds.), Mineola, New York: Dover Publications, Inc., 2001), 57-58.

lives. They built all their hopes of a better political and ecclesiastical future on this. In the multitude of pamphlets, tracts, broadsheets and manifestos in the latter half of the sixteenth century and the whole of the seventeenth century, the Old Testament played a conspicuous part. The songs of the Puritans were almost entirely from the Hebrew Psalter. The Psalms shaped Protestant thought in England and Scotland. The religious fervour, the love of liberty,¹⁸⁴ and the vivid sense of the presence of God in human affairs, were derived mainly from Old Testament Scriptures – the legacy of Judaism was a major source of inspiration. The Puritans found a close analogy between their fortunes and those of Israel in the Old Testament. For many of the Puritans the Old Testament became the blueprint for the ordering of political and religious life.¹⁸⁵

The Old Testament met their peculiar needs and provided a congenial atmosphere for their thought. The dominant idea was that of a Covenant which God and His people were party to and the terms of which included Grace, Faith and Predestination. The ‘Leitmotiv’ of the Puritan authors was the Lord of Righteousness. Moral strictness – perhaps the most characteristic feature of Puritanism – drew its inspiration from the Old Testament ideals and a genuine attempt to reconstruct society on the foundations of Hebrew models in the Old Testament. The Hebrews had a very strong memory of their origins as a people bound together in covenant with God. Puritan political and constitutional theory understood ‘the good’ as based upon firstly, the glorification of God, and secondly, the protection, maintenance and furtherance of the spirit. The importance of spiritual progress made the Puritans conceive of a society where the state was only a framework to protect the growing spontaneous life of the spirit.¹⁸⁶ The promise of God’s redemption was a point to which political and legal theory had to aspire. The promise that men should live again in the joy of Zion, with the

¹⁸⁴ Reflecting upon the Old Testament, the Puritans placed strong emphasis on liberty. In his work, *History of the Rise and Influence of Rationalism in Europe* Vol. II (London, 1866), 172, W. E. H. Lecky states: “It is at least an historical fact that in the great majority of instances the early Protestant defenders of civil liberty derived their principles chiefly from the Old Testament and the defenders of despotism from the New. The rebellions that were so frequent in Jewish history formed the favorite topic of the one – the unreserved submission inculcated by St. Paul of the other.”

¹⁸⁵ W. B. Selbie, “The Influence of the Old Testament on Puritanism”, in Edwyn R. Bevan & Charles Singer, (eds.), *The Legacy of Israel*, (Oxford, 1927), 408.

¹⁸⁶ A. D. Lindsay, *The Modern Democratic State*, Vol. 1, (New York: Oxford University Press, 1943), 168.

assurance of election and the hope of salvation, was no less realistic than believing in the promises of secular redemption.¹⁸⁷

Seventeenth-century enlightened theorists were fascinated with the attempt to replace the fear of what happens after death, as the basis for morality, with a more natural scientific psychology.¹⁸⁸ This supported the transformation of civic virtue to more of an irreligious understanding, thereby also diminishing the relevance of the Divine law, the latter also acting as condition in the context of the idea of the biblical covenant. The *bonum publicum* therefore became understood as implying the accommodation of various beliefs to fulfil the expectations related to the ‘collective good’. In the process, Christianity (religion) was withdrawn from the public sphere.¹⁸⁹

The soteriological eschatology is understood as taking place within the gradual unfolding of God’s purposes for the world (while the humanists by contrast claim that the course of human events can be shown to proceed in a series of recurring cycles).¹⁹⁰ In *England and Scotlands Covenant With their God*,¹⁹¹ it is stated that,

The heart of man is backsliding, and a Covenant is like a hedge or wall to stop us from going back: it being a good and ready answer to a tempter or temptation: How shall I do this, and break my Covenant? Surely we have been too loose toward God, having almost lost a Religion, too loose in our lives, and too dis-united among ourselves: and well it may be thought, that a main end of this Rod which now lyes upon us, is to beat us into this Covenant; that thereby we may be knit faster to God, to holiness, and each to other by this Band of Unity ...

The prevalence of error and sin, past backslidings, present favours, existing distress, anticipated trials and animosities (and other circumstances in the condition of the church and of the times) are indications to the people of God to review their ways and

¹⁸⁷ S. A. Burrell, “The Covenant Idea as a Revolutionary Symbol: Scotland, 1596-1637”, *Church History*, Vol. 27, 4(Dec., 1958), 349.

¹⁸⁸ Gordon Wood, *Creation of the American Republic*, (Use in American History at the University of Arkansas; “Republicanism” from Gordon Wood’s *Creation of the American Republic*, 11, <http://www.littlejohnexplorers.com/jeff/jefferson/woodrepublicanism.html> (accessed 2 December 2012).

¹⁸⁹ Needless to say, this does not exclude other reasons for the development towards the privatisation of religion, for example the Bodinian move to establish sovereignty in the ruler so as to stem the tide of religious conflict. In this regard, see Malan, “Godsdiensvryheid as prototipiese mensereg: Op die breuklyn tussen *republica Christiana* en staatsoewereiniteit”, 416-423.

¹⁹⁰ Quentin Skinner, *The Foundations of Modern Political Thought*, Vol. 1: *The Renaissance*, (Cambridge: Cambridge University Press, 1978), 109-110.

¹⁹¹ Printed for *Edw. Husband*, Printer to the Honorable House of Commons, 1645, 14.

bind their souls afresh to the throne of God and of His Christ.¹⁹² T. Mocket also supports the relevance of covenantal thinking (in also a political sense) during testing political and social climates by stating (in 1644):

... beside almost two hundred thousand Protestants slain yea, Butchered for Religion lately in *Ireland* and in *England*, with the many Plots against this Kingdom, give just occasion to us now to enter into a League and Covenant with God, and against the common enemies of God and his people, now to joyn together to root out Popery, Prelacy and prophannesse, which are so destructive to the true Religion, and the Prostestors of it.¹⁹³

Referring to the observations by Robert Paul, James Culberson states that George Gillespie and his fellow Scottish Commissioners viewed the Solemn League and Covenant, with its goal of uniformity of religion, as an indispensable tool in securing the Church of Scotland from the encroachments of the English Crown. Culberson also observes that Gillespie jealously guarded this provision of the Solemn League and Covenant. Gillespie warned his English audience that the Covenant was inconsistent with unbounded liberty for heretics and sectaries and that the civil magistrate ought to

¹⁹² Willson, *Social Religious Covenanting*, 8. Willson refers to the covenant at Horeb which was entered into at a time when the church and the nation had received, or were about to receive, a more complete organization. Willson also refers to Israel's renewal of the covenant in the plains of Moab (Deut. 29) just before their entrance into the land of Canaan. Social covenants should be formed when great works are about to be undertaken, when great conflicts seem to impend, *ibid.*, 8. In the words of Willson: "The covenant was renewed (2 Chron. 15) when the nation had greatly declined. Seasons of reviving from spiritual decays, are appropriate seasons of covenanting. Great deliverances call to this work. Israel covenanted after their return from Babylon", *ibid.*, 8.

¹⁹³ T. Mocket, *A View of the Solemn League and Covenant, for Reformation, defence of Religion, the Honour and Happyness of the King, and the Peace, Safety and Union of the three Kingdoms of England, Scotland, and Ireland, to be taken by all sorts, in all the said Kingdoms; that Covenant is Analysed, opened, proved, and fully cleared from 24 Objections and Quaeres made against it, by such as either out of conscience or malignity, scruple at, With an appeal to Conscience*, (Printed for C. Meredith: London, 1644), 16. Mocket also observes that: "Every man ought to be free from sin, and from all things that are indifferent and uselesse, and to be bound only to things lawfully good, usefull and necessary, at least very conducing to the publike good and such is a Covenant, and this in particular at this time, when God's hand lyeth heavy upon us; corruptions are many, and enemies combine together against us (See Ezekiel 20:37. 2 Kings. 11. 4.17. 2 Chron. 29. 10 and 31. 20, 21. and 34. 30, 31, 32) Which Covenant is partly religious and sacred, and partly civill and politicall, very good and usefull in both respects. Therefore I answer, Men may be urged and compelled to duty, and things necessary for the publike good, and so to receive, and take this Covenant, or discover themselves to be disaffected to the publike good, That we may know who are for us, and who against us; whom to trust, and whom to beware of, because secret enemies may do the greatest mischief ... Frequently in sacred Scriptures, Governours did presse the People to enter into Covenant. See 2 King. 11.4. 9. 2 Chron. 15.13. and 34.32. and Ezra 10. 3.5 ... 2 Chron. 34 ...", *ibid.* 10-11 (Author's emphasis).

punish these men. Gillespie was also not shy about reminding the House of Lords that the Covenant obliged them to discover and root out malignants and heretics.¹⁹⁴

In all of this, the covenantal idea provided the Christian community with a practical and understandable mechanism, which also provided a sense of responsibility and accountability to a Supreme Being (in the most ultimate sense) as part of the mechanism in the unfolding of God's soteriological plan with humankind. The covenant demanded more accuracy pertaining to prescriptions regarding the ordering of society (which included the ordering of religion). Therefore, the maintenance and protection of the covenantal conditions received much urgency from especially the Scottish Commissioners. Rutherford states that the covenant gives to the believer a sort of action of law, to plead with God in respect of his fidelity to stand to that covenant that binds him due to his fidelity.¹⁹⁵ The covenant is so mutual that if the people break the covenant, God is unbound from His part of the covenant.¹⁹⁶

By means of the covenant God's promise of redemption, and that men should 'live again in the joy of Zion with the assurance of election and the hope of salvation', became personal and digestible – the community that follows in the religious precepts of God is met with favour, while the community that violates the true religion suffers God's displeasure. The covenant is relevant to both the individual and society and is ingrained in nature. The individual's prioritisation of being obedient to the precepts of God and inclusion in God's purpose of salvation is included in the larger social and political paradigm, in which the obedience and salvation of society and the normative format to accomplish this, was also emphasised by the Puritans (including Rutherford).

It is reiterated that theologico-political federalism was nothing new or unique when focused upon by the Scottish Divines or during the activities of the Westminster Assembly in seventeenth-century Britain. The Scottish history of banding, John Knox's covenantal expressions, and the Scottish National Covenant of 1581, are some of the events in British history that serve as beacons attesting to the legacy of the

¹⁹⁴ James Kevin Culberson, *'For Reformation and Uniformity': George Gillespie (1613-1648) and the Scottish Covenanter Revolution*, (Unpublished thesis for the Degree of Doctor of Philosophy, University of North Texas, May 2003), 161. Also see *ibid.*, 2-3.

¹⁹⁵ Rutherford, *Lex, Rex*, 54(2).

¹⁹⁶ Rutherford, *Lex, Rex*, 54(2).

British Isles to political covenantal theory. The prominence of the Scottish Presbyterians to covenanting and politics during this period outweighed the contributions of their English counterparts. Nearly a century prior to the Westminster Assembly (1643-1646), Knox's political thought expressed clear indications of an adherence to the theologico-political federalism of Heinrich Bullinger.¹⁹⁷ The sixteenth-century reformed theorist Pierre Viret's view on republicanism was that it referred to a 'free city' where political authority rested with 'the people';¹⁹⁸ a republic was an organisation in which the citizens had to agree upon what their public officials did. This in turn indicated that Viret believed that in order to operate their state harmoniously, some kind of *pact* existed between the governors and the governed.¹⁹⁹

However, the publication of popular political tracts such as *Lex, Rex*, among others, and the centrality of covenantal political thought during the time of the Westminster Assembly provided an added impetus to covenantal political insights at a time that was to go down in history as the last fully-fledged attempt at making the covenant both a national and regional political and societal reality. In many respects this represented one of the pinnacles of federalist political application, federalism in this sense meaning an understanding of the relationships between God and the world, and among humans as based on covenants.²⁰⁰ This federalism constitutes an important part of republicanism and contributes towards the presentation of a constitutional frame of governance.

For the Puritans the idea of covenant described not only the relationships between persons and God, but also the multiple relationships among persons in church, state and society. In turn, these divine and temporal covenants defined each person's

¹⁹⁷ Regarding confirmation of Knox's contractual political theory as similar to that of Bullinger's, refer to Andries Raath and Shaun de Freitas, "Calling and Resistance: Huldrych Zwingli's (1484-1531) political theology and his legacy of resistance to tyranny", *KOERS: Bulletin for Christian Scholarship*, Vol. 66, 1(2002), 70-72. Also see Richard L. Greaves, "John Knox and the Covenant Tradition", *Journal of Ecclesiastical History*, Volume XXIV, 1(1973), 23, 26-27 and 29, as well as Burrell, "The Covenant Idea as a Revolutionary Symbol: Scotland, 1596-1637", 340. Bullinger was also very influential within the English Reformation and was therefore familiar within both Scottish and English reformed circles, Torrance Kirby, "The Civil Magistrate and the 'cura religionis'. Heinrich Bullinger's prophetic office and the English Reformation", 935-950, in *Heinrich Bullinger. Life – Thought – Influence*, (Zürich, Aug. 25-29, 2004, International Congress, Heinrich Bullinger (1504-1575), Vol. II, Emidio Campie & Peter Opitz (Hrsg.), Theologischer Verlag Zürich, [2007]), 935. Rutherford refers no less than seven times to Bullinger in his *A Free Disputation Against Pretended Liberty of Conscience*.

¹⁹⁸ Robert Dean Linder, *The Political Ideas of Pierre Viret*, (Geneva: Librairie Droz, 1964), 69.

¹⁹⁹ Linder, *The Political Ideas of Pierre Viret*, 85 (Author's emphasis).

²⁰⁰ See McCoy and Baker, *Fountainhead of Federalism. Heinrich Bullinger and the Covenantal Tradition*, 12.

natural, religious and civil rights as well as duties within these various relationships.²⁰¹ The practice of covenanting was at the heart of the Second Reformation in Scotland. The revolution in church and state that occurred in 1638 had as its manifesto the National Covenant, and the Solemn League and Covenant gave direction to the Scottish efforts on the Parliamentary side in the English Civil War. The printed sermons and other literature of the period show how prominent the covenanting idea was, and how seriously the idea of covenant obligation was taken.²⁰²

The period from Knox to Rutherford was submerged within a federal theological medium, which was inseparably accompanied by federal political implications. The custom of *banding* or *bonding* became common amid the disorders of medieval Scottish life. These *bands* were a source of political ideas and practices disturbing to monarchical power, with its emphasis on *shared authority, local initiative, voluntary commitment* and *mutual contractual obligations*.²⁰³ The transition from medieval to modern times, as has often been suggested, was marked by a transformation in which

²⁰¹ Witte, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, 277-278. John Adams came to see this Puritan covenantal theory of ordered liberty and orderly pluralism as a critical antecedent, analogue, and alternative to the Enlightenment contractarian theories of individual liberty and religious pluralism that were gaining prominence in eighteenth-century America. John Adams eventually worked some of this early Puritan covenantal theory into the 1780 Massachusetts Constitution, which he drafted and defended at great length, *ibid.*, 278 and 301.

²⁰² Wayne R. Spear, *Covenanted Uniformity in Religion: The Influence of the Scottish Commissioners upon the Ecclesiology of the Westminster Assembly*, (Submitted to the Graduate Faculty of Arts and Sciences in partial fulfilment of the requirements for the degree of Doctor of Philosophy, University of Pittsburgh, 1976), 347. In the words of Spear: "Upon the basis of such considerations, we conclude that the Form of Church Government was approved by the Scottish General Assembly, not because the Scottish Commissioners at Westminster had been able to enforce their desires there with the backing of the Scottish army, nor because it was inherently superior to the books of polity which the Scottish church had previously used, but because a majority of the General Assembly felt obligated to fulfill their obligation to seek for a covenanted uniformity of religion with the English nation", *ibid.*, 350. The documents produced by the Westminster Assembly have held a place of high esteem in the Presbyterian family of churches during the three centuries which have passed since the meeting of that remarkable body, *ibid.*, 350. All of this negates the opinions, as observed by Spear, that the Solemn League and Covenant was the product of Scottish shrewdness, to be used as an instrument for Scottish domination in the religious aspects of the English Civil War. It is understood that the Scots took advantage of the desperate need, which the English had for military assistance from Scotland, and forced the English negotiators against their will to agree to a religious covenant pledging efforts to achieve the reformation of the English church according to the Scottish pattern. In fact, Spear shows that covenanting was practiced among the English Puritans prior to 1643, *ibid.*, 48-50, and that the Scottish Commissioners to the Westminster Assembly were unable or unwilling to enforce their desires upon that Assembly in the formulation of the Form of Church Government, *ibid.*, 346.

²⁰³ Maclear, "Samuel Rutherford: The Law and the King", 69-70. The kings in the Anglo-Saxon period were aware of the fact that God blesses obedience and judges the disobedient in history and therefore that their standing before God was of the greatest importance for the stability of their reign, for the peace and prosperity of their kingdom, and for success in war, Stephen C. Perks, *Christianity and Law. An Enquiry into the Influence of Christianity on the Development of English Common Law*, (England: Avant Books, 1993), 33. Also see F. N. McCoy, *Robert Baillie and the Second Scots Reformation*, (Berkeley and Los Angeles: University of California Press, 1974), 39-40.

one man's relationship to another ceased to depend so much on the estate or station in life occupied by each, and came to be based more on whatever covenant, that is, *contract* or *agreement*, might exist between them. Whether this change owed anything to religious ideas or whether certain religious ideas were themselves the product of the change can never be known, but it is clear that many sixteenth- and seventeenth-century Protestants, and especially Puritans, thought about their relationship with God as though it were based on a covenant.²⁰⁴

During the early part of the Reformation, federal theology took root in England as well. William Tyndale discussed covenant theology and extended the covenant relationship from a personal bond between man and God, to a national obligation, binding God, the ruler and the people.²⁰⁵ Towards early seventeenth-century England, William Perkins, who was the first English Calvinist to win a major European reputation, and his successors, had much to say about a covenant or contract God had made with his people, and about the moral obligations which it imposed. Perkins insisted that God's promise to man is that whereby he binds himself to man to be his God if he performs the condition. Man's promise to God is that whereby he vows his allegiance to the Lord, and performs the condition between them.²⁰⁶

This covenantal thought played a major role in the history of America. Harold Berman observes that prior to World War I, and even up to the Great Depression, Americans *as a people* continued to believe that the Constitution and the legal system were rooted in a Covenant made with God by which America was to be guided in its mission to be a 'light to all the nations'.²⁰⁷ In nineteenth-century America, some Baptists emphasised the covenant against the background not only of individuals, but

²⁰⁴ Edmund S. Morgan, "Introduction", xiii-xlvii, in *Puritan Political Ideas 1558-1794*, Edmund S. Morgan (ed.), (United States of America: The Bobbs-Merrill Company, Inc., 1965), xx.

²⁰⁵ Edward Vallance, "'An Holy and Sacramentall Paction': Federal Theology and the Solemn League and Covenant in England", *English Historical Review*, Vol. 116, 465(2001), 57. Edward Dering stated that like Israel, England had been chosen by God to receive the truth of his word, and in receiving this gift, it was the duty of the English people and their sovereign to protect and further the Reformed religion, *ibid.*, 57. Dudley Fenner, in his, *Sacra Theologia* (1585), assigned a crucial role to inferior magistrates towards the ensuring of the maintenance of the double covenant in the context of the upholding of both the reformed church and the laws of the commonwealth, *ibid.*, 57.

²⁰⁶ Collinson, Patrick, *The Elizabethan Puritan Movement*, (Oxford and New York: Clarendon Press; Oxford University Press, 1967), 434-435.

²⁰⁷ Harold J. Berman, "The Interaction of Law and Religion", *Capital University Law Review*, Vol. 8, 3(1979), 350.

also of nations, which depended on the Almighty.²⁰⁸ Donald Lutz and Charles Hyneman conducted an exhaustive ten-year research of approximately 15000 political documents of the Founding era (1760-1805). They found, among others, that the authors referred most frequently to the sections in the Bible on covenants and God's promises to Israel, as well as to similar passages in Joshua, I and II Samuel, I and II Kings, and Matthew's Gospel.²⁰⁹ The communities that first came to New England were heavily drawn to the covenantal doctrines of the Old Testament, with specific emphasis on the authority of the congregation in the election of ministers. This resulted in the view that a congregation was a body politic, comprised of members who, by means of a willing covenant made with their God, were under the government of God.²¹⁰ Andrew Murphy in his study of Puritanism in Massachusetts in the period 1630-1660 observes that although the social covenant incorporated the Puritan commonwealth, the substantive bases of law and social practice were supplied by another aspect of the covenant, namely the agreement to follow God's word.²¹¹

²⁰⁸ Philip Hamburger, *Separation of Church and State*, (Cambridge, Massachusetts & London, England: Harvard University Press, 2002), 174.

²⁰⁹ P. J. D. Jacobs, *The Influence of Biblical Ideas and Principles on Early American Republicanism and History*, (Dissertation in partial fulfilment of Philosophiae Doctor, Faculty of Theology of the Potchefstroom University for Christian Higher Education, 1999), 68. The connection between covenant theology and social-contract theory is self-evident in the *American Declaration of Independence*, especially when compared with the *French Declaration of the Rights of Man and Citizenship*, De Gruchy, *Christianity and Democracy. A theology for a just world order*, 92. According to Baldly: "One of the great common patterns that guided men in the period when American democracy was formed, that was present both in their understanding and in their action, and was used in psychology, sociology and metaphysics as in ethics, politics and religion, was the pattern of the covenant or of federal society", Richard Niebuhr, "The Idea of Covenant and American Democracy", 129. Niebuhr also states: "Whatever the influences of Christianity on the development of American democracy have been in the past, there is no small number of men in this society today who participate in its actions, exercise their pressures, use their freedom, as those who believe that the world has this fundamental moral structure of a covenant society and that what is possible and required in the political realm is the affirmation and reaffirmation of man's responsibility as a promise-maker, promise-keeper, a covenanter in universal community. I know no way by which their influence can be measured. But they and their principles are and have been an element in our democracy. It is safe to say that without Christianity, so broadly defined, our democracy would be something quite different from what it is", *ibid.*, 135. More than a hundred social covenants similar to the Mayflower Compact of 1620, are sprinkled throughout the seventeenth-century New England archives. Similar examples are also reflected in the new town of Salem which convened in 1629 to formulate a covenant, and the same applied to the Watertown Covenant (1630), the Fundamental Orders of Connecticut (1638/9), and the Covenant of Exeter, new Hampshire (1639), *ibid.*, 296-297. The belief that the covenant society lived perennially under "solemn divine Probation" is reflected in sundry legal and theological texts alike, see *ibid.*, 300-301. Also see Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, 99-106.

²¹⁰ Evans, *The Theme is Freedom*, 188. Also see *ibid.*, 189-193.

²¹¹ Murphy, *Conscience and Community*, 39. Also see *ibid.*, 37-42, and Witte, *God's Joust, God's Justice. Law and Religion in the Western Tradition*, 143-160. Moots (referring to Dale Kuehne's, *Massachusetts Congregationalist Political Thought, 1760-1790: The Design of Heaven*) observes that of the twenty-nine sermons published by Massachusetts clergy from 1777 to 1783, twenty-two reminded the listeners of the covenant and called them to virtue and piety, Moots, *Politics Reformed*.

Regarding eighteenth-century America, Gordon Wood states that the Americans, like Old Testament Israel, were God's chosen people and bound to him by a 'visible covenant'.²¹² Therefore, Rutherford's support of a covenanted Christian nation formed part of a popular tradition both before and after his contributions in this regard.

Rutherford's emphasis on the importance of the covenant went beyond the Old Testament and included a special relationship with Christ. In Rutherford (similar to the English ecclesiastic John Donne) there is the pre-occupation with Christ as Bridegroom and the Church as Bride.²¹³ Kingsley Rendell advises that too much should not be deduced from Rutherford's erotic language, since he was steeped in that of the Canticles and could hardly avoid marital imagery. Although not a mystic,²¹⁴ Rutherford employed mystical language. Spiritual life for Rutherford was a romance and his concept of union was that of spiritual sympathy.²¹⁵ In this, we find Rutherford's belief of the close and intimate relationship of the visible and invisible Church with Christ, also implying a covenantal relationship and consequent committed responsibility on the part of the Church to the accomplishment of Christ's sovereign purpose regarding Creation. In conclusion, it can be said that Rutherford's political and legal mind was steeped in a rich tradition of covenantal thinking, and especially confirmed by *Lex, Rex*. Therefore, the covenant formed an important facet of Rutherford's constitutional model, which was not foreign to many preceding

The Anglo-American Legacy of Covenant Theology, 111. Also see Hall, *The Genevan Reformation and the American Founding*, 297 and William Edgar, "The National Confessional Position", 176-199, in *God and Politics. Four Views on the Reformation of Civil Government*, Gary Scott Smith (ed.), (Phillipsburgh, New Jersey: Presbyterian and Reformed Publishing Company, 1989), 196-198.

²¹² Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, (Chapel Hill: The University of North Carolina Press, 1969), 115. Also see Donald L. Drakeman, "Religion and the Republic: James Madison and the First Amendment", *Journal of Church and State*, Vol. 25, 3(1983), 442; Timothy L. Hall, "Roger Williams and the Foundations of Religious Liberty", *Boston University Law Review*, Vol. 71, 3(1991), 467; Hall, *The Genevan Reformation and the American Founding*, 344; Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, 109-111; and Robert N. Bellah, *The Broken Covenant. American Civil Religion in Time of Trial*, (New York: The Seabury Press, 1975), 53-54.

²¹³ Rendell, *Samuel Rutherford. A new biography of the man and his ministry*, 102.

²¹⁴ Louise Yeoman comments that in seventeenth-century Scotland, mystical love experiences were not confined to presbyterianism, Yeoman, *Heart-Work: Emotion, Empowerment and Authority in Covenanting Times*, 139. John Coffey cautions here stating that, "If by 'mystic' we mean someone with 'an intense desire for immediacy of communion with God', then Rutherford certainly was one. But if we are thinking of an individual who seeks the absorption of their human personality into the divine, or direct access to personal revelation which bypasses Scripture, then he most definitely was not", Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 95. Also see Rendell, *Samuel Rutherford. A new biography of the man and his ministry*, 133-134.

²¹⁵ Rendell, *Samuel Rutherford. A new biography of the man and his ministry*, 131. Also see Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 91-95.

centuries of thinking on constitutionalism. Rutherford's uniqueness in building on these covenantal perspectives was his elaboration on the relationship between Divine Will and human agency.

3.2 Divine sovereignty and human agency

John Coffey comments that *Lex, Rex* tried to balance the language of natural law with a biblical insistence on the need to preserve national religious covenants. According to Coffey, there were always tensions between the two modes of political argument deriving from secular classical sources that stressed the role of the aristocracy (natural law theory and ancient constitutionalism), and the two deriving from the Hebrew Scriptures, which emphasised the importance of the people of God (religious covenantalism and apocalypticism).²¹⁶ The rich legacy of thought preceding Rutherford also had this challenge. However, for Rutherford the language of natural law and the biblical insistence on the need to preserve the idea of the covenant were inextricably connected with each other. Although Rutherford was not unique among the Puritans for embracing natural law theory,²¹⁷ what was contributory in Rutherford's approach to natural law thinking was his deliberative attempt to understand the whole of nature and its ethical laws based on the biblical covenant doctrine. To Rutherford, God's covenant with nature involved a 'concreated' internal normative principle by which all created things instinctively obeyed God. That principle, which takes the form of physical and biological laws in non-rational nature,

²¹⁶ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 254.

²¹⁷ The divine's understanding of natural law was in perfect harmony with the WCF, which does not refer to Scripture as providing the first revelation of God's will to man; rather it says that man himself, created in the image of God, reflects a moral nature analogous to his Life-giver. The fall into sin was not understood to have negated the apprehension of what is good and bad, but merely the inclination to do the good required by the law, Chris Coldwell and Matthew Winzer, "The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis, Part Two: Analysis", *The Confessional Presbyterian*, Vol. 5, (2009), 60. There is also unity of the natural law and the law of Scripture, and Rutherford calls the law of nature (which is written on man's heart) and the light of the Word "two candles that God has lighted" for the direction of conscience, *ibid.*, 61. The moral law which had been given to Adam was not terminated in the fall, but "This law, after his fall, continued to be a perfect rule of righteousness, and, as such, was delivered by God upon mount Sinai, in ten commandments, and written in two tables", *ibid.*, 62. For Rutherford's understanding of the natural law refer to, Webb, *The Political Thought of Samuel Rutherford*, 90-99. In this regard, Webb states that if a single, summary definition had to be made of Rutherford's idea of the meaning of Natural Law it would no doubt have to be the statement, "Natural is the law of self-preservation", *ibid.*, 98. Rutherford also refers to the natural law as authority for more general precepts that are in accordance with the Divine law such as self-preservation, see Rutherford, *Lex, Rex*, 67(1)-(2), 81(2)-82(1), 84(1), 95(1), 97(1) and 102(1); the resignation of liberty, see *ibid.*, 81(2) and 118(2); the safety of the people, see *ibid.*, 125(2); and the justification (self-defence) of resistance in instances of tyranny.

takes the form of the Decalogue in rational human nature. The precepts of the Decalogue were first engraved on the heart of man simultaneous with his creation before they were given in an audiole covenant through Moses. These precepts constitute the law of nature, the original covenant of works.²¹⁸

David Little, in his analysis of John Calvin's understanding of natural law, states that in Christian ethics, natural law must remain at best a companion theory, one that is seen in relation to, and complementary with, the norms of Christian revelation. It will in some sense, always remain minimal, "or, to use Calvin's word, 'vestigial'".²¹⁹ The

²¹⁸ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 262. This is similar to Calvin's view, see Paul Helm, "Calvin and Natural Law", *The Scottish Bulletin of Evangelical Theology*, (Scottish Evangelical Theology Society & Rutherford House, 1984), 7. Previous scholarship confirms that Rutherford's theological and political contributions revolve around covenantal thought, for example, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 13 and Shaun A. de Freitas, *Samuel Rutherford on Law and Covenant. The Impact of Theologico-political Federalism on Constitutionalism*, (A thesis submitted in accordance with the requirements for the Masters of Law degree, in the Faculty of Law, Department of Constitutional Law and Philosophy of Law, University of the Free State, 2003). According to Marshall, Rutherford gives no precise definition of natural law in *Lex, Rex*. However, Marshall does point out that Rutherford (in *A Free Disputation Against Pretended Liberty of Conscience*), comes closest to giving a practical working definition of natural law namely that it is, "the Register of the common notions left in us by nature, the Ancient Records and Chronicles which were in Adams time, the Law of nature of two volumes, one of the first Table, that there is a God, that he createth and governeth all things, that there is but one God, infinitely good, most just rewarding the Evil and the good; and of the second Table, as to love parents, obey Superiours, to hurt no man, the acts of humanity", Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 164. This definition is for all practical purposes, the same thing as the covenant of works revealed in the Old Testament, embodied and codified in the moral law, or Ten Commandments, *ibid.* Rutherford refers to natural law in many contexts – sometimes it is 'conscience' and other times it is 'reason'. Rutherford even occasionally uses 'conscience' and 'reason' interchangeably, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 16. Omri Webb states: "The author [Samuel Rutherford] simply proclaims Natural Law as a great and overriding principle which all will understand. On various occasions he includes in the category different kinds of things, manifesting a confusion between an 'empirical' and a political use of the term. On the one hand, he uses the term Law of Nature in referring to the movement of the heavenly bodies, to the 'natural' subjection of the weak to the strong, and to the instinctual impulse to self-defense. These may properly be classed as descriptions of the state of things. On the other hand, he uses the term more in the political sense when he includes in Natural Law such things as the power of government and the Decalogue as expressing the law of the 'safety of the people.' Probably the author is not aware of making any distinction between the two uses. In his mind, there is one sovereign will expressing itself in the whole creation. God commands the stars to move, and he commands men to refrain from stealing and killing. In the political realm, man's constant task is the endeavor to bring political action in harmony with God's intention for man as inscribed in his nature. A description of how God has made man is considered at once to be a prescription of how he should live. Natural law is God's law. It is known in man's reason as he analyzes the nature God has given him. Natural Law is a descriptive concept before it is prescriptive. Theologically, a statement of Natural Law is descriptive. Morally, it becomes an 'ought' for man", Webb, *The Political Thought of Samuel Rutherford*, 91. Webb also then investigates Rutherford's thought on the content of Natural Law in terms of: (1) subjection of the weak to the strong; (2) self-defence; (3) power of government; and the (4) supreme law of self-preservation, see *ibid.*, 91-100.

²¹⁹ David Little, "Calvin and the Prospects for a Christian Theory of Natural Law", in *Norm and Context in Christian Ethics*, Gene H. Outka & Paul Ramsey (eds.), (New York: Charles Scribner's

same applies to Rutherford.²²⁰ Rutherford's rallying cry in *Lex, Rex* is, "Show me a warrant in nature's law *and* in God's word".²²¹ In addition, as Marshall observes, "Indeed, to Rutherford the law of nature was virtually synonymous with the voice of God himself speaking in the Scriptures".²²² This is similar to Rutherford's view of, among others, natural law to be understood against the background of human conscience in the social order. Rutherford viewed conscience as the understanding and knowing faculty of the soul, the guiding and judging principle. It is not autonomous but must be guided and directed, either by the law of nature or by

Sons, 1968), 196. Also see Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 14-15; R. S. Clark, "Calvin on the Lex Naturalis", *Stulos Theological Journal*, Vol. 6, 1-2(1998), 9-10 (Here R. S. Clark refers to the *Institutes*, 1. 6. 1.); and Grabill, *Rediscovering the Natural Law in Reformed Theological Ethics*, 88. Stephen Grabill observes that: "The natural apprehension of the moral law, revealed through the intellectual habit of conscience (*synderesis*) and the law written on the heart (*lex naturalis*), which are closely identified for Calvin, averts any possible escape from moral culpability under the pretence of ignorance. But that natural apprehension also suggests affirmatively, when taken together with 'the general grace of God' toward all and the desire implanted in humanity to search for truth, that reason is sufficient to apprehend moral precepts related to civil, social, and economic order (i.e. second table precepts) since sparks of its original integrity still gleam through fallen human nature. Yet, because reason is 'choked with dense ignorance' and fails to see beyond the blindness of its own concupiscence, it is insufficient to apprehend precepts related to true faith, true worship, and God's perfect righteousness (i.e., first table precepts)", Grabill, *Rediscovering the Natural Law in Reformed Theological Ethics*, 71-72. Similarly Calvin states: "But man is so shrouded in the darkness of errors that he hardly begins to grasp through this natural law what *worship* is acceptable to God", *ibid.*, 89 (Author's emphasis). According to Calvin, "No one can get even the slightest taste of right and sound doctrine unless he be a pupil of Scripture", *ibid.*, 81. Also, says Calvin, it is precisely because of the human tendency to corrupt the natural knowledge of God that Calvin insists upon the epistemological necessity of the 'spectacles of Scripture' to gather up the confused (natural) knowledge of God in our minds, disperse our dullness, and clearly show us the true God, *ibid.*, 84. Also see *ibid.*, 83.

²²⁰ Also see Coffey, *Politics, Religion, and the British Revolutions. The mind of Samuel Rutherford*, 154. Here one needs to note that Rutherford's use of 'natural law' is not so simple. For more on this see Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 13-21 and 97; as well as Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 108). Also see *ibid.*, 61, 278 and 282.

²²¹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 93 (Author's emphasis). Similarly, Calvin recognised that the natural law is obscure, and that therefore the revealed law of God is required to clarify and focus upon it – "... he does not mean that the natural law is essentially or inherently obscure, but that its obscurity is due to the obfuscating effects of sin. Just as the 'spectacles' of special revelation, God's word, are necessary in order properly to interpret physical nature so the same spectacles are needed in order not to understand the full, precise content of the natural law. So that in a real sense the natural law is now never understandable and acceptable apart from God's revealed, more explicit and emphatic version of it.", Helm, "Calvin and Natural Law", 8.

²²² Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 97. Also see *ibid.*, 167, 177 and 195. Rutherford's support on the inextricable relationship between nature and Scripture is further confirmed in Marshall's observation that according to Rutherford: "The Gospel itself is not revealed in nature at all, but to the extent God reveals himself in the Gospel, that revelation becomes part of natural law which nations that embrace it are bound to follow in its fullness if they wish to avoid the wrath and judgment of God. This fullness for Rutherford, included the establishment of Presbyterianism as the true biblical expression of church order", *ibid.*, 221.

Scripture. In Scripture, the law of nature is revealed more clearly, and is therefore the infallible source by which conscience is to be guided.²²³

To Rutherford, the Scriptural doctrine of the covenant added a significant angle to his [Rutherford's] understanding of reason – common notions of right and wrong existed among all peoples through the ages and though dimly perceived because of sin, was explainable not only by reference to a rational human nature, but also by the Scriptural doctrine of the covenant. According to Rutherford, the whole creation (including man) is a covenantal entity stamped with principles that man cannot escape – “Therefore the covenantal nature of creation provides indelible principles discernible to human reason, though fallen that enable men to construct and preserve a stable society ...”²²⁴

According to Rutherford, the political covenant also belonged to the ‘covenant natural’, which included covenant principles such as a mutual obligation to live in society and this obligation involves the need for government.²²⁵ Covenant obligations do not depend for their validity upon official recognition by written or vocal contract.

²²³ Marshall confirms that Rutherford seemed suspicious of the term ‘right reason’, because it suggests to him a certain independence from the rule of Scripture, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 142. For a brief overview of the various meanings ascribed to reason by the medieval era and the periods before and after the eighteenth century, see *ibid.*, 86-87, Marshall also stating that, “The idea of reason as the organ of ethical norms helps explain why the Puritans could use reason and conscience interchangeably” and Rutherford did not always clearly distinguish between them, *ibid.*, 87. According to Rutherford, “all that conscience saith is not Scripture”, Murphy, *Conscience and Community*, 113 (Here Murphy refers to *Joshua Redivivus; or, Mr. Rutherford's Letters* (Rotterdam, 1664), 511). The four themes which John Marshall identifies in Rutherford regarding natural law are referred to and briefly explained in the following: Firstly, there is natural law and divine providence in the social order, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 19. Secondly, there is the natural law and human reason in the social order. In the individual, ‘reason’ is synonymous with the ‘rational’ faculty (understood as the ability to construct arguments and reach intelligible conclusions syllogistically). But reason is also a type of community instinct that enables an entire people to grasp without prior reflection, what principles and actions are necessary for self-preservation, *ibid.*, 20. Thirdly, there is natural law and human conscience in the social order: For Rutherford, conscience is the understanding and knowing faculty of the soul, the guiding and judging principle. It is not autonomous, but must be guided and directed either by the law of nature or by Scripture. In Scripture, the law of nature is revealed more clearly and is thus the infallible source by which conscience is to be guided, *ibid.*, 20. Marshall also observes that according to Rutherford, conscience is primarily a ‘knowing’ faculty in which the precepts of God’s law are engraved upon it by natural or special revelation, *ibid.*, 220-221. Lastly, there is natural law and the church in the social order: The church is the object and repository of the covenant of grace. Rutherford sees the church conforming to Scripture, as the instrument for perfecting the law of nature within its own members and within society as a whole, *ibid.*, 20-21.

²²⁴ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 89.

²²⁵ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 29.

The presupposition underlying the choice of a ruler, even without a vocal or written covenant, is what Rutherford refers to as ‘the general covenant of nature’. This refers to an implicit awareness in all parties that they are bound by the law of God to mutual responsibilities. The voice of nature is therefore a covenant voice, echoing the voice of Scripture itself, declaring not only the lawfulness of setting up a king but also the necessity of establishing conditions for his rule.²²⁶ In addition, God himself inaugurated a covenant relation with his people.²²⁷

Rutherford’s political theory served as the last stalwart within the theologico-political federalist tradition, arguing for the relevance and application of the idea of the Biblical covenant for the Christian society. Rutherford and John Milton (1608-1674) represent two detectable streams of political theory to be found towards the close of the Puritan era in Britain; the one marking the end of an era, the other the beginning – biblical covenantalism versus an enlightened Christian democratic nationalism.²²⁸ Milton’s emphasis on the New Testamentary covenant that manifests itself in Christ’s work of redemption under the command of love, and the New Testamentary covenant of grace that “did away with the preceding covenant” provided a popular line of thinking that would later form part of the idea that formed a substantial part of American history. According to Milton, the Gospel is the “straitest and the dearest cov’nant” that can be made between God and man; “God being now no more a judge after the sentence of the Law, nor as it were a schoolmaster of perishable rites, but a most indulgent father governing his Church as a family of sons in their discreet age

²²⁶ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 60-61.

²²⁷ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 64. George Gillespie’s understanding of the covenant for a political context was similar to Rutherford’s. In this regard, see Culberson, ‘For Reformation and Uniformity’: *George Gillespie (1613-1648) and the Scottish Covenanter Revolution*, 130-132 and 160-161.

²²⁸ Andries Raath & Shaun de Freitas, “Theologically United and Divided: The Political Covenantalism of Samuel Rutherford and John Milton”, *Westminster Theological Journal*, Vol. 67, 2(2005), 321. John Marshall writes: “For John Milton ... the controlling principle for interpreting scripture was human convenience, to which the Bible was subservient”, Hill’s, *The World Turned Upside Down*, cited in, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 94. John Locke intentionally included Milton’s thought in his refutation against Filmer’s support of the divine right of kings, Arnold, “Was Samuel Rutherford a Source for John Locke’s Political Theories?”, 14-15. However, Locke did not do the same regarding references to Rutherford. In this regard, also see Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, fn. 60, 12. Arnold confirms that Locke was greatly influenced by Milton, Hugo Grotius, Richard Hooker, and Thomas Hobbes, Arnold, “Was Samuel Rutherford a Source for John Locke’s Political Theories?”, 20. Locke did not once refer to Rutherford in his extant works, correspondences, or extensive journals, and Locke’s library indexes reference none of Rutherford’s books, *ibid.*, 20. This supports the popularity of Milton on further enlightened Christian political theory, as strongly furthered by Locke.

...”. The Gospel is a covenant revealing grace! “... wee being now his adopted sons, and nothing fitter for us to think on, then to be like him, united to him ...” The Gospel is our new covenant. The Gospel (or new covenant) did away with the preceding covenant. Similar to the covenant under the Old Testamentary dispensation, the covenant of grace is also conditional – In Mark 16:16, it is stated that, “he that believeth and is baptized shall be saved; but he that believeth not shall be damned.”²²⁹

For Rutherford, the one and eternal covenant or testament contained the condition of obedience to the Law of God, which remained the same under the Old and New Testaments. The Covenant of Grace does not mean that good works are not necessary for salvation; although not a condition of the covenant, “holiness and sanctification” are conditions of the Covenants.²³⁰ Milton’s covenant however, was a New Testamentary covenant, based on the gospel of love – the entire Mosaic Law having been abolished.

This reminds one of the influence of dispensationalism that surfaced towards the latter half of the seventeenth century, and which not only acted as a catalyst to the secularisation of the covenant, but also to political theory in general. Support of the love command, to the neglect of a righteous God’s Old Testamentary covenantal relationship with man (with the Decalogue as condition), received more emphasis. Consequently, this not only assisted in the disintegration of the idea of the biblical covenant, but also invited the dictates of the mind to determine man’s political theory and activity. The supposedly ‘archaic’ covenantal dealings of God with his people based on the Decalogue (as taught in the Old Testament), could no longer serve as authority for constitutional and political theory. This resulted in a new source of authority, namely a natural law theory excessively loyal to reason. As explained earlier on, Grotius and Bodin played an influential role in this regard. Consequently, the organisation and regulation of power, as well as the application of justice, became

²²⁹ See Raath and De Freitas, “Theologically United and Divided: The Political Covenantalism of Samuel Rutherford and John Milton”, 314-315.

²³⁰ D. Patrick Ramsey, “Samuel Rutherford’s Contribution to Covenant Theology in Scotland”, *The Confessional Presbyterian*, Vol. 5, (2009), 122. Similar to his previous Reformed predecessors, Rutherford postulates that the covenant in the Old Testament is the same as the covenant in the New Testament in substance. The one covenant of grace is declared in the old covenant “to the Jews undir shadow and types in the law of ceremonies, and in the new testament clearlie in Christ”, *ibid.*, 123. The Covenant of Works is made with perfect men, who do not stand in need of mercy, while the preface to the Decalogue expresses God’s mercy to Israel, *ibid.*, 123-124.

not only arbitrary but were also exposed to the whims of rational and expedient options concerning form and substance.²³¹

John Calvin (like his Lutheran brethren) sought to formulate a theory of religious liberty that would avoid the extremes of both radical Anabaptist antinomianism and radical Catholic legalism. Calvin sought to counter the claims of certain Anabaptists that Christian believers are set free from all law and authority, and sought to counter the claims of certain Catholics that Christian believers can be free only through submission to law and authority.²³² Rutherford was confronted with the same challenge and the relevance of this matter for political and legal thought is highly relevant. Rutherford's views in this regard were similar to that of his contemporary Scottish Divine, George Gillespie, who understood the Presbyterian view on the power of the state as being the most balanced view available. Gillespie placed the Arminians and the Erastians, who gave the magistrate too much power, at the one extreme. At the other extreme, Gillespie located the papists and Anabaptists (the Independents as well) who, for very different reasons, gave the state too little power.²³³

The feature of the fourteenth-century Augustinian, Thomas Bradwardine's²³⁴ thought that is key for understanding Rutherford's views of secondary causation is the 'doctrine of coefficientcy'. This doctrine is a synthesis of two principles that have generally stood in relation to one another as thesis and antithesis, namely *divine necessity* and *human freedom*. God works supremely in every human act, but he does so in such a way that human freedom is preserved – "God relates to his world as a captain to his ship, a conductor to his choir, law to the state, a commander to the troops he drills".²³⁵ According to Rutherford, the work of the reformation mediates

²³¹ See Raath and De Freitas, "Theologically United and Divided: The Political Covenantalism of Samuel Rutherford and John Milton", 315.

²³² Witte, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, 43.

²³³ Culberson, 'For Reformation and Uniformity': *George Gillespie (1613-1648) and the Scottish Covenanter Revolution*, 146.

²³⁴ Thomas Bradwardine outrightly countered the emphasis on the free will of the 'modern Pelagians' (as he called them), by confirming the primacy of God's will. According to Bradwardine, God was so actively involved in his creatures, as the senior partner in all that they did, that creation was virtually an extension of His will. In this regard, see Paul Edwards (Editor in Chief), *The Encyclopedia of Philosophy*, Vol. 1, (USA: Simon & Schuster & UK, MacMillan, Inc., 1996), 363.

²³⁵ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 38-39. Marshall also refers to this doctrine of co-efficiency in

God's presence – outward reformation promotes inner piety, and the Gospel places an obligation on the consciences and spirits of men to reform (though God must make it effectual by an inward reformation).²³⁶ Rutherford states,

By nature's light, man now fallen and broken, even under all the fractions of the powers and faculties of the soul, doth know, that promises of reward, fear and punishment, and co-active power of the sword, as Plato said, are natural means to move us, and wings to promote obedience and to do our duty; and that government by magistrates is natural.²³⁷

This idea is very prominent in Rutherford's understanding of secondary causation in both a political and legal context, where the law and the maintenance of the true religion are exercised in pursuit of the preservation of society and ultimately the salvation of the individual. This idea was mostly dormant in the centuries prior to the Middle Ages, and Rutherford's stance in this regard was a continuation of the thought emanating from the Middle Ages where political society and the state ceased to be considered as institutions of sin. Instead, they became the embodiment of moral purpose and instruments in the realisation of justice and virtue. This transition was prepared in John of Salisbury's *Policraticus* (1159), which derives much of its insights on the state as "an instrument of general good" from the writings of Cicero and Seneca, and received its main impetus from the revival of the study of Aristotle.²³⁸

Rutherford was aware of the intellectual difficulty related to the position that if God must first stir the heart and will prior to any good action, then how can the will be

opposing the view by Omri Webb that Rutherford's emphasis on the human role in shaping historical events actually makes the doctrine of providence superfluous, see *ibid.*, 37 and 43.

²³⁶ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 65 (Burgess here refers to Rutherford's, *Spiritual Antichrist* [Part 2, p. 199]). In Reformation Scotland (as was the case with the Reformation generally) there was not merely a need to simply find evidence that political authority is in some sense limited, not absolute. In the words of Burns: "That political power is indeed limited by the law of God and the principles of morality was a proposition which no sixteenth century writer except Machiavelli, would have thought of denying. But there were two more difficult questions: first, can these moral and religious restrictions be enforced by any temporal, human authority, or must their enforcement be left wholly to God? And secondly, are there, over and above these restrictions, purely political, constitutional limits to the ruler's power, and if so, how can these be enforced?", J. H. Burns, "The Political Ideas of the Scottish Reformation", *Aberdeen University Review*, Vol. 36, (1955/6), 252. Not that Rutherford was the only Reformer to contribute towards answering these questions, but *Lex, Rex*, among others, provided substantial arguments towards proving that moral or religious restrictions may be enforced by temporal human authority without denying God's participation therein.

²³⁷ Rutherford, *Lex, Rex*, 228(1).

²³⁸ Andries Raath, unpublished notes for the module, Philosophy of Law, Faculty of Law, University of the Free State, (2012), 104.

called free? Rutherford agreed that God's influences are inseparable, but they are not thereby violent. The idea of violence suggests that God moves a thing in a manner contrary to the nature with which he endowed it. By commanding the sun to rise and set, the sun "cannot but obey him; for all creatures are his servants (Psalms 119:91)".²³⁹ By moving all natural causes to act, however, God does no violence to their natures, nor does he overthrow their legitimacy as second causes. It is in the nature of men to have a will, a power of free choice. It is not in their nature for that will, though 'free', to be independent of God's providence. God does not wait for free will to act and then offer his concurrence –

the freedom of the will is found in its having a subsidiary dominion in keeping with man's status as the divine image. Thus it has 'more dominion over its own acts, being a rational and free agent, than the Sun over its acts'. A choice is free in that it is directed to what the subject truly desires ... It is the Lord who 'bids and determines' the soul in all its moral actions, yet in such a way as to leave it 'to judge, know, consider, esteem, ponder, and weigh' the action, whether right or wrong, lawful or unlawful, acceptable or displeasing to God, and what the consequence of the action will be, whether reward or punishment, heaven or hell. The individual is thus responsible for his choices ... in all acts of the human will, God is preeminent in such a way that the individual is both responsible for his choices and the choices themselves are significant and meaningful.²⁴⁰

In the Westminster Confession of Faith (WCF) (Rutherford participated in the formulation of this confession) it is stated that God has sovereignly, unchangeable, and wisely ordained all that happens, but at the same time, He is not the author of sin. The reference to God as not being the author of sin was to undercut a possible criticism, whilst retaining Ussher's scholastic distinction between primary and secondary causes to offset the charge of fatalism, thereby affirming the integrity of the created order, including human free agency. Against the background of the WCF, God's decree does not override the liberty of his creatures or the contingency of secondary causes. In short, if something happens, it happens because God ordained that it happen. In the case of free agents, the thing that happens is of their choosing. In the case of events in the natural world, the thing that happens is in accordance with the laws of nature. If it rains, God ordained it so. Yet it rains due to the atmospheric

²³⁹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 78-80.

²⁴⁰ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 78-80.

circumstances prevailing. In other words, God has so created the universe as to maintain its own contingent freedom within the scope of his unchangeable purpose – “God and man are not competitors”.²⁴¹ The Reformed concept of covenant did not posit God and man treated as equals, but retained respect for the sovereignty of God. It is one thing for God to condescend to man, and quite another for Him to lay aside His omnipotence.²⁴² John Marshall states:

The difficulty in reading the divine purpose for events concerned many seventeenth-century Puritans, including Samuel Rutherford. This difficulty can be expressed in the form of certain questions. Writing amid the turmoil of the English Civil War, Rutherford was moved to ask, with others, how God, the First Cause, relates to the world he has made, particularly to man, the second cause in history. If God acts in each natural occurrence, what is that in nature which responds to God? What is that in man which serves as the instrument of God in shaping the course of history and the direction of human society? If despite the mystery of providence God acts to an ordered purpose, then how does man serve as the agent of providential order in history?²⁴³

These questions are undoubtedly inextricably connected to constitutionalism, politics and the law. Rutherford sees God working through human agents in the course of human history. Rutherford states that God was working through the Parliament and the people to reform England.²⁴⁴ Rutherford’s understanding of *God’s presence* in the

²⁴¹ Robert Letham, *The Westminster Assembly. Reading its Theology in its Historical Context*, (Phillipsburg, New Jersey: P& R Publishing, 2009), 184. Also see Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 219. Therefore, for example, when the people choose the proper person to be the ruler (to occupy the office of magistracy) then it is God that works through the people to elect a ruler that will rule according to God’s will. In other words, God has so created the political sphere as to maintain its own contingent freedom within the scope of his unchangeable purpose regarding Divine governance. John Marshall uses an apt formulation by commenting that Rutherford, “embraces a view of divine providence in human affairs that seeks to preserve the mystery and sovereignty of God’s ways and at the same time allow for the significance of human action”, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 80-81.

²⁴² Herz, *Covenant to Constitutionalism: Rule of Law as a Theological Ideal in Reformed Scotland*, 100. The Reformed system of doctrine posited not an antithesis between divine sovereignty and man’s responsibility to an eternal law, but an explanation of how God sovereignly reconciled man to himself within the framework of divine law. The covenantal framework in which God interacts with man is both an example of divine condescension and a means whereby the effects of the fall are mitigated not least because of the limits the covenant places on man, including those who are in positions of authority, *ibid.*, 117.

²⁴³ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 22-23.

²⁴⁴ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 57. In response to the Antinomianism (and Familisme) of, among others, Will Del, Rutherford states: “Del by this Argument inferres a cessation of all second causes, of Ministry, Ordinances. Reformers, converters of soules by Word and Gospel, of heaven and Earth ... God undertaketh to doe all ... *Parliaments* ought not to fit,

world plays a key role in his thought. Rutherford develops this notion in terms of both the life of the individual believer and the course of human history.²⁴⁵ Human agency did not counter divine sovereignty.²⁴⁶ For example, Rutherford states, "... and are obliged sincerely, really, and constantly, through *the grace of God to endeavour in their several places and callings*, the preservation of the Reformed Religion in the Church of Scotland, in doctrine, worship, discipline, and government against our common enemy".²⁴⁷

Assemblies should not dispute, Ministers should not preach, nor Print Sermons ... But shall men therefore omit all duties in outward reforming?", Samuel Rutherford, *A Survey of the Spiritual Antichrist*, Part 2, (Printed by F. D. & R. I. for Andrew Crooke, London, 1648), 210. Also see *ibid.*, 206.

²⁴⁵ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 50 (Author's emphasis).

²⁴⁶ John Marshall refers to Omri Webb's concern that an emphasis by Rutherford of the role of second causes in human affairs, implicitly weakens the doctrines of predestination and, by extension, divine providence. Marshall comments that Webb's view in this regard is based on a serious misunderstanding, as it fails to take into account Rutherford's acknowledged dependence on a thinker who shaped his theological understanding of secondary causation, the fourteenth-century Augustinian Thomas Bradwardine; see Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 37. Robert Letham, in his observations on the Westminster Assembly's work on, among others, the Confession of Faith, states: "At no point do they [the framers of the Confession of Faith] offer a *theory* of divine providence, for they are 'resolutely *a posteriori* in intent.' Nor is there any trace of dependence on natural theology, nor an appeal to natural light or human experience – their Confession is thoroughly grounded on the assertions of Scripture. Their only concession in the chapter is the use of the idea of primary and secondary causality, a distinction used in the Middle Ages. But Calvin also used it [Letham here refers to P. Helm's observation]", Letham, *The Westminster Assembly. Reading its Theology in Historical Context*, 104. Also referring to Helm, Letham states that the records of the debate in the Westminster Assembly regarding the Confession of Faith, reflect the fact that the divines did not argue from logic, but from the Bible. Their use of the distinction between primary and secondary causes in the WCF 5. 2 reflected the thinking of the Assembly of God in relation to the order of the world and nature – "it used these concepts to maintain the integrity of the created order, not to impose an alien philosophical framework upon pristine biblical thought. Moreover, it had emphatically declared in WCF 4 that God was the Creator, not an impersonal cause", *ibid.*, 194. In the WCF, the divines make use of the language of first and second causality. God is the first cause; he created and he governs, and the various elements of creation are the second causes – "Thus, God determined that it would rain yesterday in Bridgend, Wales. However, his government takes fully into account the atmospheric conditions that produce rain: the air pressure, wind speed and direction, air temperature, and so on. Thus, it rains according to regular meteorological conditions. Hence, while God decreed infallibly and immutably that it would rain yesterday in Bridgend, it happened in harmony with the principles that produce rain; he decreed the end and the means.", *ibid.*, 195.

²⁴⁷ Rutherford, *A Survey of the Spiritual Antichrist*, 6 (of the Preface), (Author's emphasis). Also see Rutherford, *The Divine Right of Church-Government and Excommunication*, 266, where Rutherford explains the role of human agency against the background of excommunication. In this regard, Rutherford, referring to Jeremiah 1:10 states: "Hath Jeremiah no Propheticall authority over the Nations and Kingdomes to whom he prophesieth in the Name of the Lord, to build and destroy, to root out, and to plant, because he declareth and prophesieth, that such Nations shall be destroyed and rooted out for their wickedness, and such shall be builded and planted?". See in the following how Rutherford, in his, *Testimony*, understands the interplay between God's sovereignty and human agency without sacrificing the hierarchical order of the two: "The Church of Scotland had once as much of the presence of Christ, as to the power and purity of doctrine, worship, discipline, and government, as any

Lex, Rex can only be understood properly within the larger context of his other writings. The *Letters* and *Sermons* express Rutherford's confidence that *God is present* in history. God uses the Parliament and the Westminster Assembly to restore the state based on the natural law. *Lex, Rex* is not an abstract treatise of logic, but a declaration of the constitutional and political order that God commands and presently effects.²⁴⁸ In the words of Rutherford: "It is the Anabaptists' argument – God writeth his law in our heart, and teacheth his own children, therefore books and the ministry of men are needless".²⁴⁹ What we find here is Rutherford's suggestion of a personal

we read of, since the Lord took his ancient people to be his covenanted church. The Lord stirred up our nobles to attempt a reformation in the last age, through many difficulties, and against much opposition from those in supreme authority; he made bare his holy arm, and carried on the work gloriously, like himself, his right hand getting him the victory, until the idolatry of Rome, and her cursed mass, were dashed; a hopeful reformation was in some measure settled, and a sound Confession of Faith was agreed upon, by the Lords of the Congregation. The people of God, according to the laudable custom of other ancient churches, the Protestants in France and Holland, and the renowned princes in Germany, did carry on the work in an innocent, self-defensive war, which the Lord did abundantly bless. When our land and church were thus contending for that begun reformation, those in authority did still oppose the work; and there was not then wanting men from among ourselves, men of prelatical spirits, who, with some other time-serving courtiers, did not a little undermine the building; and we, doating too much upon sound parliaments, and lawful general assemblies, fell from our first love, to self-seeking, secret banding, and little fearing the oath of God." *Testimony to the Covenanted Work of Reformation (from 1638 to 1649) in Britain and Ireland*. (Also note Coffey's finding that: "Although no manuscript attestation survives for Rutherford's final Testimony, its substance was recorded by Wodrow, who had access to documents now lost, Coffey, *Politics, Religion, and the British Revolutions. The mind of Samuel Rutherford*, 26).

²⁴⁸ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 44-45. J. P. Burgess' observation of Rutherford's view of the role of the Westminster Assembly also presents a good example of Rutherford's understanding of the relationship between human agency (in this regard, the Westminster Assembly) and Divine sovereignty, namely: "Despite the hindrances to the work of the Assembly the Lord will build his own Zion, and evidence to us that it is done, not by might nor by power, but by the Spirit of the Lord", Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 49. David Mullan observes that Rutherford's *Exercitationes apologeticae pro divina gratia*, "represents a defence of God's eternal decrees and efficacious grace: if God's will to save were influenced by an external cause, the will of God – indeed, the essence of God itself – would be mutable. His opponents found it an impressive piece of theological scholarship. Bishop Maxwell reportedly offered it something of a compliment: 'He did not expect that any puritan in Scotland, had so much learning'", David G. Mullan, "Theology in the Church of Scotland 1618-c.1640: A Calvinist Consensus?", *Sixteenth Century Journal*, Vol. 26, 3(1995), 605.

²⁴⁹ Rutherford, *Lex, Rex*, 12(2). "God gave corn and wine to Israel (Hos. ii) and shall the prelate and the anabaptist infer therefore he giveth it not by ploughing, sowing and the art of the husbandman?", *ibid.*, 21(2). "Although God in creation is the immediate author of all things and therefore without consent of the creatures, it does not follow that all works of providence, such as is the government of kingdoms, are done immediately by God, for God in the most part works by means – God uses sleep and food for man to live and uses sun to give light", *ibid.*, 22(2). Also see *ibid.*, 33(1). "Because God is Light of lights, doth he not enlighten the earth and air by the mediation of the sun? The God communicateth not life mediately by generation, he causeth not his saints to rejoice with joy unspeakable and glorius by the intervening mediation of the Word", *ibid.*, 23(2). Also see *ibid.*, 203(1). "The Lord 'giveth the power to get wealth,' – will it follow that Israel getteth no riches at all, or that God doth not mediately by them and their industry get them? I think not", *ibid.*, 23(2). Rutherford also speaks of the " ... power of the working and the actual working ...", *ibid.*, 23(2). "God won the battles of the Israelites as the first, eminent principal, and efficacious pre-determinator of the creature, but this is not to say that

and interactive God, a God that meets and works with man by means of intermediary ideas, concepts and institutions; a God that unfolds His will in history. Rutherford's emphasis on man's role in acting out God's will is also witnessed in his view that, although famine is often a punishment of God in a land (Rutherford here refers to Amos 4:7-8), it is not unlawful in famine to "till the earth and seek bread by man's working" – "man is not to do nothing but for daily bread?"²⁵⁰ Rutherford uses this argument against the background of his qualification of resistance to tyranny. In this can also be deduced that Rutherford placed much emphasis on the role that not only the individual, but also society, the office of magistracy and the church, need to play in the uplifting of religion and a stable society during times of hardship. This whole idea of 'agency' that is so ardently presented by Rutherford forms a substantial contribution to the idea of active citizenship which in turn forms such an important part of republicanism and consequently of constitutionalism.

This has consequences for the law and its purpose for society. The law and its application by the civil authority form part of the created order of mediums working towards the fulfilment of God's plan. This can be clearly illustrated in the context of church discipline, as Calvin explains,

Believers need the law firstly to learn more thoroughly the Lord's will, secondly the law is to the flesh like a whip to an idle and balky ass. The sting or threat of the law troubles the soul with fear, which leads the believer to the delightful sweetness of the 'accompanying promise of grace' ... therefore it is clear that the Christian freedom proclaimed by the preaching of the church be supplemented by subjection to God's law as enforced by the disciplinary sanction of the church. These sanctions protect the name

Moses did not lead them or that none drew their sword or walked on their own legs", *ibid.*, 18(2). Regarding the principle of God's first agency and the secondary working thereof in the election of the ruler Rutherford states: "Let royalists show us any act of God making David king, save this act of the people making him formally king at Hebron, and therefore the people, as God's instrument, transferred the power, and God by them in the same act transferred the power, and in the same they chose the person; the royalists affirm these to be different actions ... This power is the people's radically, naturally, as the bees (as some think) have a power natural to choose a king-bee, so hath a community a power naturally to defend and protect themselves; and God hath revealed in Deut. xvii. 14, 15, the way of regulating the act of choosing governors and kings, which is a special means of defending and protecting themselves; and the people is as principally, as a fountain is of water ...", *ibid.*, 203(2). Also, "God is the first agent in all acts of the creature", and "God by the people ... is the first agent", *ibid.*, 7(1); "Nothing can here be dreamed of but God's inclining the hearts of the states to choose this man and not that man", *ibid.*, 9(2); and "The applying of the person to royal authority is from the people; but the applying of royal authority to the person of the king, is immediately and only from God, as the hand putteth the faggot to the fire, but the fire maketh it burn", *ibid.*, 11(2).

²⁵⁰ Rutherford, *Lex, Rex*, 75(2).

of the church from disgrace, prevent the good from being corrupted, and to cause repentance.²⁵¹

There is a similar understanding of this pertaining to the importance of civil laws. An emphasis on the active role to be played by man is also detected in Rutherford's *Letters*. To the Viscountess of Kenmure, Rutherford states, "Stir up your husband, your brother and all with whom ye are in favour and credit, to stand upon the Lord's side against Baal".²⁵² In a letter to Marion M'Naught, Rutherford writes, "Oh! How easy is it to deceive ourselves, and to sleep, and wish that heaven may fall down in our laps!"²⁵³ To Jean Brown, Rutherford writes, "It were not wisdom for us to think that Christ and the Gospel would come and sit down at our fireside; nay, but we must go out of our own warm houses, and seek Christ and His Gospel".²⁵⁴ To John Clark, Rutherford states, "Hold fast Christ without wavering, and contend for the faith, because Christ is not easily gotten nor kept. The lazy professor hath put heaven as it were at the very next door, and thinketh to fly up to heaven in his bed, and in a night-dream; but, truly, that is not so easy a thing as most men believe. Christ Himself did seat ere He wan this city, howbeit He was the freeborn heir".²⁵⁵

To Lady Boyd, Rutherford writes, "The Lord hath put us in His books as a favoured people in the sight of the nations, but we pay not to Him the rent of the vineyard. And we might have had a gospel at an easier rate than this Gospel; but it would have had but as much life as ink and paper have. We stand obliged to Him who hath in a manner forced His love on us, and would but love us against our will."²⁵⁶ To Lady Kenmure, Rutherford says, "We live little by faith, but much by sense, according to the times, and by human policy. The watchmen sleep, and the people perish for lack of knowledge. How can we be enlightened when we turn our back on the sun? and must we not be withered when we leave the fountain?"²⁵⁷ Throughout Rutherford's

²⁵¹ R. C. Hancock, *Calvin and the Foundations of Modern Politics*, (Ithaca, NY: Cornell University Press, 1989), 55.

²⁵² Andrew Bonar, *Letters of Samuel Rutherford* (with a sketch of his life and biographical notices of his correspondents), (Portage Publications, 2006), Letter to the Viscountess of Kenmure on occasion of illness and spiritual depression, Anwoth, 27 July, 1628.

²⁵³ Bonar, *Letters of Samuel Rutherford*, Letter to Robert Gordon of Knockbreck, after arriving at Aberdeen, Aberdeen, 20 September, 1636.

²⁵⁴ Bonar, *Letters of Samuel Rutherford*, Letter to Jean Brown, Aberdeen, 13 March, 1637.

²⁵⁵ Bonar, *Letters of Samuel Rutherford*, Letter to John Clark (supposed to be one of Rutherford's Parishioners at Anwoth).

²⁵⁶ Bonar, *Letters of Samuel Rutherford*.

²⁵⁷ Bonar, *Letters of Samuel Rutherford*.

Letters, an emphasis on God’s divine providence is clear; yet the role of man and society within such providence should not be underestimated. In Rutherford’s sermon titled, “The Deliverance of the Kirk of God”, mention is made of the importance of Christians to, “rebuke one another”; to “teach and exhort”; to “warn them that are unruly”; and to “comfort the feebleminded”. This says Rutherford, is recommended as a special means for preventing hardness of heart.²⁵⁸

The *Letters* and *sermons* do not contain the intricate political arguments that characterise *Lex, Rex*.²⁵⁹ Rather, Rutherford preaches a vision of the kingdom of God. The spirit is transforming society. According to J. P. Burgess, this larger context establishes why political change is necessary. It provides a general pattern and standard both for evaluating the significance of the present political situation and guiding political change. The specific political argument of *Lex, Rex* does not contradict this broader consideration of politics, but follows from it.²⁶⁰ Similarly, Burgess observes that the *Letters* and sermons “explore[s] the larger context in which political agents act and political events occur”.²⁶¹

Through *Lex, Rex*, Rutherford would testify to the Spirit’s transformative work. Rutherford no longer devotes his attention to the struggle, between forces of good and evil, but to the kind of political order that God restores. Rutherford translates the general vision of the *Letters* and *sermons* into specific political arguments.²⁶² In contrast to the *Letters* and *sermons*, *Lex, Rex*, does not present the image of the kingdom, but the form of human society relative to man’s fallen condition. Society can proceed toward the kingdom of God only after the people restore the state as a check on sin.²⁶³ *Lex, Rex*’s primary concern is the *practical reformation* of the state, and this contributes to *God’s work* of preparing the way toward the kingdom.²⁶⁴ For Rutherford, *Scriptures* contains a political (and constitutional) framework according

²⁵⁸ Samuel Rutherford, “The Deliverance of the Kirk of God”, (Fire and Ice Sermon Series, <http://www.puritansermons.com/>), 8-9 (Author’s emphasis).

²⁵⁹ Also see Webb, *The Political Thought of Samuel Rutherford*, 21.

²⁶⁰ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 63.

²⁶¹ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 95.

²⁶² Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 67.

²⁶³ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 77.

²⁶⁴ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 96.

to which society can be reformed and restored when rulers deviate from God's will.²⁶⁵ The law plays a substantial role in this regard.

According to Rutherford's *A Survey of the Spiritual Antichrist* (Part 2), the work of the reformation mediates God's presence. Outward reformation promotes inner piety. The Gospel "layes in obligation on the consciences, and spirits of men, both actively to reforme, in that outward way (tho God must make it effectual by an inward reformation) it leadeth men, even as it is external, to a spiritual end, obedience in God to Christ".²⁶⁶ In this regard, the law played an important role, especially against the background of the common good being as much a statement of theology as it was of politics or sociology.²⁶⁷ Both Lutherans and Calvinists espoused a theological doctrine of the uses of moral law. Firstly, the moral law's civil use was to restrain people from sinful conduct; secondly, its theological use was to condemn sinful persons; and thirdly, its educational use was to enhance the spiritual development of believers.²⁶⁸ This reflects the centrality of 'the law and its inextricable theological characteristic' also acting as a secondary cause towards the maintenance and protection of the spiritual health of the community.²⁶⁹

John Marshall also points to Rutherford's view that even though the physical acts of praying and hearing the gospel do not guarantee conversion to the sinner, God commands them as indispensable means for it.²⁷⁰ There is, before the intermediary means of the individual, the preaching of the gospel and prayer, the *means* of creation,²⁷¹ the social order itself, through the policies of the state, by which the

²⁶⁵ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 109.

²⁶⁶ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 65.

²⁶⁷ See Robert K. Vischer, *Conscience and the Common Good. Reclaiming the Space between Person and State*, (Cambridge: Cambridge University Press, 2010), 107.

²⁶⁸ Vischer, *Conscience and the Common Good*, 31.

²⁶⁹ This is elaborated upon in Chapter 3. Also see footnote 259.

²⁷⁰ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 44. See what Rutherford states in, *The Divine Right of Church-Government and Excommunication*, 14 namely: "... Christ doth an externall Act of Royall power, and giveth not only an inward but also a Politicall, externall power to his disciples ... *Go Teach, and Baptize all Nations*: Is this only inward and heart teaching, and inward Baptizing by the Spirit? I think not". Also see *ibid.*, 220.

²⁷¹ In fact, Marshall observes that according to Rutherford, the creation became the means for the redemption of the elect, and therefore creation became God's instrument in the implementation of the covenant of grace, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 47.

conversion of the elect can take place.²⁷² This is also true for the role of ecclesiology, which is clearly reflected in the emphasis placed by Presbyterianism on the external means that the Presbyterian form of church government must exercise to be effective.²⁷³

Grace not only makes a demand, but also mediates God's Spirit that empowers man to participate in his own reformation – God works through man.²⁷⁴ Similarly, Rutherford accents throughout his work the importance of human action as the means God uses to accomplish his works of ordinary providence in every area of human concern, whether societal or spiritual.²⁷⁵ Against the background of Rutherford's view that the spirit is already beginning to effect reformation in England, he judges the role of particular political agents, and criticises the failure of Parliament to fulfil the work that it has begun.²⁷⁶

²⁷² Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 56. Marshall adds that according to Rutherford: "God's sovereignty does not render the contribution of human actions a mere formality; there is real, though secondary, efficacy to human deeds. Because creation is the agency of God's covenantal designs, created means, through human agency, become instruments in the hand of God for the improvement of the human condition and for the conversion of the elect, as God wills. The significance of created means implies the goodness of creation ...", *ibid.*, 81-82.

²⁷³ John Tonkin comments that whereas Luther interprets faith in Christ primarily in terms of hearing and responding to the Word, Calvin's emphasis is rather on participation in Christ's body – while Luther is preoccupied in his eschatology with the radical judgment of God on the present order, Calvin's thought is dominated by the triumphant resurrection hope which embraces the whole creation and promises transformation of the present order, John Tonkin, *The Church and the Secular Order in Reformation Thought*, (New York & London: Columbia University Press, 1971), 119. The final goal of Calvin's vision, is not restricted to the Church but embraces the whole creation and sees it as filled with the kingdom of Christ. The new order of God must be made visible not only in the ecclesiastical community but also in society as a whole. Calvin's organization of the city of Geneva is an outgrowth of this drive, and there is no doubt that he saw his purpose there in the same terms as he once used to describe the growth of the reform movement in Poland – namely, to 'establish the heavenly reign of God upon earth.' – "As the Gospel moves out to claim all nations, the kingdom of Christ comes into full splendor. The structures of the world which oppose his rule are destroyed, as the structures of grace become manifest, and the whole creation is transfigured into conformity with Christ. The fact that this goal will always remain ahead for the Church in no way lessens the urgency of its present task of being the agent of the restoration of order throughout the world", *ibid.*, 128-129. As explained earlier, the covenant does much to enrich this idea and to give it practical and personal relevance.

²⁷⁴ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 108. According to Rutherford, man participates in his own Reformation – he obeys the Word that teaches him what is good and he exercises reason in accordance with the Word. He then comes to a greater sense of God's presence in his life, *ibid.*, 56 (Here Burgess refers to Rutherford's *Sermon* [1643, p. 22]).

²⁷⁵ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 44.

²⁷⁶ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 63. Rutherford states: "For the word must go before, and not simply the externall letter of the word; but the word first

Marshall reminds us of the importance of the inextricable link between human agency, natural law, the covenantal idea and a personal relationship between God and man, regarding the theory of Rutherford. The social order is one sphere of nature governed by God's providential activity, and human agency is the preeminent means by which he achieves his ultimate designs in that sphere. According to Rutherford:

As a rational creature, man is gifted with the power to will his end in conformity with the principles God has laid down, first in man's natural constitution, and later in the pages of Scripture. As a rational creature, therefore, man possesses the covenant principle in a manner different from that of non-rational creatures.²⁷⁷ It is an instrument of his self-consciousness by which he sets about to order the whole of his natural life; it is the driving force behind all human social transactions, including government. Obedience or disobedience to the covenant principle inhering in his nature and expressed more fully in Scripture will determine the success or failure of his social enterprise. Because human agency is the means God in his providence uses to bring about the ends he has designed for human society ...²⁷⁸

Rutherford's understanding of human agency and the mediating structures used by God to maintain and protect society were contrasted with Antinomianism, which rejected outward reformation of the church as carnal, as the work of flesh and blood. The Antinomians saw an incompatibility between nature and spirit that suggested to Rutherford a revival of Manicheism. Antinomianism failed to see that external commandments (involving things that are tangible and visible) are not thereby sinful – “they are agents by which God effects spiritual ends in the life of his church. The outward and material are not opposed to the inward and spiritual. In fact, Antinomianism went further in seeming to reject the goodness of creaturely actions as such.”²⁷⁹ Rutherford, in *A Survey of the Spiritual Antichrist*, presents us with insight

believed and received by the efficacious working of the holy Ghost ...”, Samuel Rutherford, *The Divine Right of Church-Government and Excommunication*, 523.

²⁷⁷ Regarding reason itself, Rutherford states that it is one of the *means* the use of which God commands. The metaphysical act of using reason (understood as proper argumentation) *in considering the truth of the gospel* is just as necessary as the external means of attending church and listening to sermons, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 119.

²⁷⁸ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 31-32. Also, the covenant idea reflects the personal dimension, namely that law is not an impersonal force whose point of contact is reason exclusively; it is embodied in the whole person. It is written ‘in the soul’. Law is fundamentally relational in character, binding the soul to God in a deeply personal way. This relational dimension, according to Rutherford, suggests the authority of God himself, not that of an impersonal reason, *ibid.*, 18.

²⁷⁹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 101-102. Marshall states that, “Antinomianism, in rejecting created

on the approaches by Antinomianism (hereby including overlap with Libertine²⁸⁰ and Familist²⁸¹ thinking) regarding the relevance of the law and the external regulation thereof by the authorities. Antinomianism emphasised the lively spirit of Christ, negating the importance of Scripture generally, and especially the Old Testament, as authority. Antinomianism did not support the sanctioning of outward sins and viewed society as being under no law.²⁸² According to Rutherford, Antinomianism denies any certainty of being in grace and therefore holy in actions²⁸³ – “the Spirit frees us from all outward ordinances”²⁸⁴.

The Calvinist project of building disciplined, godly societies regulated by righteous rules (which depended on profound respect for the external written Word, the moral law and the proper ecclesiastical forms) was motivated by strong ‘covenantal’ perspectives in the line of theologico-political federalism as reflected in authors such as Heinrich Bullinger, Peter Martyr Vermigli, Johannes Althusius, Philippe DuPless-

means as valid instruments in reforming the church, was nothing less than the old Manichean heresy anew. It virtually denied the goodness of creation and its usefulness to God as a conveyer of spiritual truths ... This Manichean outlook led Anabaptists especially to a complete rejection of the world and its institutions as evil. It led Antinomians to deny the necessity of obeying lawful authority because Christians were freed by grace from such subjection”, *ibid.*, 102-103. Anabaptism advocated the separation of the redeemed realm of religion and the Church from the fallen realm of politics and the state. Although God had allowed the world to survive through his appointment of state magistrates to exercise order and peace, Christians were to avoid active participation in and interaction with the world. This understanding ultimately proved to be an influential source of later Western political arguments for separation of religion and politics, Witte, *God’s Joust, God’s Justice. Law and Religion in the Western Tradition*, 20-21. Also see Hall, *Savior or Servant? Putting Government in its place*, 238-239.

²⁸⁰ Joseph Lecler most probably gives a description that matches Rutherford’s understanding of the term in that ‘Libertines’ was a term formerly in use at Geneva (towards the end of the sixteenth century) to designate the political enemies of Calvin. Calvin also used this term to brand those who were inclined to accept only spiritual interpretations of religious realities, and called them ‘spiritual libertines’. In the Low Countries these freethinkers or libertines were in fact the small group of humanists who hated violence and dreamt of a peaceful coexistence of the rival denominations. They based their attitude less on political reasons than on an inclination, inherited from Erasmus, to reduce the demands of dogma to a minimum. They remained Christian humanists, devoted to Scriptures and therefore should not be identified with the French deists and freethinkers of the seventeenth century. They were rather related to what were later called in England the ‘men of latitude’ or ‘latitudinarians’. In France they were called ‘liberals’, Joseph Lecler, *Toleration and the Reformation*, Vol. 2, (translated by T. L. Westlow, Longmans, Green and Co. Ltd., 1960), 259-260.

²⁸¹ F. McCoy explains that Familism was the teaching of a sixteenth-century German; it was mystical, emotional, had no prescribed religious service, and its followers lived a communal life, McCoy, *Robert Baillie and the Second Scots Reformation*, 105.

²⁸² Rutherford, *A Survey of the Spiritual Antichrist*, Part 1: 3-5.

²⁸³ Rutherford, *A Survey of the Spiritual Antichrist*, Part 1: 153. Also see *ibid.*, Part 1: 29 and Part 2: 65.

²⁸⁴ Rutherford, *A Survey of the Spiritual Antichrist*, Part 2: 73. Rutherford adds that the Libertines taught that all things happen as a result of the will of God, and therefore sanctioning should cease, *ibid.*, Part 2: 219. It was both the Libertines and the Antinomians who would have people doing nothing because God does it all, *ibid.*, Part 2: 221. Also see *ibid.*, Part 2: 9, where Rutherford observes that the Antinomians believe that they have nothing to do with Moses and the law (which was also what the Anabaptists believed, *ibid.*).

Mornay and Samuel Rutherford. Implicit in Anabaptist political theology was a belief that the New Testament covenant was a spiritual covenant, while the Old Testament covenant was a carnal (and obsolete) covenant. This belief not only undermined continuity between the Old and New Testaments of Scripture, but also challenged any application of Scripture to political practice. The result was a strict separation of Christians from any role in civil politics and no role for the magistrate in religious matters.²⁸⁵

Rutherford saw the logical progression that flowed from a rejection of nature. By rejecting nature, one is forced logically to reject the visible church (as that exists within the natural order). The same applies to government, and finally one must reject any notion of common morality.²⁸⁶ This has implications for the formulation and application of a constitutional model, as well as how the law, its function and application have to be understood. What arises is a negation of the use of external means, such as magistracy, to maintain and protect God's precepts. When Rutherford speaks of nature as fallen and broken, he does so in an ethical sense, in connection with man in sin, the 'natural' man.²⁸⁷ Regarding the view that nature has another visage, which is 'unbroken and sinless', nature is considered in its metaphysical constitution; it is synonymous with the goodness of creation, which sin has not destroyed²⁸⁸ – "Because it is not sinful to be human; neither are the acts associated with humanness sinful, such as eating, sleeping, marrying, and participating in government. Sin has introduced corrupt attributes that adhere to these actions such as domination as a feature of government power and pride that refuses to acknowledge the glory of God as the true end of every act".²⁸⁹ In this regard, Rutherford does not support an absolute negation of external means, due to such external means being part of a sinful world.

According to Rutherford, God's use of external means such as magistracy opposes such scepticism. Rutherford, by explaining that government is something good,

²⁸⁵ Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, 37.

²⁸⁶ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 103-104. Also see *ibid.*, 102.

²⁸⁷ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 115.

²⁸⁸ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 117.

²⁸⁹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 118.

something natural, responded to Antinomianism that it had failed to see that external commandments (involving things that are tangible and visible) were not sinful – “they are agents by which God effects spiritual ends in the life of his church”. The outward and material are not opposed to the inward and spiritual, and therefore there need to be no rejection of the goodness of creaturely actions. As stated earlier, according to Rutherford, therefore, there was reason to be wary of the logical progression that flowed from a rejection of nature. By rejecting nature one is forced logically to reject the visible church (as that exists within the natural order), and therefore the Christian government (and the laws it needs to uphold) as well as any notion of common morality or ruling by means of such common morality.²⁹⁰

When God reconciles and saves men through pastors, he saves and reconciles by means of the “intervening action of men”.²⁹¹ Rutherford brings the same argument to the fore when he asks whether all sciences applied to men are only of God, and not from man’s free will, industry and studies?²⁹² If everything were ascribed to God’s action, does this mean that the church cannot sanction a churchman? Although God has both gifted and called a specific person to the ministry, this does not mean that the church plays no role in ‘designing’ such a person according to the office to which he

²⁹⁰ Rutherford further explains the mutual relationship between divine sovereignty and human agency by referring to ‘faith’. In this regard, Marshall explains that, “Rutherford stoutly denies that reasonings and syllogisms or the Scriptures apart from the power of the Holy Spirit can produce faith. But they are the indispensable means by which the Spirit works. Denying this would be the same as arguing that rain and sunshine and good soil cannot produce crops because this is the work of God’s omnipotent power. It is just as vain to argue ‘that because faith is the work of the omnipotency of grace, therefore faith cometh not by hearing and reasoning from Scripture: the contrary whereof is evident in Christ’s proving the resurrection, by consequents from Scripture, Matthew 22:31-32; Luke 20:37-38’”, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 120. Therefore, Marshall concludes that: “In adopting the Thomistic formula (that grace perfects nature), and in distinguishing between nature as ethical and nature as metaphysical, Rutherford wanted to avoid the extremes of human autonomy on the one hand, as represented by ‘rationalist’ papists and Arminians, and of human insignificance on the other, as represented by ‘Manichean’ Antinomians, Familists, and Libertines. At the same time he wanted to guard against any suggestions that human actions are independent, not simply of divine control, but of the need of grace to strengthen endeavors that are fundamentally good when considered as metaphysical realities”, *ibid.*, 123.

²⁹¹ Rutherford, *Lex, Rex*, 23(1). Rutherford also states: “But to say, that Ecclesiasticall Reformation should be spiritual, as spirituall is opposed to externall and outward, and onely spirituall, and in the heart; Satan could not fancie a more wicked untruth to destroy all godlynesse and holynesse, as it appears in the outward man, in the duties of the first and second Table, for Gospel-reformation, as touching Gods part, is inward, spirituall, invisible, done by him that is Lord of soule and conscience, but this is but the halfe ...; but as touching man’s part, it is externall, and also spirituall and done by the Preaching of the Word, and discipline of the Church”, Rutherford, *A Survey of the Spiritual Antichrist*, Part 2: 198.

²⁹² Rutherford, *Lex, Rex*, 12(2).

has been called.²⁹³ Rutherford states, “Many things are ascribed to God only, by reason of a special and admirable act of providence – as the saving of the world by Christ, the giving of Canaan to Israel, the bringing his people out from Egypt and from Chaldee, the sending of the gospel to both Jew and Gentile; but, shall we say that God did none of these things by the ministry of men, and weak and frail men?”²⁹⁴ Rutherford poses the argument that when God reconciles and saves men by pastors, He saves them by the intervening action of men, and also that he scourges His people by men as by His sword – “Is it therefore to be inferred from this that God does not immediately scourge His people?”²⁹⁵

²⁹³ Rutherford, *Lex, Rex*, 14(2).

²⁹⁴ Rutherford, *Lex, Rex*, 21(1). Also on *ibid.*, 21(2), Rutherford states: “And what though God gave David a crown, was it not by second causes, and by bowing all Israel’s heart to come in sincerity to Hebron to make David king? 1 Kings xii. 38. God gave corn and wine to Israel, (Hos. ii.) and shall the prelate and the Anabaptist infer, therefore, he giveth it not by ploughing, sowing, and the art of the husbandman?”

²⁹⁵ Rutherford, *Lex, Rex*, 23(1). Rutherford says: “God vindicateth to himself, that he giveth his people favour in the eyes of their enemies. But doth it follow that the enemies are not agents, and to be commended for their humanity in favouring the people of God? So Psalm l xv. 9, 10, God maketh corn to grow, therefore clouds, and earth, and sun, and summer, and husbandry, contributeth nothing to the growing of corn ... We grant that this is an eminent and singular act of God’s special providence, that he moveth and boweth the wills of a great multitude to promote such a man, who, by nature, cometh no more out of the womb a crowned king, than the poorest shepherd in the land; and it is an act of grace to endue him with heroic and royal parts for the government. But what is all this? Doth it exclude the people’s consent? In no ways. So the works of supernatural grace, as to love Christ above all things, to believe in Christ in a singular manner, are ascribed to the rich grace of God”, *ibid.*, 33(1). Also see *ibid.*, 71(1). Rutherford states: “God alone giveth rain, but not for that immediately, but by the mediation of vapours and clouds” – in other words, God alone gives powers to rule but not so immediately, but by the mediation of the community. Rutherford adds: “ ‘God alone killeth and maketh alive’, Deut. xxxii. 39, that is, excluding all strange gods, but not immediately; for, by his people’s fighting, he slew Og, king of Bashan, and cast out seven nations, yet they used bow and sword, as it is used in the book of Joshua; and, therefore, God killed not Og immediately. God hath an infinite, transcendent way of working, so that in his kind he only worketh his alone ... God only giveth learning and wisdom, yet not immediately always – often he doth it by teaching and industry”, *ibid.*, 174(1)-174(2). Rutherford also states: “If God feed Moses by bread and manna, the Lord’s act of feeding is mediate, by the mediation of second causes; if he feed Moses forty days without eating any thing, the act of feeding is immediate; if God made David king, as he made him a prophet, I should think God immediately made him king; for God asked consent of no man, of no people, no, not of David himself, before he infused in him the spirit of prophecy; but he made him formally king, by the political and legal covenant between him and the people”, *ibid.*, 229(2). According to Rutherford, it makes no sense to say that because it is natural for man to eat (because it is natural for man to be governed), therefore election of this or that meat is not in their choice – in other words it is false to argue that because it is natural for man to be governed (for government is natural) election of this or that person / or type of government as ruler is not in the people’s choice (as secondary cause). Also see Thorburn’s, *Vindiciae Magistratus*, 60-61, where God’s use of magistracy against the background of secondary causes is similarly explained. In this regard, Thorburn states: “The truth is, the most, if not all the moral precepts of God, and perpetual laws of nature, are so made and delivered to man, as that to the putting of them in practice, or bringing of their obligation into act, there must intervene some positive constitution either from God or man, and most commonly it is from the latter”, *ibid.*, 60. This is similar to Calvin’s understanding. Calvin emphasises the role of the visible church in externally developing the internal faith of the believer and in this regard the visible church plays an important soteriological role – the

C.E. Rae, in his conclusion on the political thought of Rutherford, states:

What then can we conclude about Rutherford's legacy as a political figure? Even after all the necessary qualifications have been made, his positive contribution must be seen in his staunch adherence to the maxim 'We must obey God rather than men and his demolishing of Royalist, Hobbist, or indeed any other arguments which make the individual subservient to the arbitrary dictates of the state and seek to absolve him from moral responsibility. When this is combined with his advocacy of the conservative ideals of the rule of law and limited government, we can perhaps forgive him for the negative consequences of attempts like his to build the Kingdom of God on earth through human agency, and his inability to realize that without God visibly reigning on earth, the millennial kingdom simply cannot exist.²⁹⁶

A proper reading of Rutherford's works as well as that of many of the first- and second-generation Reformers would not ascribe to such theorists "an inability to realize that without God visibly reigning on earth, the millennial kingdom simply cannot exist". According to Rutherford, God, in the world at present, visibly reigns not only in the sense of His absolute providence over and in Creation, but also in the sense of the ability to establish, at any period of time, through the working of the Holy Spirit, a Christian community *through* the various individual, social, constitutional and political instruments. The failure of man to establish a Christian societal and political paradigm should not override the authority of Scriptures, and Rutherford convincingly supports the responsibility of man in endeavouring the furtherance of a Christian Republic. In the end, God's absolute control and determination of all of Creation are the deciding factors but this does not negate the understanding that God uses means in accomplishing His purpose. The following statement by A. van de Beek provides a good perspective on the relationship between God's sovereignty and man's responsibility:

An analogy from modern physics may clarify the way Thomas and the *Canons* deal with predestination and human freedom. In physics, light can be considered both as waves and as particles. Dependent on the aim and nature of your research you can make your calculations according to the one model or to the other. Both are equally valid. You must only avoid confusing the models. In a similar way, we can say that we can view a

church is the means by which God has chosen to make believers, Hancock, *Calvin and the Foundations of Modern Politics*, 46.

²⁹⁶ C. E. Rae, *The political thought of Samuel Rutherford*, (MA dissertation, University of Guelph, 1991), 179.

human's life both in the perspective of human freedom and responsibility and in the perspective of divine determination. Both are equally valid. You must avoid speaking about human achievements in the discourse of final salvation. You must also avoid speaking about limitations on human choice in the discourse of human calling and responsibility. Our salvation is totally of God, and we are fully responsible as well, just as light is a particle and waves as well. You cannot stress the one at the cost of the other.²⁹⁷

Rutherford's understanding of human agency, also from a constitutional, political and legal point of view, was based on the assumption that God's Spirit was already active in society. One needs to be reminded of the fact that if the working of the Holy Spirit does not capture the overwhelming majority of the hearts and minds of the people in a given society, the establishment of a Christian nation would be impossible. In the words of Thomas Sproull:

If the members have not individually taken hold of God's covenant for their personal salvation, it is not to be expected, that as a family they will dedicate themselves to Him who is 'the God of the families of Israel.' When the majority of a nation are infidels, we cannot expect to see the nation any thing but infidel in its national capacity. The mass must partake of that which characterises its constituent parts. Society will be no better in any of its forms, than the individuals of which it is composed.²⁹⁸

It was not for Rutherford to prove that seventeenth-century Britain had been converted to Christ; however, bearing in mind the strong currents of the Reformation at the time, it was for Rutherford to do everything Scripturally qualified to strive towards the development and maintenance of a Christian Britain.²⁹⁹ Behind all of this lay the medieval answer to reconciling consensus with the ultimate power of God. According to Brian Tierney, the canon and civil lawyers had already prepared the

²⁹⁷ A. van de Beek, "God's Omnipotence and Human Freedom", *Essentialia et Hodierna, Acta Theologica Supplementum* 3, (2002), 175.

²⁹⁸ Thomas Sproull, "The Duty of Social Covenanting", (A sermon preached on 14 March 1841 in the Reformed Presbyterian Church Allegheny), (Pittsburgh: Printed by William Allinder, 1841), 22-23. Israel's ancient covenant had included relations among God, the people, and the land. Christians had augmented this in the classical period by distinguishing between the corporate covenants of the people and the covenant of individuals with God through Christ. This individual covenant wound through the monarchical theology of the Middle Ages to the personal monarchy of each saint emphasised by the Puritans.²⁹⁸ In a republic, an external covenant alone is never sought. It is of the nature of a republic that its citizens must love it, not merely obey it. The external covenant must become an internal covenant", Bellah, *The Broken Covenant. American Civil Religion in Time of Trial*, 142-143. Also see David M. Smolin, "The Judeo-Christian Tradition and Self-Censorship in Legal Discourse", *University of Dayton Law Review*, Vol. 13, 3(1988), 383.

²⁹⁹ This is explained in more detail in Chapter 2.

ground for the understanding that power came from God through the people. Laurentius (c. 1210) stated, “The people through election makes an emperor but not the empire, just as the cardinals promote someone to a jurisdiction that is given by God”.³⁰⁰ This was the alternative pillar flowing from thirteenth-century thought, in contrast to the view that God was presented only as a remote first cause, which included the view (as postulated by Peter Aureoli in his *Commentarium* – 1596) that God did not directly institute government among men; rather, God endowed men with natural reason, and natural reason then perceived the need to institute government and to choose rulers. In this form of argument, the existence of God is presumed, but He is not a necessary hypothesis; the discussion could just as well begin from empirical observations of man’s rational nature.³⁰¹

On the other hand, one could perceive God as more actively at work in guiding the choice of the community. John of Paris probably had this in mind when he referred to emperors created by the people ‘through the inspiration of God’. In the words of Tierney, “More explicitly, Bonaventure, considering the choice of a pope, described election as ‘the way of the Spirit’, a process in which the Holy Spirit worked to produce a consensus of hearts and minds. In the fifteenth century Nicholas Cusanus built a whole ecclesiology and political theory around this doctrine”.³⁰² Myron Gilmore, against the background of the question as to whom public power in general belongs, states that for Azo, Odofredus and other early civilians (of the Medieval period), as well as for Aquinas, the idea that all power was of God, but that it was mediated by the *populus* who had transferred it to the prince,³⁰³ was an accepted understanding. There were, therefore, in centuries prior to the Reformation and to Rutherford’s theory on God’s overall sovereignty and man’s activity in realising God’s will for mankind, glimpses of similar modes of thinking.

The covenant idea postulated by Scottish Presbyterianism is criticised by those who are of the view that perceiving the covenant (whether in a theological or political context) in a bilateral sense, giving human agency also a prominent role in the functioning of the covenant, goes too far and in the process violates the view of God’s

³⁰⁰ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 41.

³⁰¹ Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 41.

³⁰² Tierney, *Religion, law, and the growth of constitutional thought 1150-1650*, 41-42.

³⁰³ Myron Piper Gilmore, *Argument from Roman Law in Political Thought 1200-1600*, (Cambridge: Harvard University Press, 1941), 19-20,

absolute sovereignty. It is important to address such criticism in order to have more clarity on Rutherford's views in this regard, as well as for the fact that there are quite substantial implications for constitutional and political theory emanating from how one understands the role and obligations not only of the ruler but also of the whole of society.

Francis Lyall (in his research on legal language and covenant theology) refers to the apt example of Abbot's *Flatland*, where, in a two-dimensional world, the inhabitants are capable of appreciating only those parts of a three-dimensional world that intersect with their own two-dimensional world. To these inhabitants, a table would consist of four separate units (the legs in plane), at certain distances from one another. Lyall explains that if it were revealed to these inhabitants that these separate units were interconnected as being part of some greater truth (the table), some would most definitely attempt to bring the separate elements together.³⁰⁴

There is the possibility that some would find this process impossible and that many would therefore conclude that it was therefore incorrect to say that these 'four truths' were connected. Others might find it possible to bring these 'truths' together by some form of higher mathematics, but were they able to do so, they would produce a distortion of the real table.³⁰⁵ Another possibility is for the inhabitants to accept that 'reality' which has been presented to them as 'representative of' the true reality, although they cannot quite comprehend the true reality themselves. In other words, the Flatlanders would then believe that the four elements of which they are conscious are interconnected and interdependent in a different frame of reality, although they would normally consider such elements as separate within their own frame of reference – the four parts 'represent' aspects of the truth of the three-dimensional table. This latter option, one needs to keep in mind when dealing with theological truths,³⁰⁶ or any other non-religious truths, for that matter.

Lyall therefore provides an important reminder of how to deal with pillars of revealed theological truth pertaining to matters such as the interplay between God's sovereignty and human agency. Be as it may, the understanding that communal

³⁰⁴ Francis Lyall, "Of Metaphors and Analogies: Legal Language and Covenant Theology", *Scottish Journal of Theology*, Vol. 32, (1979), 3.

³⁰⁵ Lyall, "Of Metaphors and Analogies: Legal Language and Covenant Theology", 3-4.

³⁰⁶ Lyall, "Of Metaphors and Analogies: Legal Language and Covenant Theology", 4.

agency is an important factor heightens the relevance of covenantal societal, constitutional and political existence and activity, as well as the active role that especially the church should play in maintaining and protecting religion, coupled with the important primary role of magistracy in exercising justice. This should not negate the accommodation of God's absolute and ultimate sovereignty.³⁰⁷ This acceptance of the truth of Scriptures reflecting both God's sovereignty and the importance of human agency is witnessed in Rutherford's comment, "So Christ had a commandment to suffer the death of the cross (John 10: 8) but had Herod and Pilate any warrant to crucify him? None at all."³⁰⁸ While Calvin's humanist training encouraged him to provide logical justification for doctrinal articulation wherever possible, he also looked to *experience* as confirmation. Calvin argued against inquiring too much into logical demonstrations of Scripture and the life of faith. Instead, he referred the reader to the confirmation of experience. In the words of Glenn Moots,

Experience is brought into Calvin's theology because he knows that faithful exposition of the Scripture does not always produce a truly 'rational' synthesis. Of the Christian life, for example, Calvin wrote, 'Doctrine is not an affair of the tongue, but of the life; is not apprehended by the intellect and memory merely ... but is received only when it possesses the whole soul, and finds its seat and habitation in the inmost recesses of the heart'.³⁰⁹

Likewise, Rutherford's approach to seventeenth-century Britain included an understanding of the law and of politics as subordinate and dependent upon God and His Word; reason and 'rational' synthesis having to be abandoned when not in agreement with Scripture.³¹⁰ The same regarding rational synthesis pertains to any ideology.

³⁰⁷ Glenn Moots states: "Neither would any of the Reformed Protestants say that the Christian truly aids God in his or her own redemption. But this was all mainly agreement in principle. Exhortation, admonishment, or warning would still come from pen or pulpit, and the Christian was not to be passive and presume upon divine grace. How these two ideas – divine sovereignty and human responsibility – were reconciled has come to define the boundaries of scholarly debates over Reformed soteriology and political theology", Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, 41.

³⁰⁸ Samuel Rutherford, *Lex, Rex*, 16(2).

³⁰⁹ Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, 17. Moots also states that Calvin repeatedly warned against inquiring into the eternal counsels of the divine will, *ibid.*, 44. (In this regard, Calvin was specifically referring to election).

³¹⁰ In a letter to Lady Kenmure, Rutherford writes: "Cannot God bring us to heaven with ease and prosperity? Who doubteth but He can? But His infinite wisdom thinketh and decreeth the contrary; and we cannot see a reason of it, yet He hath a most just reason. We never with our eyes saw our own soul; yet we have a soul. We see many rivers, but we know not their first spring and original fountain; yet

The criticism by James Torrance against the influences of federal theology³¹¹ briefly refers to Rutherford's *Lex, Rex*. Torrance takes the principle of federal theology as supportive of man's effort over and above God's grace, and applies it to political theory. At the beginning of his article is stated,

In the socio-political context of a nation struggling for freedom, this was a language which people understood, as possibly people today would understand the language of trade unions, civil rights, settlement of wage disputes, etc. It was a kind of 'theology of politics' which provided a conceptual framework for communication of the Gospel to the man in the pew, and by means of such terminology the Gospel grasped the imagination of a covenanted nation. Through it the Scottish people became aware of the great central realities of the Bible and were gripped by the Gospel of grace ... But as so often in the attempt to effect a synthesis between Christianity and culture in the interests of communication, the Gospel itself was to suffer certain modifications in this framework, and contractual notions were to be introduced which were radically to change the preaching and worship habits of the Scottish Church.³¹²

Torrance then mentions Rutherford's, *Lex, Rex*, refers to Buchanan and Locke, and terms such as 'social contract', making the association between not only federal theology and its threat to God's grace, but including Rutherford and his political theory in his (Torrance's) opposition to the perceived influences of federal theology and its influence on political theory. Torrance also refers to the Scottish National Covenant (1638), the Solemn League and Covenant (1643), and the Westminster Assembly, adding,

It is significant that the *Directory for the Publick Worship of God* was officially described as 'a part of the covenanted uniformity in religion betwixt the Churches of Christ in the kingdoms of Scotland, England and Ireland'. The key word throughout was *Foedus* – 'covenant'. For the next hundred years we read about churches, congregations, individuals like Thomas Boston, Ebenezer Erskine, Adam Gib, making covenants with

they have a beginning", Bonar, *Letters of Samuel Rutherford*. To Robert Blair, Rutherford writes: "I deny not but ye have cause to inquire what His providence speaketh in this to you; but God's directing and commanding Will can by no good logic be concluded from events of providence. The Lord sent Paul on many errands for the spreading of His Gospel, where he found lions in his way. A promise was made to His people of the Holy Land, and yet many nations were in the way, fighting against and ready to kill them that had the promise, or to keep them from possessing that good land which the Lord their God had given them", Bonar, *Letters of Samuel Rutherford*, Letter to Robert Blair, Aberdeen, 7 February 1637.

³¹¹ James Torrance, "Covenant or Contract? A Study of the Theological Background of Worship in Seventeenth-Century Scotland", *Scottish Journal of Theology*, Vol. 23, 1(1970), 51-76.

³¹² Torrance, "Covenant or Contract? A Study of the Theological Background of Worship in Seventeenth-Century Scotland", 64.

God. Innumerable books, pamphlets and sermons were to appear on this subject, written by Dickson, Durham, Rutherford, George and Patrick Gillespie and many others. The background of much theological controversy was the emerging socio-political philosophy of ‘social contract’, ‘contract of government’ ...³¹³

This contribution, states Torrance, was included in the philosophy of the many Puritans who escaped the tyranny of British kings and feudal overlords, and headed towards the ‘free world’ where they would be free to worship God as they pleased and with whom they pleased and where no one would ‘tell’ them. “If on the one hand this was the birth of modern democracy (and the so-called ‘American way of life’), it was on the other hand to have a profound influence on Protestant theology and worship. It provided a conceptual framework within which Reformed theology was to be recast (federal theology) ...”³¹⁴

Torrance comments that during the seventeenth century, a change began to take place in Scottish preaching. A subtle kind of legalism began to creep in – “the Scottish preacher preached the law in such a way that his concern was to produce a conviction of sin and a fear of judgment, so that he could call upon the sinner to repent and renounce his sin so that he might receive the word of forgiveness and hear the comforts of the Gospel.” This pattern became so widespread that many divines felt that it produced a doctrine of conditional grace that was foreign to the Gospel.³¹⁵ Torrance states that in the Bible the form of covenant (in both the Old and New Testaments) is such that the indicatives of grace are always prior to the imperatives of law and human obligation. In other words, “I have loved you, I have redeemed you ... therefore, keep my commandments ...”³¹⁶

According to Torrance, Judaism turned it the other way round: “If you keep the law, God will love you. If you keep the sabbath, the Kingdom of God will come.” In this case, the imperatives are made prior to the indicatives.³¹⁷ Torrance also states, “What

³¹³ Torrance, “Covenant or Contract? A Study of the Theological Background of Worship in Seventeenth-Century Scotland”, 53.

³¹⁴ Torrance, “Covenant or Contract? A Study of the Theological Background of Worship in Seventeenth-Century Scotland”, 53.

³¹⁵ Torrance, “Covenant or Contract? A Study of the Theological Background of Worship in Seventeenth-Century Scotland”, 58.

³¹⁶ Torrance, “Covenant or Contract? A Study of the Theological Background of Worship in Seventeenth-Century Scotland”, 56.

³¹⁷ Torrance, “Covenant or Contract? A Study of the Theological Background of Worship in Seventeenth-Century Scotland”, 56.

happened in the history of Israel, has happened in the Church in all ages. There is something in the human heart, which makes men want to bargain with God. We see it in the story of the early medieval Church, and also in the development of theology in seventeenth-century Scotland.”³¹⁸

Did federal theology in general place *imperatives of law* prior to *indicatives of grace*? Is Torrance’s criticism justified, and what are the implications of this criticism for theologico-political federalism flowing from sixteenth-century Zurich and reaching its apex in Scottish Reformed political theory and the Westminster Assembly towards the middle of the seventeenth century? Scottish Reformed thought regarding covenant theology emanating from sixteenth-century Zurich did not divert from the Reformed doctrine of absolute grace. Lyle Bierma concludes that there were no substantial differences in the way the covenant was understood in the Zurich-Rhineland and Genevan theological traditions, albeit there were differences on certain points of doctrine. These differences cannot be traced to fundamentally different views of the covenant. Reformed covenant theologians – Zwingli, Bullinger, Calvin, Olevianus, Musculus, Ursinus, Perkins and others recognised both a unilateral and a bilateral dimension to the covenant of grace within the context of a *monergistic soteriology*.³¹⁹

Most seventeenth-century Scottish divines were aware of the danger implicit in the idea of covenant, namely that by stressing the contractual aspects of the scheme they might be opening the door to freedom of the will – to Pelagianism³²⁰ or, even worse, from their point of view, to Arminianism.³²¹ They were fully conscious of this

³¹⁸ Torrance, “Covenant or Contract? A Study of the Theological Background of Worship in Seventeenth-Century Scotland”, 57. In similar fashion as Torrance, Charles Bell is of the view that: Because of his framing of the covenant bilaterally, his regular use of mercantile language (contract, bargain, market, wages, etc.), and his insistence upon the use of the term “conditional” in reference to the covenant, he presents a confusing picture of the covenant of grace, both for lay readers of his Catechism, and for pastor-theologians. The end result is to leave one with the impressions of that very view of the covenant which he labels the heresy of Arminians and Antinomians, M. Charles Bell, *Calvin and Scottish Theology. The Doctrine of Assurance*, (Edinburgh: The Handsell Press, 1985), 76.

³¹⁹ Lyle D. Bierma, “Federal Theology in the Sixteenth Century: Two Traditions?”, *Westminster Theological Journal*, Vol. 45, 2(1983), 304-321, especially *ibid.*, 320-321. For more on this see De Freitas, *Samuel Rutherford on Law and Covenant: The Impact of Theologico-political Federalism on Constitutional Theory*, 15-24.

³²⁰ F. McCoy explains that Pelagianism was a fifth-century heresy that rejected the Augustinian doctrine of the basically sinful nature of man. The Pelagians believed that man had the inborn ability to recognise the good and to follow it; baptism and communion were therefore unnecessary to grace. God’s grace was prevenient, McCoy, *Robert Baillie and the Second Scots Reformation*, 105.

³²¹ The root of the trouble, to the Scottish Calvinists, was the spread of Arminianism, which went hand in hand with prelacy from which ‘the hated service book’ was compiled by among others, John Maxwell, Rendell, *Samuel Rutherford. A New Biography of the Man and His Ministry*, 60. Arminius

possibility; however, they strove to maintain what they called ‘the middle way of God’s truth’ between what they regarded as the two dangerous extremes of Catholic and Arminian theology on the one hand, and Antinomianism, on the other.³²² S. A. Burrell then refers to Rutherford’s answer to the charge that the covenant scheme denigrated divine grace and exalted the human will:

... None of us say, the crowne is given, either for faith, or for good works, as if they should determine the Lord to give a reward, or lay bands upon him for the intrinsecall dignitie and meritorious vertue that Christs merit hath put upon our works; we utterly deny any such vertue, either in good works, considered in their own nature, or as they borrow some perfume of Christs meriting vertue For Justification if it merit all the favor and blessings of God, then it must merit the favour of eternal election to glory, or effectual calling, of Christs coming in the flesh, of free Redemption, of the sending of the Gospel of Grace to this nation, rather than to this; whereas all these goe before justification, and flow from a more ancient and eternall free grace then justification; even from eternall election and everlasting love.³²³

Robert Letham, in his study of the Westminster Confession of Faith (WCF) against the background of the Westminster Assembly, also places covenantal thought in better perspective in its relation to God’s absolute sovereignty. Firstly, the Confession

credited fallen man with the ability to believe, along with power to do good or evil, but human will required supernatural assistance to operate for good. This supernatural power, which assisted human will, was prevenient grace, an aspect of that common grace which God made available to all after the entry of sin into the world (this doctrine was repudiated at the Synod of Dort), *ibid.*, 81. A general election embracing all who will believe (as supported by Arminianism) was rejected by Rutherford, *ibid.*, 82. Rutherford was regarded as the chief protagonist of the Calvinist cause in its conflict with Arminianism, Rutherford also having formulated his *Examen Arminianismi* in this regard, *ibid.*, 77. For confirmation of the dominance of Arminianism in early seventeenth-century Britain, and William Laud’s support of Arminianism, see David G. Mullan, *Episcopacy in Scotland: The History of an Idea, 1560-1638*, (Edinburgh: John Donald Publishers Ltd., 1986), 167.

³²² Burrell, “The Covenant Idea as a Revolutionary Symbol: Scotland, 1596-1637”, 342.

³²³ Burrell, “The Covenant Idea as a Revolutionary Symbol: Scotland, 1596-1637”, 342 [Burrell takes this from Rutherford’s, *A Survey of the Spiritual Antichrist*, Part 2: 50-51)]. John Marshall comes to the conclusion that Rutherford embraces a view of divine providence in human affairs that seeks to preserve the mystery and sovereignty of God’s ways and at the same time allows for the significance of human action. In the words of Marshall: “The nexus between God’s providence and the world he made is the principle of covenant, understood as the driving principle built into the very fabric of creation, ordering all created things either to the ends for which God made them or to contrary ends, depending on God’s will”, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 80-81. Also to note that in *England and Scotland’s Covenant With their God* (Printed for Edw. Husband, Printer to the Honorable House of Commons, 1645), is stated: “And withal let us remember this; that all the wayes of God are mercy and truth to them that fear him and keep his Covenant. *But because no man is strong in his own strength*, let us seek strength of Him who is both our strength and our Redeemer, that by Him we may be enabled to keep our Covenant with him, that so he may delight to dwell with us, to be called our God, and to call us his people; upon which happy condition, attend Peace, Prosperity, and all blessings of Heaven and Earth, temporall and eternall”, 15 (Author’s emphasis).

emphasises *condescension*³²⁴ as underlying all God's covenants, including the Covenant of Works. Whatever the place of law may be, it is in harmony with God's free and sovereign stooping down to do us a favour.³²⁵ Secondly, for the Assembly, law and grace were not polar opposites; it saw no incompatibility between them. Law is present in the covenant of grace, both in the time of the law (WCF 7.5) and in the time of the gospel –

In the covenant of grace, grace and law are not competing ways of salvation. Instead, they fulfill different roles. Grace constitutes; law regulates. The covenant is pervasively gracious, yet we receive the promise through the obedience of Christ, and the law continues to regulate the life of the Christian (WCF 20.2, 5-7). Hence, the Assembly insists that the uses of the law are not contrary to the gospel, 'but do sweetly comply with it' (20.7).³²⁶

³²⁴ This word one finds in the WCF 7.1 (in the chapter on, "Of God's Covenant with Man"). Here Letham observes that in Protestant scholasticism, long entrenched by the time of Westminster, *condescensio* (also meaning voluntary condescension) was used for God's accommodation of himself to human ways of knowing in order to reveal himself. In the words of Letham: "This was closely related to *gratia Dei* (the grace of God), the goodness and undeserved favor of God toward man, and to *gratia communis* (common grace), his nonsaving, universal grace by which, in his goodness, he lavishes favor on all creation in the blessings of physical sustenance and moral influence for the good" (here reference is made to R. A. Muller's, *Dictionary of Latin and Greek Theological Terms Drawn Principally from Protestant Scholastic Theology*), Letham, *The Westminster Assembly. Reading its Theology in its Historical Context*, 225-226. Letham adds: "These are the clearest senses of the terms for the Assembly, for they saw grace as fully compatible with law, not offsetting or limiting it, as in the late medieval notions of congruent and condign grace", *ibid.*

³²⁵ Letham, *The Westminster Assembly. Reading its Theology in its Historical Context*, 231. The WCF never maintains that man was created originally in a statically legal relationship with God. Also, "Prior to the fall man in his finitude stood in need of God's grace. Man could not initiate communion with the transcendent God. After the fall man cannot initiate communion with God, not only because of the given of the Creator/creature distinction, but also because of sin. Sinful man now stands in need of God's grace which is defined differently after the fall in terms of new needs ...", David B. McWilliams, "The Covenant Theology of the Westminster Confession of Faith and Recent Criticism", *Westminster Theological Journal*, Vol. 53, 1(1991), 110. Also, regarding the covenant of works at least as it is presented in the WCF, does not prioritize law over grace, see *ibid.*, 119-120. McWilliams states that: "Torrance, Rolston, and Barth, then, criticize confessional covenant theology because, it is claimed, federalism teaches a priority of law over grace. We have shown that this is not the viewpoint represented in the WCF. The confession clearly represents the prelapsarian covenant as gracious. Anytime God condescends to fellowship with man, whether considered upright or fallen, it is an act of sheer, unadulterated, sovereign, free grace!", *ibid.*, 114. Also see *ibid.*, 115 (including fn. 24, where McWilliams questions Torrance's view that the idea of social contract in the seventeenth century became the formative element in federalism). According to McWilliams, Rolston and Torrance have absolutised one attribute of God to the distortion of the biblical revelation of who God is. This is clear in the way in which they contrast grace and law. The issue involved is much the same as C. H. Dodd's polarization of wrath and love, making the latter more ultimate than the former, *ibid.*, 115. Also see *ibid.*, 122 for a brief yet clear exposition on how the Westminster Divines viewed the covenantal perspective as a pervasive theological theme which was indispensable at every turn for this applicability to the life of the church.

³²⁶ Letham, *The Westminster Assembly. Reading its Theology in Historical Context*, 231. Samuel Rutherford states that good works "are conditions without which wee cannot bee saved. For John Baptist taught this with the Gospel, *Every tree that bringeth not forth good fruit, shall be hewen downe,*

There was fundamental agreement in placing the grace of God and the sinfulness of human nature at the forefront of any argument. All Reformed theologians would agree that the terms of the covenant of salvation are set by God in His eternal decree, and communicated in the Scriptures. Referring to John von Rohr's *Covenant of Grace*, Moots states that, "No Reformed theologian, regardless of their other disagreements, would confuse a covenant with a contract giving or receiving something in exchange for something else, as in the sense of a *quid pro quo*."³²⁷ According to Heinrich Bullinger, the covenant as *bilateral* and *conditional* is not to be understood as a sacrifice of any support of God's grace (or predestination for that matter).³²⁸ In this regard, Lyall Bierma comments,

Bullinger does not look upon the covenant as exclusively one-sided. It consists rather of two parts: God's promise to us and our obligation to respond to him. Already in his covenanting with Adam, God had made us 'partakers of all his good and heavenly blessings' but had also bound 'us unto himself in faith and due obedience.' ... While circumcision and baptism indeed testify to our responsibility in the covenant, they also testify to the fact, Bullinger contends, that it is God who fulfills that responsibility in us and through us. They are signs that God, solely by his grace and goodness, bound himself in a covenant to justify and sanctify us through Christ, 'who by his Spirit cuts

and cast in to the fire ...", *A Survey of the Spiritual Antichrist*, Part 2: 38. However, Rutherford, in the same passage adds, "... onely we cannot say, Good works doe merit salvation, or purchase right to life eternal, Christs blood is onely so a ransome of life ...", *ibid.*, 39.

³²⁷ Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, 41. Moots comments that Calvin and Bullinger, in theological principle, would also agree that God is the guarantor of human participation. This, according to Moots means that persons could not ultimately attribute covenant faithfulness to their own merit or will. Neither would any of the Reformed Protestants say that the Christian truly aids God in his or her own redemption, *ibid.*, 41. Moots adds that: "When viewed as an imposition or a demand, the covenant asserted the sovereignty of God to do with His creatures as He saw fit. This was consistent with Reformed Protestant theology, which emphasized divine holiness, justice, and mercy. When viewed as something more akin to a contract both voluntary and conditional, it recognized that the sovereignty of God did not negate the responsibility of persons. Thus, the covenant preserved the rights of God and man ... Reformed Protestantism understood that the biblical narrative is not a story of puppets or of push-pull cause-and-effect. It is a story of redemption, and redemption follows failure. The Bible's patriarchs and leaders proved capable of great deceptions and betrayals. Christ's parables tell of stony ground, unfaithful servants, prodigal sons, and barren fig trees. This recounting of failures enabled reformers to talk about the covenant of salvation as both bilateral and unilateral at the same time. God defined terms and in some mysterious way enabled believers to persevere to the end, but He also called on them to heed and hearken to terms, leaving persons without excuse", *ibid.*, 130-131. Moots explains that unlike a contract which presumes to create things *ex nihilo*, covenants call us to things that precede and transcend us. No covenant is under the precise control of the covenanting parties – they are invited into it (perhaps even bound to it) by divine call – "They can decide whether to hear its call by adhering to its terms, but they do not create that to which they are called. Nor do they define the terms of participation", *ibid.*, 160-161.

³²⁸ McCoy and Baker, *Fountainhead of Federalism*, 104-105. The merits of humans play no role on this offering of the covenant, and perhaps one of the clearest expressions of this is the Second Helvetic Confession of which Bullinger was the main architect, the grace and sovereignty of God permeating the teachings within this Confession.

from us whatsoever things do hinder the mutual league [covenant] and amity betwixt God and us; He also doth give and increase in us both hope and charity in faith, so that we may be knit and joined to God in life everlasting.³²⁹

It is therefore clear that Bullinger put forward a *bilateral conditional covenant* structure without intending the negation or actually negating the sovereignty and grace of God. Whether this covenantal structure would have been possible without the intervention of God is certainly clear to Bullinger and others. Nothing would have been possible without the intervention of God, and a prerequisite to the materialisation of the bilateral conditional covenant between God and man was God's *unilateral institution* of this very covenantal structure, which in turn is nothing other than a clear expression of God's free grace. Rutherford supported this understanding.

Reformers never differed about the fact that behind human faith there stood the elective love of God. Although there were some differences concerning the covenant, these differences were never of such a nature that some Reformers connected election and covenant with each other, while others did not. The differences pertained to 'how' the connection between election and covenant must be laid out in order to accomplish the expression of the complete message of Scriptures the best. Bullinger would opt for a bilateral conditional structure and Calvin for a unilateral unconditional one. These differences between Bullinger and Calvin certainly are misleading for the simple reason that Bullinger, as well as Calvin, knew that it is God who lets faith work through the Spirit in the heart. Bullinger was more afraid than Calvin of simply coming to logical conclusions was. For Bullinger, the covenant is the manner in which God functions with His people in history, with his promise and claim.³³⁰ One could say that Bullinger's thought contained more of a historical dimension than that of Calvin. For Calvin, thought from eternity played a larger role than for Bullinger. Calvin views the covenant in such a manner that it is directed at election, while in Bullinger election is of less importance.³³¹ In this regard, Bullinger's line of thinking which was supported by Rutherford, lends itself more towards the relevance of the idea of the covenant (and its inextricable connection to the law) for constitutional and republican thinking.

³²⁹ Bierma, "Federal Theology in the Sixteenth Century: Two Traditions?", 312.

³³⁰ D. Willie Jonker, *Uit Vrye Guns Alleen. Oor Uitverkiesing en Verbond* (From Grace Alone. Concerning the Election and the Covenant), (Pretoria: NG. Kerkboekhandel, Edms. Bpk., 1988), 89.

³³¹ Jonker, *Uit Vrye Guns Alleen. Oor Uitverkiesing en Verbond*, 90.

3.3 The individual covenant

Relying on authors such as G. D. Henderson, S. A. Burrell and M. Steele, John Coffey observes that whilst it is often asserted that covenant theology inspired the idea of a national covenant, the precise relationship between the two is usually left vague.³³² The popularity of federal theology made it natural to think in terms of covenant relationships with God. Coffey asks, “How did they move from the covenant of grace, which was made only with the elect, to the national covenant, which was made with a whole people, both elect and reprobate?”³³³ In this regard, Rutherford made a sharp distinction between national covenants and the covenant of grace. The covenant of grace was a personal ‘internal’ covenant (who formed the elect – the members of the invisible church). On the other hand, national covenants were ‘external’ and included every ‘baptized’ member of the visible national church.³³⁴

Dispensationalists such as Roger Williams opposed the relevance of national covenanting due to his view that the New Testament provided no authority for this.³³⁵ According to Rutherford, the Old Testament had prophesied the existence of national churches in the new dispensation, and this made the Jewish practice of national covenanting part of the moral rather than the judicial law, and so perpetually binding on the church.³³⁶

Theologico-political federalism accommodates the individual in the commonwealth while simultaneously emphasising the fabric of the commonwealth as a collectivity with its own responsibilities. This Daniel Elazar explains as follows: The individual who is created in the image of God has the task of striving to be holy by acting according to the Divine precepts (such as doing justice, providing for the poor,

³³² Coffey, *Politics, Religion, and the British Revolutions. The mind of Samuel Rutherford*, 165.

³³³ Coffey, *Politics, Religion, and the British Revolutions. The mind of Samuel Rutherford*, 166.

³³⁴ Coffey, *Politics, Religion, and the British Revolutions. The mind of Samuel Rutherford*, 167. Coffey observes that according to Rutherford: “Just as God had shown mercy to a thousand generations of Abraham’s descendants, and included them in the covenant their forefathers had made, so he accepted infants into an external covenant with himself; even though they had no ‘personal’ holiness, they were partakers of a ‘federal’ holiness derived from their parents or godly forefathers, *ibid.*, 167. The National Covenant of 1638, therefore, was nothing new. Along with the ‘covenants’ of 1560, 1581, 1590 and 1596, it simply mended the ‘external’ covenant relationship between God and the nation which was first established at the time of Scotland’s conversion to Christianity but had been repeatedly broken by apostasy”, *ibid.*, 167.

³³⁵ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 167.

³³⁶ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 167.

maintaining human freedom and dignity, and assuring a basic economic floor for every household). Of importance is that every individual is morally autonomous and his or her consent is required for all acts, which includes responding to God's commandments. This means that they listen to God's commandments and decide whether to observe these commands or not.³³⁷ In the words of Marshall,

Rutherford would argue that the recognition of the "Argument of Providence" is possible only from a thorough knowledge of Scripture, which teaches the dependability of God towards his people. This dependability is based upon a covenant transaction that God himself inaugurated, and that serves moreover as the internal, unitive principle directing nature as a whole. Therefore all acts of providence must be seen through the lens of God's covenant, which assures the believer of the orderliness of God's actions despite outward appearances or disorder and confusion. This covenant transaction not only assures the believer that God's character is dependable but also that human actions are meaningful, both in relation to God and in the context of the social order, since they are the instruments God uses to achieve his providential designs in society. Thus human agency takes on a deeper significance when viewed from the standpoint of the covenant principle. Human agency is a means that God uses to preserve and re-establish the order that was disrupted in the beginning.³³⁸

Rutherford states that, "the Lord shall actually perform, yes and intends to perform what He has promised *upon condition* that we perform the required condition."³³⁹ *Although the Lord is debtor to neither*, He commands covenant ways with promise of a reward to the obeyer, bearing in mind that it is condescension that God commands covenant ways.³⁴⁰ A covenant speaks something of giving and taking; work and reward, and mutual engagements between parties – although there is something in the

³³⁷ Elazar, *Covenant and Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, 311-312.

³³⁸ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 30-31. Andrew Muttitt similarly states: "The personal freedom arising from ... redemption gives rise to an equally significant freedom in relation to the whole of life and society. The guiding principle of *Lex, Rex* is that the freedom acquired through redemptive grace goes beyond the spiritual reformation of the individual believer and equips him with the liberty and responsibility, in communion with other believers, to advance into society and reform every aspect of life in accordance with the law of God. ... the true application of Christian freedom ... takes the form of a right and a duty to establish civil government on the basis of the biblical covenant; which in turn functions as a positive law affirmation of the right and duty of each member of the covenanted community to act in obedience to the law of God as inscribed on the human conscience, enunciated in the Decalogue and fulfilled in the person of Christ," Muttitt, "The Conception of Liberty in Samuel Rutherford's *Lex, Rex*", 41.

³³⁹ Samuel Rutherford, *The Covenant of Life Opened*, (Printed by Andro Anderson for Robert Broun, Edinburgh, 1655), 7 (Author's emphasis).

³⁴⁰ Rutherford, *The Covenant of Life Opened*, 15 (Author's emphasis).

covenant between God and man that is not in the covenants of men namely *God is under no obligation to give life*, yet He does it.³⁴¹ The Lord gives a counter command to them, which is a clause in the covenant that the Lord entered into with them that they act or do not act.³⁴²

*Nothing can be given covenant ways to God all-sufficient; no one can recompensate the Lord for life and being.*³⁴³ Rutherford states that God has become our debtor not by receiving anything from us but by promising what He pleases; after we have fulfilled the condition it is still God's. There is no just equality between work and wage here.³⁴⁴ Even the covenant of works entails *a command by God ruled in its entirety by His sovereignty*, and it is via *God's mercy* that He rewards obedience.³⁴⁵

The Covenant of Grace is not made with everyone, as was the situation with the Covenant of Works.³⁴⁶ The covenant made with Abraham is that of grace made with all the seed and made with all believers who are Abraham's children.³⁴⁷ When God made the covenant with Abraham (Genesis 17) and renewed it (Deuteronomy 29), he also made it with Gentiles.³⁴⁸ Deuteronomy 29:14-15 does not state, "He shall make another covenant".³⁴⁹ There is only one covenant,³⁵⁰ which is the covenant made with Abraham. The same covenant made with Abraham is made with the Corinthians (2 Corinthians 6:16).³⁵¹ Rutherford mentions a Covenant of Works as obeying law by holiness of works, and refers to a Covenant of Grace where faith is the first

³⁴¹ Rutherford, *The Covenant of Life Opened*, 15-16 (Author's emphasis).

³⁴² Rutherford, *The Covenant of Life Opened*, 19.

³⁴³ Rutherford, *The Covenant of Life Opened*, 41 (Author's emphasis).

³⁴⁴ Rutherford, *The Covenant of Life Opened*, 42-43 (Author's emphasis). Faith is the sole condition of the covenant of grace, *ibid.*, 202-203.

³⁴⁵ Rutherford, *The Covenant of Life Opened*, 35. In fact, God's sovereignty shines in Adam's Fall, which could not have taken place without a singular providence, *ibid.*, 36. Rutherford states: "But no man first acts for God, for God is the first actor and mover in every action, and motion", *ibid.*, 23. Rutherford adds: "You can give nothing to God Creator of all, but it must be either an uncreated Godhead, but he who perfectly must be a created thing: But how wide is his universal dominion? Can you give to one that of which he was absolute Lord before? ... Nothing can be given to him, in whose hand is power and might ...: For 1. Riches and things we give are of him. 2. Power, might and strength to give, wither physical, to bear burden to his house: or, Morall, a willing mind and heart to give is in his hand ... Can we give to any that which is his own already?", *ibid.*, 37-38, and further "... that God's bargaining with us depends not upon the equality between thing and thing, the work and the wage; but upon his own free pleasure of disposing of his own ...", *ibid.*, 43.

³⁴⁶ Rutherford, *The Covenant of Life Opened*, 119.

³⁴⁷ Rutherford, *The Covenant of Life Opened*, 64.

³⁴⁸ Rutherford, *The Covenant of Life Opened*, 111. Also see *ibid.*, 86, 90-91 and 107.

³⁴⁹ Rutherford, *The Covenant of Life Opened*, 111.

³⁵⁰ Rutherford, *The Covenant of Life Opened*, 111-112.

³⁵¹ Rutherford, *The Covenant of Life Opened*, 75.

requirement.³⁵² In this regard, the condition of the covenant to believe is a gift of grace for we are justified by His grace.³⁵³

The first act of believing, which is a condition of the covenant, depends on grace.³⁵⁴ However, good works are still necessary under the covenant of grace.³⁵⁵ In fact, good works are the fruits of free grace.³⁵⁶ He that is under grace, says Rutherford, finds sweetness of delight in a positive law though the thing commanded be as hard to flesh and blood as to be crucified, yet it obtains a sweetness of holiness from God's will.³⁵⁷ Christ does not get rid of the law in Matthew 5.³⁵⁸ Rutherford states that the people should not glorify God contrary to Matthew 5:16,³⁵⁹ and good works are necessary,³⁶⁰ In fact, Scripture is clear concerning adherence to the law.³⁶¹ This gives impetus to the important role of magistracy and a constitutional framework for the instilling of the performance of good works in society.

It is also the law that reveals what the magistrate may do *de jure*, and what the guilty deserves by the law.³⁶² If good works are necessary, if Scripture is clear concerning adherence to the law, and if it is the law that reveals what the magistrate may do *de jure* (and what the guilty deserves by the law), then this is where the covenant is

³⁵² Rutherford, *The Covenant of Life Opened*, 47. According to Rutherford, faith is the sole condition of the covenant of grace, *ibid.*, 202-203. The law as the law can convert none, *ibid.*, 69. According to Rutherford, the difference between the two covenants is that they do not similarly command faith and forbid unbelief, *ibid.*, 191-192. Original sin entered the world by the Covenant of works, while the covenant of grace made not death but found it in the world. The administration of the law covenant is first habitual holiness of works and then a crown. The administration of grace is first faith and a title to Christ followed by a habitual holiness, *ibid.*, 47.

³⁵³ Rutherford, *The Covenant of Life Opened*, 216-217. As confirmation Rutherford refers to Philippians 1:13, 29; Romans 3:24; 6:23; 2 Timothy 1:9; Ephesians 1:7; 2: 8; 2: 4-5; Ezekiel 36:26, 32; Colossians 1:14; Jeremiah 31:35; 32:39-40; Isaiah 54:10; Job 15:5; John 3:16; and Hebrews 2:9. Christ bows our wills because we are in a weaker state when it comes to using our will, *ibid.*, 230. It is the same as someone receiving an inheritance; he has it by birth, *ibid.*, 232.

³⁵⁴ Rutherford, *The Covenant of Life Opened*, 346-347.

³⁵⁵ Rutherford, *The Covenant of Life Opened*, 152.

³⁵⁶ Rutherford, *The Covenant of Life Opened*, 176. Also see Rutherford, *A Survey of the Spiritual Antichrist*, Part 2: 237.

³⁵⁷ Rutherford, *The Covenant of Life Opened*, 70-71.

³⁵⁸ Rutherford, *The Covenant of Life Opened*, 156. Also see Rutherford, *A Survey of the Spiritual Antichrist*, Part 2: 122 and 238.

³⁵⁹ Rutherford, *The Covenant of Life Opened*, 165.

³⁶⁰ Rutherford, *The Covenant of Life Opened*, 177. At *ibid.*, 178, Rutherford states that good works are necessary for the glory of God, and are necessary by the law of gratitude, which is common both to the Covenant of Works, as well as to the Covenant of Grace, because we are debtors to God for being. But this is not to say that our works are the formal cause of our justification, as this will place good works in the place of Christ. Scripture does not speak of justification by works. At *ibid.*, 180, Rutherford states that life is promised to believers who work, not because they work.

³⁶¹ Rutherford, *The Covenant of Life Opened*, 200.

³⁶² Rutherford, *The Covenant of Life Opened*, 4.

similar from an individual as well as a societal or political perspective – in the covenant of grace, the faith of the individual, as God-given condition for salvation provides the fruit of eagerness and thankfulness in following God’s precepts, and where this is multiplied extensively, one finds a society consisting of individuals similar in this regard. This understanding is inextricably connected to that of covenant liberty originating in the individual’s heart (with its reliance absolutely on God’s grace) and extending into society as a whole in the form of Godly activity towards the accomplishment of obligations, including political.

Archibald Mason comments that personal covenanting with God is one of the sacred duties of religion and that Christians perform this sacred spiritual duty when they solemnly renounce all false confidences in salvation in the exercise of grace, and live in godliness. If this is the “employment which is competent to a believer in a solitary state, must it not be an exercise that is lawful for a company of them to perform in a social capacity?”³⁶³ Robert Bellah comments that conversion was not just an act of purely private piety. The liberty flowing from it did not mean escape from social obligations. Covenant liberty was seen as profoundly social as in the following quotation from the leading eighteenth-century Baptist, Isaac Backus:

The true liberty of man is, to know, obey and enjoy his Creator, and to do all the good unto, and enjoy all the happiness with and in his fellow creatures that he is capable of; in order to which the law of love was written in his heart, which carries in its nature union and benevolence to Being in general, and to each being in particular, according to its nature and excellency, and to it’s relation and connection with the supreme Being, and ourselves. Each rational soul, as he is part of the whole system of rational beings, so it was and is, both his duty and his liberty, to regard the good of the whole in all his actions.³⁶⁴

³⁶³ Mason, *Observations on the Public Covenants, betwixt God and the Church. A Discourse*, 22. This is similar to public prayer, public fasting or mourning for sin and public thanksgiving and praise to God, which correspond to private prayer, personal fasting and thanksgiving, *ibid.*, 22-23. Though there may be a difference between the objects which a Christian as an individual, and a body of them in their collective capacity are called, in their covenanting with God, the nature and tendency of these solemn transactions are substantially the same, *ibid.*, 10. Also see *ibid.*, 14.

³⁶⁴ Bellah, *The Broken Covenant. American Civil Religion in Time of Trial*, 20. The juncture of liberty and duty in Backus’s last sentence is the key to the Protestant conception of liberty in relation to conversion and covenant, *ibid.* Bellah refers to Edwards who noted with disapproval the common ‘notion of liberty’ as ‘a person’s having the opportunity of doing as he pleases’, *ibid.*, 21. This is similar to Daniel Elazar’s view that: “Covenantal liberty is not simply the right to do as one pleases, within broad boundaries. Contractual liberty could be just that but covenantal liberty emphasizes the liberty to pursue the moral purposes for which the covenant was made. This latter kind of liberty

William Everett refers to James Harrington, who emphasises the unison between the law in the ‘heart of the individual’ and the law as applied over society in the context of the Christian Republic, Harrington stating that in the perfect republican order the law is king, and since the law is known in the people’s hearts ruled by Christ, the people are king. With this assertion, one knows one is still moving in the afterglow of a Christendom illuminated by a single religion, a homogeneity where the separation between Church and government is unknown and irrelevant, since both aim at the creation of a Christ-ruled Republic.³⁶⁵

Everett comments that “[p]ublic virtue’ was central to a republic, a virtue which replaced effective governance due to fear of sanction by the government with an inherent generosity or charity by the individual for the community at large – a submersion of individual interests into the greater good of the whole.”³⁶⁶ Public virtue in the Christian community or state would especially imply this inherent charity by the individual for the community at large. God’s law as reflected in Scriptures is based on love and benevolence. The idea of the biblical covenant is instrumental in blending individuality with commonality – the covenant provides a uniform purpose working towards the prosperity of both the individual and the collective, founded upon an encompassing normative and political dimension.³⁶⁷

Public covenanting is a moral duty, incumbent upon the church in every age. The change the Lord has made in the outward ordinance of his worship under the different dispensations does not alter anything regarding the moral obligation.³⁶⁸ David McAllister’s idea of the state as a moral person, “that is, a being which can and ought to be conscious of its duties, and which for the fulfilling of these duties is responsible

requires that moral distinctions be drawn and that human actions be judged according to the terms of the covenant”, Moots, “The Covenant Tradition of Federalism: The Pioneering Studies of Daniel J. Elazar”, 394. According to Elazar, “*Federal liberty* emphasizes freedom only within the boundaries of community and moral responsibility. *Natural liberty*, by contrast, neither emphasizes nor obligates community or moral responsibility”, *ibid.*, 396. In the words of Elazar: “The omnipotent Deity, by freely covenanting with man, limits His own powers to allow humans space in which to be free, only requiring of them that they live in accordance with the law established as normative by the covenant ... Federal liberty calls all partners to public and private adherence to both social norms and divine moral prescriptions ... This binds the community together and transcends what may otherwise be only minimal moral obligations prescribed by legal, contractual, or private agreements”, *ibid.*, 396.

³⁶⁵ Everett, *God’s Federal Republic. Reconstructing Our Governing Symbol*, 76-77.

³⁶⁶ Wood, *The Creation of the American Republic, 1776-1787*, 68.

³⁶⁷ Everett, *God’s Federal Republic. Reconstructing Our Governing Symbol*, 129.

³⁶⁸ Mason, *Observations on the Public Covenants, betwixt God and the Church. A Discourse*, 12.

before God and mankind”,³⁶⁹ attains deeper meaning within the context of the idea of the biblical covenant. James Willson similarly refers to *nations as moral persons* – their existence is recognised, and their organisation is provided for of God. Nations are under God’s authority and His law prescribes national duties; it defines the principles and establishes the ends of national institutions.³⁷⁰ This public covenanting is exercised by the church, a company of visible believers in Jesus, who subject themselves to God’s word.³⁷¹ Therefore, it also makes sense that a nation that has generally come to accept the Gospel comes to receive the truths of Christ and submits to His laws, and is consequently bound by covenanting nationally with Him, to swear an oath of national allegiance to the Lord, as did the house of Israel and the house of Judah in the land of Canaan.³⁷²

The covenant, with its view of the law as a condition, provides the law with greater meaning and emphasis. It also acts as a practical tool to instil the law within the political community. The covenant also gives a more stable and less arbitrary attribute to the law, and understanding that is in line with Rule of Law thinking. Godly man and the community experience the highest sense of liberty when able to live according to the precepts dictated to him by nature. Therefore, in a covenanted society, where the materialisation of the precondition of such a society has already taken place, namely that the “heart of the community (or most of it anyway) has already been converted”, liberty obtains its highest enjoyment by the members of the community. Consequently, the dichotomy that may be perceived as existing between liberty (properly exercised in accordance with the Divine Will) and authority (properly exercised in accordance with the Divine Will) is avoided. It is now for the magistrate to manage these faithful which have formed a society externally and this responsibility is covenant-based – in other words to rule over the faithful according to God’s precepts (although not every single member is of the faith).

³⁶⁹ David McAllister, “The True Idea of the State”, *The Christian Statesman*, Vol. 144, 1(2001), 29-30.

³⁷⁰ Willson, *Social Religious Covenanting*, 4. Referring to Ps. xlvii:7-8, Rev. 19:16, Rev. 1:5, Isa. lx:12, xlix:1 & 4, and Rev. 11:15, Willson states: “If all this be so – if nations owe obedience to God – if His law, the law of the Bible, is law to them – if they have Christ above them as King of their kings, and Lord of their lords – then, surely, it is competent to them, it is obligatory upon them, to own their relation to God and to Christ”, *ibid.*, 4-5.

³⁷¹ Mason, *Observations on the Public Covenants, betwixt God and the Church. A Discourse*, 7.

³⁷² Mason, *Observations on the Public Covenants, betwixt God and the Church. A Discourse*, 60.

According to Rutherford, men naturally have that covenant principle lodged within him, which sin has not totally effaced, enabling man to recognise and construct a stable social order. Sin introduced the need of compulsion to ensure that men do by law what they are reluctant to do now by nature.³⁷³ This also needs to be understood against the background of biblical texts such as Deuteronomy 17 and Romans 13 where Christian magistracy is qualified for a Christian society. Regarding the inextricable relationship between the individual and the community in the context of the covenant, Thomas Sproull states, “But as the distinction in the allegation between the moral covenanting of individuals and the typical covenanting of communities, is without the slightest foundation in Scripture, we forbear to notice it, and unhesitatingly assert that covenanting was not typical but moral in respect both to individuals and communities.”³⁷⁴ As well as being manifest in external leagues amongst the godly, such as the National Covenant, the idea of the covenant itself was connected to a theology of inner dependency and spiritual experience, which was linked with the kingdom of Christ.³⁷⁵

Rutherford taught a Covenant of Works that took place before the Fall, as well as a Covenant of Grace taking place from the Fall and covering both the Old and New Testaments. In both these covenants, Rutherford emphasises an element of man’s responsibility and of Divine sovereignty, although the latter always receives superiority. The condition in the Covenant of Works was to obey the law and the condition in the Covenant of Grace is to have faith.³⁷⁶ Regarding personal covenanting, the individual believer ‘lays hold’ of God’s covenant, by believing in Christ, and with an eye to his righteousness and grace, devoting himself to the service of God, engages to walk in all the ways of new obedience. The Covenant of Works is no longer of any value as a means of securing the favour and blessing of God –

³⁷³ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s, Lex, Rex*, 61. Marshall, referring to Rutherford, adds, “‘There is a covenant natural, and a covenant politic and civil.’ The latter, because of sin, now requires a system of mutual accountability, involving ‘an oath betwixt the king and his people, laying on, by reciprocation of bands, mutual civil obligation upon the king to the people, and the people to the king’”, *ibid.*, 61-62.

³⁷⁴ Sproull, “The Duty of Social Covenanting”, 8.

³⁷⁵ Yeoman, *Heart-Work: Emotion, Empowerment and Authority in Covenanting Times*, 96. It was in and from this inner kingdom that the Lord worked and gave authority and encouraged the people to covenant against the abuses of their governments, *ibid.*, 118. Also see *ibid.*, 129-130 for Alexander Henderson’s indication as to how the inner covenant of election related to the outer Covenant.

³⁷⁶ There was a strong supralapsarian representation at Westminster – “Twisse and Rutherford were the leading exponents of the position in their day, and among the most notable in history”, Letham, *The Westminster Assembly. Reading its Theology in Historical Context*, 183-184. This goes to prove Rutherford’s strong emphasis on the overall sovereignty of God.

It is a broken covenant ... Its voice is a voice of terror only. The only way of access to God *now*, is through Christ, looking to Him as Mediator, to His righteousness for pardon and eternal life, to His mediatorial fullness for safe-keeping and ability to obey, for holiness and comfort; to His intercession for the acceptance of all personal religious services and acts of obedience. So in social covenanting, the church looks to Christ as the 'Lord her righteousness.' As her head, He secures her the favour of the Father, and becomes the medium of communication between the body of the faithful and the throne of God.³⁷⁷

Applying Rutherford's view of the covenant in an individual context to political theory implies that, as stated before, there must first be a Christian community, which professes allegiance to Christ externally, hereby representing the visible church. This external profession is indicative of the peoples' inclusion in a communal covenant with God, although all within the community are not believers. Therefore, Rutherford's views on the covenant in his political and jural theory regards the covenant of the visible church with God. However, it is assumed that within this visible church, according to Rutherford, are a substantial number of those who are 'heart-covenanters'; therefore forming part of the invisible church. John Marshall observes that to Rutherford,

God's providence governs all particulars of human society, but without destroying the significance of human actions. The significance of all actions, involving the roles of secondary causality, human volition, and political power, is derived from the doctrine of the covenant. The doctrine of the covenant is a relational concept, involving primarily the relationship of God to his creatures, and secondarily the relationship of rational creatures to each other.³⁷⁸

However, the covenant also had to be understood from a natural law background. Regarding Rutherford's view on natural law against the background of providence, the language of nature was covenantal.³⁷⁹ When God created man, he created him a covenantal being; that is, he created in him the self-conscious awareness that he was subject to God in all things. The law of "the image of God, the natural knowledge of

³⁷⁷ Willson, *Social Religious Covenanting*, 5. The connection between personal and social covenanting is very clear as no man can stand alone – man is a social being, having relative duties to perform, *ibid.*, 4. Also see *ibid.*, 8.

³⁷⁸ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 19.

³⁷⁹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 23.

God, his holiness, justice, mercy and of right and wrong, and a natural holiness and innate conformity of the heart to the eternal law of God in man's soul" is the natural law that Rutherford tended to identify with the covenant of works.³⁸⁰ According to Rutherford, this covenant structure concreated in human nature has not been thoroughly effaced by sin – Man still “comes under the Covenant naturall, common to all creatures.” Therefore, there are covenant principles that he recognises and follows, and among them is the deeply imbedded recognition that there is a “mutual obligation to live in society and that this obligation involves the need for government”. This ‘covenant naturall’ leads inevitably to a ‘covenant politic or civil’.³⁸¹

Rutherford's emphasis on duty also accords with a covenantal way of understanding, which in turn, also includes the individual and political society as playing an important role. Rutherford's attitude towards political theory is summed up in his own sense of duty.³⁸² According to Rutherford, the political order founded on the law is not yet the kingdom of God. However, reformation of society based on this law is a step in that direction – “Man is called to join in the work of restoring a godly and political order that prepares and anticipates the kingdom of God”.³⁸³ John Marshall identifies this understanding reflected in Rutherford by referring to a letter by Rutherford in 1637 to Lord Loudon stating that: “I am not of that mind, that tumults or arms is the way to put Christ on His throne; or that Christ will be served and truth vindicated, only with the arm of flesh and blood. Nay, Christ doth his turn with less din, than with garments rolled in blood. But I would that the zeal of God were in the nobles to do their part for Christ; and I must be pardoned to write to your Lordship thus”.³⁸⁴

4. Conclusion

³⁸⁰ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 26.

³⁸¹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 29. Also see *ibid.*, 60-62.

³⁸² Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 64.

³⁸³ Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 108.

³⁸⁴ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 218, fn. 115. This was written against the background of Rutherford's argument supporting resistance to tyranny and provides an example of the interplay between Divine sovereignty and human agency as understood by Rutherford.

In the previous chapter, the legacy of republican thought stemming from Classical Greece and Rome, the Roman Jurists, the Church Fathers, the Middle Ages, the Canonists and the early Renaissance was described. As is presented in this chapter, Rutherford substantially contributed towards an informed explanation in this regard with special emphasis on the covenant and the law.³⁸⁵ The idea of the Covenant and the law appeared to constitute essential principles of republicanism. As was also indicated in the previous chapter, Rutherford's constitutional, political and legal thought substantially overlapped with the legacy left by these preceding centuries of thought. The same applies to many of the prominent early and second-wave Reformers. However, in Rutherford one finds special emphasis on the idea of the law as superior to that of political power, and his integration of the idea of the Covenant with that of the law serves as one of the most prominent and informative contributions stemming from seventeenth-century Europe. Rutherford's blending of the superiority of the law with the idea of the covenant and the importance of an active citizenry is reflective of the essence of republicanism which in turn presents a true constitutional model in the context of both biblical and contemporary constitutional thought. This is elaborated upon in the Epilogue.

Immediately prior to the publication of *Lex, Rex*, substantial developments had taken place in Europe which had an influence on the law and which necessitated a reminder and further elaboration on previous republican thought. These developments included the introduction of positivist jurisprudence, the substantial influence of reason on the law (to the negation of religion), the secularisation of the covenant, and absolutist ideas related to governance. There was also a growing leniency towards scepticism regarding the interpretation of Scripture in a manner that only gave rise to one version of the truth, and also played a part in the development of the separation of religion and reason as well as an understanding of natural law as something independent of any Scriptural authority. Not only Grotius and Bodin, but also Antinomianism, Anabaptism, and Congregationalism, together with the postulations of prominent theologians such as John Milton and Roger Williams, played an important role in shifting the emphasis away from the role of the magistrate pertaining to the external protection and maintenance of the true religion. This has implications for how the

³⁸⁵ In Rutherford there are also enduring insights pertaining to the law and constitutionalism which is elaborated upon in the Epilogue.

foundations of the law are to be understood and what the underlying role of the law should be both in the Christian Republic and in any constitutional paradigm.

The enlightened political and legal theory emanating from Grotius and Bodin assisted in the reduction of political and legal theory regarding the good and of contractual theory, basically to an absolutist humanist dimension. As stated earlier, Grotius and Bodin also played major roles in supporting this growing tendency towards separating religion from the law and in supporting the gradual weakening of the idea of the covenant that was furthered by Locke and Hobbes. In Rutherford, we find the countering of these developments, and in the process Rutherford gives an explanation of the importance and superiority of law and its inextricable relationship with the idea of the Covenant. The moral or Divine law was understood by Rutherford as an immutable and universal set of norms which is not connected to relativist and pragmatic implications, as is the case for Grotian, Bodinian, Lockean and Hobbesian thinking; this in spite of the said theorists' appreciation of the Divine or moral law.

Rutherford's thought on the covenant presented ideas that were in many respects already formulated and which formed part of an already established school of thought within political and constitutional theory. Reformers such as Bullinger and Althusius had already done much to develop the social, constitutional, political and legal aspects of the law and the Covenant, and Rutherford continued in his own unique way in furthering this school of thinking. The context in which Rutherford found himself represented one of the most prominent circumstances of covenantal thinking and application. This was especially witnessed in the background to, and activities of, the Westminster Assembly in which Rutherford (and the other Scottish Divines and Covenanters such as George Gillespie and Alexander Henderson) actively participated.

Rutherford continues in the tradition of theologico-political federalism, emphasising the importance of the law and its overlapping character with the idea of the Covenant, as well as the active role of the magistracy and the people in the ordering of the community. This was coupled to a soteriological purpose, which in turn involves the law as a substantial part, not only of constitutionalism and of republicanism, but as one of the mediums through which the Divine purpose was to be attained as well. Sixteenth- and seventeenth-century Scotland attested to a strong tradition of

covenantal thinking, both from a theological and political perspective. At the time, the people of Scotland formally and collectively participated in covenantal obligations and activities, which in turn emphasised the importance of the law.

In Rutherford, the political order is determined by the inescapable antagonism of authority. Liberty is presented in a constitutional system where the constitutional and republican principles of law and contract enjoy special relevance. Rutherford presents a system of law that provides public service as required by the first and the second Tables of the Decalogue and the view that the fundamental law of any Christian polity originated in a divine-human covenantal agreement, to which both ruler and people were party to the model of the covenant made between God and Old Testament Israel. The idea of the Covenant is the binding together in one body politic of persons who assume through promise, responsibility to and for one another and for the common laws, under God. The political dimension of the covenant became possible due to the spirit of the times, because of the many individuals who professed the faith, thereby reflecting a substantial number of true believers. For such individuals, living in opposition to the Divine law results in an inherent resistance to anything contrary, which in turn provided such individuals with true liberty. Far from supporting the liberty of a person to act in an unlimited fashion on the pretext of a broad subjective appeal to individual conscience, Rutherford presents an understanding of freedom that is connected to that freedom which has been achieved by the atoning work of Christ. This is how the republican quest towards freedom according to Rutherford is to be understood.

The outcome of this in a legal sense is that the believer is now imbued with the desire and the freedom to uphold the Decalogue. This implies the relevance of constitutionalism, politics and the law in the external influence of the believer (and the community as an organic moral entity in covenant with God) to guide, maintain and protect this desire and freedom, especially when taking into consideration man's propensity towards sin. In this regard, both nature and grace work towards an understanding of a constitutional model for the Christian Republic. *Lex, Rex* did not only oppose the abuse of political power, but also opposed the late-scholastic nominalist distinction between 'grace' and 'nature'. To Rutherford, nature was a portal towards grace, an understanding that is most relevant to how politics and the

law is to be understood, which was of special relevance to constitutional thought in seventeenth-century Europe. Seventeenth-century Scotland, together with Rutherford, used the paradigm of the covenant to support the rule of law idea and this set the basis for a constitutional model.

The office of magistracy was understood to be synonymous to the law and linked to the Covenant, implying the constitutional principles of duty and accountability pertaining not only to the maintenance of the safety of the people (*salus populi*) but also, as stated earlier, to the salvation of man. Authority does not find its basis in man, but in the nature, vertical structure and the destination of the government as a covenantal structure; it is a fundamental principle of the arrangement of order without which the government cannot function. This further implies that the covenantal office of government is in its ultimate capacity an image of the absolute covenantal authority of God; that the person in governmental authority exercises his covenantal authority on behalf of God, as servant of the Almighty, who does not receive his authority from the subjects, but from his covenantal office as determined by God, and who is accountable to God for his covenantal service or covenantal neglect. The covenant also introduced a real and personal context to the individual and the community's relationship with God, and gave a sense of both liberty and responsibility (duty) towards the individual and the community. The republican idea of inclusive political activity and representation based upon a given set of foundational Divine norms formed an important part of Rutherford's thinking.

As part of the reactions to the abuses emanating from especially the Papacy and the principle of the Divine Right of Kings during sixteenth and seventeenth-century Europe, there arose concerns regarding the nature of political sovereignty and the parameters of contractual and covenantal thinking. For the Reformers these developments were cause for much concern and no less for Rutherford. Of Rutherford's works, it was especially *Lex, Rex*, which served as an important reminder that the Bodinian-like view of the king 'as the breathing law' was not the correct interpretation to ascribe to. Rutherford, having to live in tumultuous and challenging times, also leaned strongly towards the natural law, prioritising the beauty in justice, morality and the Divinity ('order' itself being of secondary origin and importance). To Rutherford, as it was for Cicero, the law was something more than

Bodin's command of the sovereign – the law originated from that 'higher dimension' that represented awe and beauty and which served as universal authority for the ordering of society. The need for a constitutional model that represents the prominence of the 'higher' (moral) law and principles was what Rutherford was so interested in postulating. *Lex, Rex*'s substantial reliance on natural law thinking also attests to this line of thought.

Puritan political and constitutional theory understood 'the good' as based upon, firstly, the glorification of God, and secondly, the protection, maintenance and furtherance of the spirit. The importance of spiritual progress made the Puritans conceive of a society where the state was only a framework to protect the growing spontaneous life of the spirit. The promise of God's redemption was a point to which political theory had to aspire. The promise that men should live again in the joy of Zion, with the assurance of election and the hope of salvation was no less realistic than believing in the promises of secular redemption.

The idea of the covenant provided the Christian community with a practical and understandable mechanism, which also provided a sense of responsibility and accountability to a Supreme Being as part of the mechanism in the unfolding of God's soteriological plan with mankind. The covenant demanded more emphasis regarding norms directed towards the ordering of society (which included the ordering of religion). Therefore the maintenance and protection of the covenantal conditions received much urgency from especially the Scottish Commissioners. The covenant is relevant both to the individual and to society and ingrained in nature. The individual's prioritisation of being obedient to the precepts of God and inclusion in God's purpose of salvation is included in the larger social and political paradigm, in which the obedience and salvation of society and the normative format to accomplish this, was also emphasised by the Puritans (including Rutherford). To Rutherford the covenant is present in every believer, capacitating the believer with an implicit awareness that he or she is bound by the law of God. As a result, in the Christian Republic, the Divine law is superior, and since the law is known in the people's hearts ruled by Christ, the people have a heightened status of authority. Nature's weakened state was accompanied by an aspect that (by grace) lent itself to acting towards the fulfilment of God's will. According to Rutherford, this was precisely what allowed for magistracy,

the church and the law to act positively and externally towards the maintenance, protection and furtherance of a Christian society, and consequently as a portal to grace (also bearing in mind the sinful nature of man).

The workings of the covenant, the functions of the magistrate and the application of the law required more clarity on the relationship between God's sovereignty and human agency. Rutherford provides clarity in the balancing of Divine Sovereignty and human agency (both in an individual and communal sense) regarding the functioning of the law within the covenant through the sovereign people (the latter always being subservient to the law). Human agency also stands central to the understanding of the law as a means towards the attainment God's purpose with man. In this manner, Rutherford personalises God's relationship with Creation, presenting to society the incentive of working towards the adherence to God's Will in society, which in turn necessitates the formulation and application of a constitutional model. The connection between God's providence and the world He made is the principle of the covenant, which Rutherford equates with the law of nature. In this regard, there is a foundational aspect ascribed to the law, which is the covenant, and the community as a corporate whole is provided with a moral duty. To Rutherford the work of the Reformation mediates God's presence; outward reformation promotes inner piety, and the Gospel places an obligation on the consciences of people to reform.

Rutherford was concerned about the logical progression that flowed from a rejection of nature. By rejecting nature, one is forced logically to reject the visible church (as that exists within the natural order). The same applies to government, and finally one must reject any notion of common morality or quest for establishing a constitutional model. This has implications for how the law, its function and application are to be understood. What arises is a negation of the use of external means in the ordering of society. When Rutherford speaks of nature as fallen and broken, he does so in an ethical sense, in connection with man in sin, the 'natural' man. Regarding the view that nature has another visage, which is 'unbroken and sinless', nature is considered in its metaphysical constitution; it is synonymous with the goodness of creation, which sin has not destroyed.

Rutherford reiterated the ancient Hebrew, Aristotelian, Ciceronian, Medieval and early Renaissance idea pertaining to the superiority of the law. With Bodinian and

Grotian developments at the time, this became essential, also necessitating emphasis that this law is connected to the Decalogue. *Lex, Rex*, by reversing the traditional *rex lex* ('the king is law') to *lex rex* ('the law is king'), was among the pioneering early modern works to give the Rule of Law principle a firm theoretical foundation, consequently serving as a strong voice in opposition to the abuses of political power. To Rutherford, as it was for Cicero and other authors in Patristic, Medieval, early Renaissance and early Reformation thinking, the law was something more than, as stated earlier, Bodin's command of the ruler, which was supported by prominent sixteenth-century Catholics such as Suárez, De Molina, and De Vitoria, as well as the royalists in England during Rutherford's time. This is further discussed in the Epilogue.

In all of this, Rutherford can be seen as one of the most informative Reformed authors (also including those within theologico-political federalism) of the sixteenth and seventeenth centuries, who wrote not only on the Covenant and the law, but also on the inextricable relationship between the two and where the individual and the collective were of relevance. This is also better understood when consulting the Westminster Confession of Faith, which is the most prominent and informative Reformed Confessions dealing with covenantal theology.³⁸⁶

In Rutherford's understanding of the law and the covenant one finds enduring value for constitutional, political and legal theory. More on this is presented in the Epilogue. Law to Rutherford enjoys priority in the ordering of society, which entails the furtherance and maintenance of justice, equity, the common good, self-preservation and peace in society. The furtherance, maintenance and protection of justice, equity, the common good, self-preservation and peace in society should not only be understood as that which pertains to the physical, but also as that which regards the religious or ideological aspect. Oppression towards religion is as important a matter to attend to as oppression towards life and physical well-being. Law according to Rutherford is to be understood as those basic foundational, moral or divine norms that are superior to the positive law and to the whims of the person of the ruler and to individualist needs in an absolutist manner.

³⁸⁶ See Eugene C. Case, "The Doctrine of the Covenant in the Westminster Standards", *Protestant Reformed Theological Journal*, Vol. 40, 1(2006), 73.

From this emanates the important idea that the State rests on no basis of mere law (understood in a positivistic, empiricist, material individualist, popular democratic, secular socialist, utilitarian, pragmatic, or absolutist rational and individualist sense), but on transcendent moral standards or natural law's foundations. The law has immutable and universal prescriptions that are embodied in republicanism and the natural law and these allow for the proper ordering of societies. This is elaborated upon in the Epilogue.

Neither the State nor the people were the first source of the moral law. The moral law exists before and beyond the State and the people. The law in this regard has a divine or natural law aspect to it, making it universal and immutable. This insight permeates the thought of Rutherford, and this is especially clear in *Lex, Rex*. To Rutherford, the idea of the Rule of Law took the form of a primary notion undergirding systems of rights and jural integrity, making this understanding of the Rule of Law much more than a convenient label for measuring the political performance of civil authorities. Although natural law has been used to support almost any ideology at different times, it was inspired by two ideas, namely that of a universal order governing all men, and of the inalienable rights of the individual.³⁸⁷ In this regard, Rutherford's legal and political thinking has substantially contributed towards, needless to say, also adding the importance not only of inalienable rights, but also of their corresponding duties.

Regarding the idea of the Covenant, contemporary political and legal philosophy has much to gain from an awareness of the idea of the centrality of the relational (contractarian) aspect in the ordering of society, where not only rights and corresponding duties are established, but that these rights and duties are inextricably connected to a normative dimension, which transcends political power in the sense of acting as authority for such political power. In this regard, the focus from a political and constitutional point of view was not primarily on the form of the ruling power, but on the *relational* aspect of such a power with the people and with higher norms. In this regard, political structures are always important, but ultimately, no matter how

³⁸⁷ Friedmann, *Legal Theory*, 96.

finely tuned the structures, they come to life (or fail) only by means of relationships that inform and shape them.³⁸⁸

The Enlightenment introduced a secular dimension to the covenant, which became more and more subservient towards reason and power as authority, which lead to many abuses in the centuries proceeding the seventeenth century. The relational aspect amongst individuals and groups in society, and between the people and government, as reflected in Rutherford's thought, presents a substantially different understanding, in which every individual does not surrender his or her sovereignty to the ruler, but allows the ruler to rule on condition that such rulership is in accordance with the moral or Divine law conditions of the covenant. Rutherford maintained a contractarian relationship between the ruler and society based on fundamental natural law norms that are superior and authoritative towards the positive law and its limitless bounds based solely on the whims of the ruler and of the majority.

The covenant, according to Rutherford, provided a link between society and a transcendental universal and eternal normative authority, in which the Rule of Law idea finds fertile ground. Rutherford's idea of the covenant comprises an agreement with a higher moral authority, in contrast to social contractarianism based on the secular phenomenon of mutual pledges, which excludes commitment towards a higher moral law,³⁸⁹ and is left to the arbitrary views of majoritarian decision-making or absolutist governance. This agreement involves a moral commitment beyond that demanded for mutual advantage.³⁹⁰ As stated earlier, this enduring contribution by Rutherford to constitutional, political and legal thought in the context of the superiority of the law and its covenantal implications is further elaborated upon in the Epilogue.

³⁸⁸ Daniel J. Elazar, "The Political Theory of Covenant: Biblical Origins and Modern Developments", *Publius*, Vol. 10, 4(1980), 10.

³⁸⁹ Elazar, *Covenant and Polity in Biblical Israel. Biblical Foundations and Jewish Expressions*, 31.

³⁹⁰ Daniel J. Elazar, "Covenant as the Basis of the Jewish Political Tradition", 21-51, in Daniel J. Elazar (ed.), *Kinship and Consent. The Jewish Political Tradition and Its Contemporary Uses*, (Washington D. C.: University Press of America, Inc., 1983), 22

CHAPTER 3

THE LAW, MAGISTRACY AND RELIGION

“... he [Samuel Rutherford] insisted upon a national conformity, imposed if necessary by the power of the civil magistrate, a thesis he strongly presented in his *Against the Pretended Liberty of Conscience*. If liberty of conscience meant that every man could do whatever he thought right in his own eyes, then Rutherford would have none of it.”¹

1. Introduction

This chapter investigates the ‘religious’ concerns in the constitutional thinking of Rutherford. The protection and maintenance of the true religion was an important facet of political and legal thought in sixteenth- and seventeenth-century Europe. Debates in the Westminster Assembly towards the end of the first half of the seventeenth century focused substantially on the form that church government should take which had implications for ideas on the role of the magistrate and of the law enforced by the civil authority. The status of religion that one finds today in many contemporary liberal and plural societies, namely its substantial exclusion from the public sphere, had its origins in especially seventeenth-century Christian thinking, in which names such as Grotius, Jean Bodin, John Locke and Thomas Hobbes, and religious denominations such as the Congregationalists and the Anabaptists played an influential role in developing. However, the views taken by Rutherford (and other prolific Reformed theorists such as Heinrich Bullinger, John Calvin and Johannes Althusius) postulated an inextricable relationship between the maintenance of religious truth, the role of the magistrate and the law. In this regard, the quest for a constitutional model had as much to do with religion as with civil matters.

Confronted with the abusive limitation on religious freedom by the Roman Catholic Church as well as the monarchy and the substantial accommodation of all denominations following on the Catholic Church’s loss of power, Rutherford set out to achieve the balance that was required between the extreme poles of absolute restriction and unlimited liberty of religion. As stated earlier, this implicated

¹ Kingsley G. Rendell, *Samuel Rutherford. A New Biography of the Man & His Ministry*, (Fearn, Ross-shire, Scotland: Christian Focus Publications, 2003), 136.

constitutional and republican thinking. Rutherford, referring to the Papists' domination over the consciences of the people states, "... this tyranny over conscience we disclaime; yet for that ought not the other extremity of wilde toleration be imbraced."² Rutherford also lived in a time in which many works came forth in support of unrestrictive accommodation of liberty of conscience and toleration pertaining to belief, and not so many works in opposition to this. For example, Rutherford's contemporary, George Gillespie was confronted with the following question during the years of the Westminster Assembly, "But tell me now your opinion of another matter and that is concerning liberty of conscience, and toleration of heretics and sectaries, for which there are so many books written of late, and so few against it."³

Then there were the developments in sixteenth-century Europe that supported both a diluted sense of doctrinal protection in the public sphere as well as staunch efforts to rid religion from the responsibility of the ruler. Bodin argued largely for the separation of politics from religion to qualify subversion to the sovereign ruler on grounds of practical necessity.⁴ Accompanying Bodin's support for the separation of politics and religion was his sceptical approach towards a universal religious truth. Scepticism often supported principles of toleration toward religious differences in the early modern world, and a wide range of thinkers (including Bodin) reasoned that the recognition of human fallibility in matters of religion must include a programme of tolerance and respect for dissenting points of view.⁵ David Stevenson observes that, "there was no political writer cited in England more often or more than Jean Bodin in

² Rutherford, "To the Godly Reader", (In the Preface to *A Free Disputation Against Pretended Liberty of Conscience*, [Printed by R.I. for Andrew Crook, London, 1649]) Rutherford also states, "Hence conscience being deified, all rebuking, exhorting, counter-arguing, yea all the Ministry of the Gospel must be laid aside; no man must judge brother Idolater, or brother Familist, or Saints to be Socinians, or men of corrupt minds, perverse disputers, vain-janglers, wresters, rackers, or torturers of Scripture, whose words eat as a cancer, who subvert whole houses, who speak the visions of their own head ...", *ibid.*

³ Chris Coldwell and Matthew Winzer, "The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis, Part 1: Chronology", *The Confessional Presbyterian*, Vol. 5, (2009), 18. This unrestrictive support regarding belief was supported by the Donatists, the Socinians, Arminians, and Anabaptists, *ibid.*, 19.

⁴ David Stevenson, "The 'Letter on Sovereign Power' and the influence of Jean Bodin on Political Thought in Scotland", *The Scottish Historical Review*, Vol. LXI, 171(1982), 31-32. Although according to Bodin, God was not entirely banished from politics, *ibid.*, 32.

⁵ Cary J. Nederman, "Toleration, Skepticism, and the 'Clash of Ideas': Principles of Liberty in the Writings of John of Salisbury", 53-70, in *Beyond the Persecuting Society. Religious Toleration Before the Enlightenment*, John Christian Laursen and Cary J. Nederman (eds.), (Philadelphia: University of Pennsylvania Press, 1998), 53. Also see Attila K. Molnár, "The Construction of the Notion of Religion in Early Modern Europe", *Method & Theory in the Study of Religion*, Vol. 14, 1(2002), 55-56.

1600-42.”⁶ Grotius also played an influential role in promoting a diluted central religious doctrine that needed to be upheld in order to accommodate different Christian religious doctrines. One can say that the views by Bodin and Grotius in this regard were to a large extent lead by pragmatic ends aimed at stifling religious conflict amongst groups in society. This does not mean that contrary views on the matter such as those taken by Rutherford (and many other prolific Reformed theorists) did not aspire towards the limitation of conflict in this regard.

Rutherford’s contemporary, John Milton expressed scepticism towards the idea of finding and maintaining the true religion as he tended to concentrate mainly on the importance of man’s will and his reason, which has not become imperfect as a result of the Fall.⁷ Milton insisted, “No visible church, then, let alone any magistrate, has the right to impose its own interpretations upon the consciences of men as matters of legal obligation, thus demanding implicit faith.”⁸ Not only did Milton postulate the infallibility of man’s reason, but he also added that man’s personal religion depends largely on himself, to enter into a covenant with God.⁹ The prominent member of the sixteenth- and seventeenth-century Spanish School, Francisco Suárez,¹⁰ already argued prior to Milton, Grotius, Bodin and the efforts by the Independents, the Congregationalists and the Anabaptists that the state is required to allow humans the freedom of working out their salvation, “the care of which ultimately belongs to individuals and their religious communities”.¹¹

⁶ Stevenson, “The ‘Letter on sovereign power’ and the influence of Jean Bodin on Political Thought in Scotland”, 32.

⁷ See Brian Horne, “Human Sin and Human Freedom: A Reading of Milton’s *Areopagitica*”, 13-23, in *God and Freedom*, Colin E. Gunton, (ed.), (Edinburgh: T & T Clark, 1995), 16-17.

⁸ Edward G. Andrew, *Conscience and Its Critics. Protestant Conscience, Enlightenment Reason, and Modern Subjectivity*, (Toronto: University of Toronto Press, 2001), 54. According to Milton, “Political and moral matters were to be disputed and proved on the basis of Scripture ...”, *ibid.*, 56. However, the scriptures are merely external authority, “The pre-eminent and supreme authority, however, is the authority of the Spirit, which is internal, and the individual possession of each man ... each believer is entitled to interpret the scriptures ... for himself. He was the Spirit, who guides truth, and he has the mind of Christ. Indeed, no one else can usefully interpret them for him, unless that person’s interpretation coincides with the one he makes for himself and his own conscience”, *ibid.*, 56. Also see *ibid.*, 57.

⁹ See Andries Raath and Shaun de Freitas, “Theologically United and Divided: The Political Covenantalism of Samuel Rutherford and John Milton”, *The Westminster Theological Journal*, Vol., 67, 2(2005), 319.

¹⁰ *Lex, Rex* confirms that Rutherford was well aware of the thought of Suárez.

¹¹ Jerome C. Foss, “Francisco Suárez and the Religious Basis for Toleration”, *Perspectives on Political Science*, Vol. 42, 2(2013), 100.

The Reformation introduced the constitutional and republican quest for liberty for the individual believer in the Christian Republic. The individual now had direct access to God and could partake in political and religious activities under the guidance of the covenantal conditions. The republican elements such as the covenant, the authority of the law and an environment where everyone could participate actively in political activities, and duly be represented were as relevant for the well-being of religious matters as it was for physical and material matters. The form and channelling of political power and the content of the law were also aimed at the maintenance and protection of the true religion. This was especially true for late sixteenth- and early seventeenth-century Scotland.

The end of government, understood as the attainment of the ‘safety and preservation of the community’, had as much to do with religion as with other matters. The ‘safety and preservation’ of society also had soteriological implications. The *Westminster Confession of Faith* (WCF) claims for the civil magistrate the right and duty to protect and to support the Christian Church legally.¹² Theories on politics and the law were necessary in order to assist the weakened (sinful) nature of man not only in matters not dealing with religion, but also in religious matters. Religious toleration, and how it was to be understood in the Covenanted Christian Commonwealth, also formed part of much debate during Rutherford’s time. Rutherford contributed to thought in this regard.

Bearing the above in mind, this chapter argues that thinking on constitutionalism and religious truth was interrelated with each other in the context of seventeenth-century Europe and that Rutherford understood political models and legal norms to not only counter the physical transgressions emanating from human depravity but also that of spiritual disorder. As is elaborated upon in the Epilogue, Rutherford’s constitutionalist thinking included the fight for the attainment of religious rights and freedoms of those in Scotland within a climate of authoritarian abuses taking place from the Roman Catholic Church and the monarchy. Consequently, this chapter also looks at the importance of context in understanding the religious plight of seventeenth-century Britain, especially of Scotland. The Reformation primarily

¹² David Estrada, “Samuel Rutherford as a Presbyterian Theologian and Political Thinker. The Question of Religious Tolerance”, *Christianity & Society*, Vol. 13, 4(2003), 11. Also see Robert Letham, *The Westminster Assembly. Reading its Theology in its Historical Context*, Phillipsburg, (New Jersey: P& R Publishing, 2009), 313.

entailed the establishment of the true religion¹³ (during a time most conducive towards the advancement of religion). Rutherford addressed himself to readers in a Christian Commonwealth whose consciences he accepted would be informed by Christian doctrine, norms and principles. Therefore, the Spirit's role in animating the conscience of a people was a subject Rutherford most likely believed did not need to be emphasised.¹⁴ Rutherford's constitutional model and its consequent political form and legal substance cannot be separated from the religious aspect. Liberty, for both the individual and the community, has as much to do with religion as with the material and physical welfare of the individual and the community. Sensitivity and insight as to the weakened (sinful) nature of man, having arisen from the Fall, served as an important reason for seeking constitutional and consequent political and legal efforts, not only at the attainment of civil justice, but also the attainment of religious purity.

There is the view that the legacy of Luther in the form of the Lutheran Church and Calvin's Geneva instituted civil rule just as repressive of individual differences as the old Roman orthodoxy. Intolerance was directed at Roman Catholics, to other reformers who differed in views, and to non-Christians who were seen as being entirely outside the bounds of tolerance.¹⁵ Placing the Scottish divines in a negative light it is stated that these divines wrote treatises against claims for freedom of conscience, and the Scottish divines understood these claims to be detrimental to the moral and spiritual identity of a covenanting society, and referred to Old Testament precedents for compulsion and discipline in matters of religion. In this regard it is stated that, "by doing so, they maintained the old Augustinian tradition of compelling

¹³ J. P. Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, (PhD dissertation, University of Chicago, 1986), 63. Also see S. A. Burrell, "The Apocalyptic Vision of the Early Covenanters", *The Scottish Historical Review*, Vol. 43, No. 135 Part 1, (1964), 5. The Reformation was too important an event to have occurred in a historical vacuum – "Surely, God did not intend that it should transpire and that no significant consequence should flow from it", *ibid.*, 5. The Spirit had already taken effect, and now it was for man and society to contribute.

¹⁴ John L. Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, (A thesis submitted to the Faculty of Westminster Theological Seminary in partial fulfilment of the requirements for the Degree Doctor of Philosophy, 1995), 176.

¹⁵ Harold Coward and John McLaren, "Introduction", 1-12, in *Religious Conscience, the State, and the Law. Historical Contexts and Contemporary Significance*, John McLaren and Harold Coward (eds.), (Albany, N.Y.: State University of New York Press, 1999), 2.

them to enter”.¹⁶ Rutherford was targeted by tolerationists who were in opposition to the idea of the covenanted Christian community that aspired to the uniformity of religion and the important role of the magistrate in the protection and maintenance of this uniformity. One such critic is John Coffey who, some years ago, wrote a biography on the life and works of Rutherford (with special emphasis on Rutherford’s political thought). Coffey’s views on toleration of beliefs and on the relationship between church and state take a similar line of thinking as those postulated by Roger Williams, John Milton and John Locke. This makes it important to address the criticisms by Coffey regarding Rutherford’s views on the protection and maintenance of religion against the background of the office of the ruler. In this regard, Coffey also fails to see the constitutional relevance (both for seventeenth-century Europe and for contemporary liberal and democratic societies) of Rutherford’s political and legal thinking.

2. The protection of the true religion and context

Puritan individualism was of the view that although the conscience had its rights, it was not protected against ‘brotherly admonition’. They felt themselves to be living in an age of chaos and endeavoured to train the conscience to be permanently on guard against sin.¹⁷ Puritanism therefore can be viewed as a response of particular persons to particular experiences of confusion and change. Consequently, Calvinism gave meaning to the experience of disorder and provided a solution, a return to certainty.¹⁸

During the seventeenth century, the twofold English revolution was carried out at a time when the fear of God was still a power that ruled nations, and by men whose sole object was to realise a Christian life amongst the people and in the government.¹⁹ In

¹⁶ David Fergusson *Church, State and Civil Society*, (Cambridge: Cambridge University Press, 2004), 73. In this regard, it is interesting to note that in early American history, the anti-toleration sentiment was strongly supported in the seventeenth century. Cornelia Dayton, referring to the Founders’ New England, states that amidst all the religious ferment of the seventeenth century, few joined with Roger Williams in understanding religious liberty as a vision of many faiths coexisting in peaceful harmony. Instead, each group saw itself as the only true vanguard of the revolution which was begun by Luther and Calvin, Cornelia Hughes Dayton, “Excommunicating the Governor’s Wife: Religious Dissent in the Puritan Colonies before the Era of Rights Consciousness”, 29-45, in *Religious Conscience, the State, and the Law. Historical Contexts and Contemporary Significance*, John McLaren and Harold Coward (eds.), (Albany, N. Y.: State University of New York Press, 1999), 30.

¹⁷ Michael Walzer, “Puritanism as a Revolutionary Ideology”, *History and Theory*, Vol. 3, 1(1963), 64.

¹⁸ Walzer, “Puritanism as a Revolutionary Ideology”, 83.

¹⁹ Henry W. J. Thiersch, *On Christian Commonwealth*, (Edinburgh: T.&T. Clark, 1877), 32.

the words of Samuel Rutherford, “Nor dare wee conceale our feare of the ... judgements of God, and his highest displeasure for the breach of the Covenant of *God* in this Land”.²⁰ The idea of the Covenant was inextricably connected to the protection and maintenance of the true religion. Alexander Henderson, in a sermon to the Lords and Commons in Parliament in 1644 stated, “And because nothing doth the Lord at this time more require then the Reformation of Religion, which is long and earnestly expected at your hands by all the godly”.²¹ For seventeenth-century Scotland the main object of attack by the king was religion, the king wanting to overthrow the religious liberties of the vast majority, and to place a religious despotism in the hands of a very small minority.²² S. A. Burrell, against the background of the Scottish uprising against Charles I, states:

Now, there is no denying ... that this upheaval was the result of tensions not all of which were religious in nature. The Scottish nobility, gentry, and merchants had specific grievances, both economic and political, against the king. On the other hand, neither can

²⁰ Samuel Rutherford, “A brotherly and free Epistle to the patrons and friends of pretended Liberty of Conscience” in *A Survey of the Spiritual Antichrist*, (Printed by F. D. & R. I. for Andrew Crooke, London, 1648). Rutherford’s, *A Free Disputation Against Pretended Liberty of Conscience*, reflects the dominant Christian spirit existing on the British continent at the time, where Rutherford writes under the heading, ‘The pretended Liberty of Conscience is against the National League and Covenant, and the Ordinance of the Parliament of England by Oath for a Reformation of Religion’, the following, “Where the Houses mention the great duty lying on them, to settle matters concerning religion, and the worship of Almighty God, and have continually before their eyes the Covenant, which they have so solemnly taken, and in pursuance of the ends of the covenant – have removed the book of Common-prayer with all its unnecessary and burdensom ceremonies, and have established the directory in the room thereof, and have abolished the Prelatical hierarchy by ArchBishops Bishops, and instead thereof have laid the foundation of a Presbyterian Government in every Congregation, with subordination to Classical, Provincial and National Assemblies, and of them all to the Parliament. Both Houses of Parliament, and the Parliament of Scotland, agree that the King’s Majesty take, or at least approve and ratify the Covenant ...”, Samuel Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 326-327 (modern version). At *ibid.*, 357 (modern version) a similar reflection is present in Rutherford’s statement, “Then if the third part of Scotland and England should turn Apostates from the religion once sworn, after they had bound themselves in Covenant, the question remaineth, what should the State and Parliament do in that case?”

²¹ *A sermon preached before the right honourable the Lords and Commons assembled in Parliament at Margarets Church in Westminster*, 18 July, (Printed for Robert Bostock, London, 1644).

²² William Hetherington, *History of the Westminster Assembly of Divines*, (Edmonton, AB Canada: Still Waters Revival Books, Reprint edition 1991, from the third edition 1856), 107. Also see *ibid.*, 287. Other reasons were that the non-religious ambitions of the Scots in England were that, First, having destroyed royal power in their state as well as in their church, they wanted to do the same in England. Not until the English Parliament had been put in a position to prevent the King using English resources against Scotland would their revolution in Scotland be safe. Secondly, to the personal union of the crowns the Covenanters wished to add permanent links between the Parliaments of the two kingdoms, through joint meetings of English and Scottish Parliamentary commissioners. This loose federal structure would be used to prevent quarrels between the kingdoms (and especially to prevent the King trying to use one against the other), and to ensure that Scotland had an equal say with England in matters of joint concern – foreign policy, commercial policy and the making of war and peace, David Stevenson, “Professor Trevor-Roper and the Scottish Revolution”, *History Today*, (February, 1980), 39.

it be denied that the form taken by the rebellion, the language of the revolutionary manifestoes, and the symbolic conception expressed in the National Covenant of 1638, all indicate how comprehensive the cause of religion was. Indeed, it was the one cause that gave unity and popular strength to the movement.²³

Dominated by the Roman Catholic Church, the minorities produced by the Reformation sought to free themselves from Caesaro-papist control and to postulate a theory of the state, which protected their own interests and allowed the state to stand free from the control of Rome.²⁴ Rutherford's *Lex, Rex* undoubtedly contributed to this cause.²⁵ Rutherford, in a letter to "the persecuted Church in Ireland", clearly expresses his concern regarding the imposition in 1639 of the Black Oath that all Scottish residents in Ulster above the age of sixteen were required to take. Many who refused to take this oath were harshly punished.²⁶ In December 1636, Charles I

²³ S. A. Burrell, "The Covenant Idea as a Revolutionary Symbol: Scotland, 1596-1637", *Church History*, Vol. 27, 4(1958), 338. William Hetherington states, "The people of Scotland loved their Church devotedly, not only on account of its purity of doctrine and scriptural simplicity of form, but also because by its means alone had they acquired a partial release from that feudal thralldom in which they had previously been held by their haughty and oppressive nobles. And they were compelled to see that their beloved Church would never be safe from the aggression of Prelacy so long as the prelatic form of Church government prevailed in England. On the other hand, the oppressive, persecuting, and despotic conduct of Prelacy, in its treatment of the Puritans, and in the aid which it so willingly lent to the sovereign in his invasions of civil liberty, had at length aroused the strong and free spirit of England, which determined to shake off the prelatic yoke, and to make such alterations as should render its future re-imposition impossible. Such a concurrence of sentiment and feeling between the two nations held out the prospect that at least an approach to uniformity of religion might now be obtained, such as would form the only sure basis of a thorough and permanent national peace; and that, too, not by one of the two dictating to the other, but in the only way by which real uniformity can ever be effected, — by mutual consultation and consent", Hetherington, *History of the Westminster Assembly of Divines*, 322. Hetherington adds that, "Even at an earlier period, in the very commencement of the negotiations between the English Parliament and the Scottish Church and people, the latter had strongly advocated a uniformity of religious worship in the three kingdoms, and at the same time had as strongly disclaimed the idea of presuming to dictate to England in so grave and important a matter. Yet this accusation is constantly urged against the Church of Scotland by her adversaries, in ignorance, it may be hoped, of the real facts of the case ...", *ibid.*, 94-95. Can it therefore truly be said that, "... the Covenanters were mistaken in trying to persuade parliament to impose true religion on the whole of Britain", John Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, (Cambridge: Cambridge University Press, 1997), 10.

²⁴ Richard Flinn, "Samuel Rutherford and Puritan Political Theory", *Journal of Christian Reconstruction*, Vol. 5, (1978-9), 51.

²⁵ Kingsley Rendell refers to the materialisation of an Episcopal form of church government in Scotland from 1610, hereby giving power to the bishops albeit the Presbyteries still remaining in name. Such were the times in which Rutherford found himself and Rutherford could not resist this challenge, Rendell, *Samuel Rutherford. A New Biography of the Man and His Ministry*, 16. Also see *ibid.*, 59-60.

²⁶ Andrew Bonar, *Letters of Samuel Rutherford* (with a sketch of his life and biographical notices of his correspondents), (Portage Publications, 2006). Letter CCLXXXVIII to the persecuted Church in Ireland, Anwoth, 1639 (Reference here to Ried's *History of the Presbyterian Church in Ireland*). The *Black Oath* read as follows, "I, ———, do faithfully swear, profess, and promise, that I will honour and obey my sovereign Lord, King Charles, and will bear faith and true allegiance unto him, and defend and maintain his royal power and authority; and that I will not bear arms, or do any rebellious or hostile act against his Majesty, King Charles, or protest against any of his royal commands, but

ordered that *The Scottish Book of Common Prayer* be purchased and used throughout Scotland. This book, which had been driven by the Scottish and English bishops (especially by Archbishop Laud), was an attempt to bring about increased uniformity in church services in England and Scotland, but at the expense of the Reformed church in Scotland.²⁷ When the supplications by the many ministers to the king received no response from the latter, the National Covenant was established, which was subscribed throughout Scotland. A revolution was in the making and, as J. H. S. Burleigh commented: “*The Book of Common Prayer* was the spark that kindled a consuming fire.”²⁸ This National Covenant was essentially an appeal to law and constitutionality.²⁹

During the Reformation, sixteenth- and seventeenth-century Europe contributed towards an explicit reconsideration of freedom in the realm of belief, where clarity regarding liberty and its relationship to the conscience became both urgent and a challenge so serious by nature, that it literally became a matter of ideological survival. George Bancroft is of the view that “the fanatic for Calvinism was a fanatic for

submit myself in all due obedience thereunto; and that I will not enter into any covenant, oath, or band of mutual defence and assistance against any person whatsoever by force, without his Majesty’s sovereign and legal authority. And I do renounce and abjure all covenants, oaths, and bands whatsoever, contrary to what I have herein sworn, professed, and promised. So help me God, in Jesus Christ”, *ibid.*

²⁷ F. N. McCoy, *Robert Baillie and the Second Scots Reformation*, (Berkeley and Los Angeles: University of California Press, 1974), 11.

²⁸ McCoy, *Robert Baillie and the Second Scots Reformation*, 11-12.

²⁹ McCoy, *Robert Baillie and the Second Scots Reformation*, 41. Rutherford also states, “The fifth and last opinion is of those who think, if the king command papists and prelates to rise against the parliament and our brethren in England in wars, that we are obliged in conscience, and by our oath and covenant, to help our native prince against them, - to which opinion, with hands and feet I should accord, if our king’s cause were just and lawful; but from this it followeth, that we must thus far judge of the cause, as concerneth our consciences, in the matter of our necessary duty, leaving the judicial cognizance to the honourable parliament of England. But because I cannot return to all these opinions particularly, I see no reason but the civil law of a kingdom doth oblige any citizen to help an innocent man against a murdering robber, and that he may be judicially accused as a murderer, who faileth in his duty ... We are obliged, by many bands, to expose our lives, goods, children, & c., in this cause of religion and of the unjust oppression of enemies, for the safety and defence of our dear brethren and true religion in England ...”, Samuel Rutherford, *Lex, Rex, (or The Law and the Prince)*, (Printed for John Field, London, 1644, Reprint, Harrisonburg, Virginia: Sprinkle Publications, 1982), 188(1). Seventeenth-century English Puritans and Scottish Presbyterians can hardly be blamed for suspecting a Rome-ward aim in Charles’ insistency upon prelacy, the use of the service book and its associated ceremonies, Rendell, *Samuel Rutherford. A New Biography of the Man & His Ministry*, 134. See *ibid.*, 135, where Rendell comments that Rutherford’s language lacks tolerance and grace, but that he lived in an age of intolerance and religious strife. Also see *ibid.*, 50-51. For Rutherford’s concern regarding the “Booke of Common Prayer and Administration of the Sacraments and other parts of Divine Service, for the use of the Church of Scotland. Edinburgh, 1637”, see his letter to John Stuart (Aberdeen, 1637), in Bonar, *Letters of Samuel Rutherford*.

liberty”,³⁰ which implies that liberty is not only an irreligiously connoted political concept, but is also most relevant to a Christian society.³¹ The first half of the seventeenth century in particular reached a high in the history of Western theories pertaining to conscience, where significant treatises on conscience were written by William Perkins, William Ames, William Chillingworth, Robert Sanderson, and Jeremy Taylor.³² Rutherford also should be added to this list.

The Reformed idea of liberty within limits, rather than of liberty as an unrestrained good in itself, applied to political life as well as to all other areas of life.³³ Liberty in Reformed thinking was inextricably connected to religious liberty. Whilst Catholic thought had emphasised the indispensable role of the church as an intermediary between God and humans, Protestants were taught to exclude ‘the middle man’ and to encourage a more direct relation between the individual and God. This can be equated with the Republican understanding of the liberty of the individual (and not only the priestly office) as being allowed to, also in a religious sense, freely participate in society. However, for Protestants the church (visible) remained important as a community of believers and as a vehicle through which the word of God is preached.³⁴ This, however, did not exclude the civil authorities from religious functions and responsibilities. Theodore Beza (1519-1605) states:

³⁰ David W. Hall, *The Genevan Reformation and the American Founding*, (Lanham, Maryland: Lexington Books, 2003), ix. A good example so as to illustrate the close relationship between ‘liberty’ and ‘religion’ in especially sixteenth and seventeenth century Europe, as presented in formal documentation, is *England and Scotlands Covenant With their God* (1645, Printed for Edw. Husband, Printer to the Honorable House of Commons). In this document one finds references to phrases such as, “Whereas the Lords and Commons now assembled in Parliament have declared, That there hath been, and now is a Popish and Traiterous Plot for the subversion of the true Protestant Reformed Religion, and the Liberty of the Subject ...”, 8-9; “That the Forces Raised by the two Houses of parliament are raised and continued ... for the Defence of the true Protestant Religion and Liberties of the Subjects, against the Forces raised by the King ...”, 11; “We shall ... endeavour with our Estates and Lives, mutually to preserve the ... Liberties of the Kingdoms ... in the preservation and defence of the true Religion and Liberties of the Kingdoms ...”, 18; “... in the preservation and defence of the true Religion and Liberties of the Kingdoms”, 36; and “And what had become of the Religion, Laws, and Liberties, of our Sister Nation of *Scotland* ...”, 37-38. This can also be interpreted so as to imply the *sine quo non* of ‘the true religion’ for ‘liberty’ as the defence and preservation of the Protestant Religion in many instances precedes references to ‘liberty’.

³¹ Hall, *The Genevan Reformation and the American Founding*, 7.

³² Andrew, *Conscience and Its Critics. Protestant Conscience, Enlightenment Reason, and Modern Subjectivity*, 28.

³³ Peter J. Herz, *Covenant to Constitutionalism: Rule of Law as a Theological Ideal in Reformed Scotland*, (A dissertation submitted in partial fulfilment of the requirements for the Doctor of Philosophy degree, Department of Political Science in the Graduate School, Southern Illinois University at Carbondale, 2001), 174.

³⁴ Steven D. Smith, *The Disenchantment of Secular Discourse*, (Cambridge: Massachusetts: Harvard University Press, 2010), 122-123.

Since the purpose of all well-ordered polities is not simply peace and quiet in this life, as some heathen philosophers have imagined, but the glory of God, towards which the whole present life of men should be directed, it therefore follows that those who are set over nations, ought to bring to bear all their zeal and all the faculties they have received from God to this end that the pure worship of God upon which His glory depends should in the highest degree be maintained and increased among the people over whom they hold sway³⁵ ... even if we were to concede that the ultimate purpose of polities was the undisturbed preservation of this life, yet we should have to admit that this was the sole reason for obtaining and preserving it, (namely) if God, both the author and the director of our life, be piously and rightly worshipped.³⁶

Rutherford set out to balance, on the one hand, the freedom of the believer's liberty to read and understand Scripture whilst, on the other hand, the important role of external regulation (from both church and government) of the true religion. In this regard, his ideas on constitutionalism and consequently of republicanism are of much value. Calvin, Beza and the Westminster Confession "transmitted a durable tradition of state-sheltered, if not supported, religion", and the Scottish and English Puritans urged governors to reform religion and to sponsor Synods towards the attainment of such an end. This understanding extended into the early colonial American charters.³⁷

The religious and consequently the political and legal climate during the German, Swiss, French, English and Scottish Reformations differed considerably from contemporary pluralistic Western societies. Christianity formed an encompassing ideology, albeit split into many versions, of which Protestantism and Catholicism were important categories. The events of the 1640s introduced a fascinating new element in how Reformed theorists viewed the functions and responsibilities of the magistrate. The magisterial reformers had relied upon an alliance between church and state in general and the support of the godly magistrate in particular when pursuing church reforms.³⁸ Part of the Protestant cause rested on the challenge to address the accommodation of a plethora of denominational views on the relationship between church and state, more specifically and consequently implicating issues such as the parameters of the liberty of conscience, freedom and tolerance. Solutions to these

³⁵ Hall, *The Genevan Reformation and the American Founding*, 180.

³⁶ Hall, *The Genevan Reformation and the American Founding*, 180.

³⁷ Hall, *The Genevan Reformation and the American Founding*, 388.

³⁸ James K. Cullerson, 'For Reformation and Uniformity': *George Gillespie (1613-1648) and the Scottish Covenanter Revolution*, (Unpublished thesis for the degree of Doctor of Philosophy, University of North Texas, 2003), 176.

issues were not easy; the same as man's contemporary endeavour at finding a workable equation towards accommodation within a pluralist society. Freedom and tolerance were not ends in themselves, but encapsulated in Scriptural and moral ends. Rutherford's limitation of the conscience is the result of factors such as the conditions of the covenant, sin, Biblical instruction³⁹ and the seduction of souls by heretics.⁴⁰ This line of thinking was neither new nor strange pertaining to the Calvinist understanding and to the religious context of early seventeenth-century Britain.

Rutherford, like many other Reformers, endeavoured to find a workable constitutional model aimed towards the protection and maintenance of the true religion in the Christian Republic. Implicated in this was the protection and maintenance of man's religious being, which had a soteriological purpose and had to be understood from a Scriptural (and logical) point of view. Presbyterianism's quest to reform polity and worship were driven by a deep desire to save souls. They sought an all-inclusive national church, with uniformity and meaningful spiritual discipline in all spheres.⁴¹ Man's belief in the true religion (faith), which was in accordance also with the first Table of the Decalogue, formed part of the covenanted relationship between God and man and had no less relevance and commitment to constitutional, political and legal theory than did the magistrate's obligation to sanction violations of the second Table. Rutherford states:

³⁹ See Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 313-314 (modern version): Here many Scriptural references are provided in confirmation of the limitation to be ascribed to toleration.

⁴⁰ Rutherford states, "... Nor must the Church and Angels of the Church of Thyatira, Ephesus, or Pergamos suffer Jezebel to seduce, nor ravening wolves to devour the flock, nor their word to eat as a Canker ...", *A Free Disputation Against Pretended Liberty of Conscience*, 60 (modern version). The magistrate may punish acts of false worship in so far as they are destructive to the souls of men", *ibid.*, 91-92, 117-118 and 412. "Heretics are grievous wolves not sparing the flock", *ibid.*, 145, 149, 319, 340, 371 and 413; and "lead souls captive" and "eat the souls of many as Canker" and "make merchandise of men ... and buy souls", *ibid.*, 146. "God allows no such liberty so as to prophesy falsely and to destroy souls", *ibid.*, 162 – also see *ibid.*, 196, 198, 254, 273-274, 320, 362-363 and 365. "And as there were false prophets among the people then, so now, who with fair words make merchandise of men's souls", *ibid.*, 198; "the seducer", *ibid.*, 214 (also see *ibid.*, 218, 220, 231, 232, 236, 237, 241 and 242). "... God would have his church neither enriched by their goods, nor to make covenants, and marriages with them, or to live in one society with them, nor to see their groves, lest they should be ensnared to follow their religion and strange gods", *ibid.*, 243, and "... tyrannize over the conscience of the Godly, and undo religion ...", *ibid.*, 458.

⁴¹ See Julie Fann, *Stories of God and Gall: Presbyterian Polemic during the Conformity Wars of Mid-Seventeenth-Century England and Scotland*, (A dissertation submitted to the faculty of the University of North Carolina at Chapel Hill in partial fulfilment of the requirements for the degree of Doctorate of Philosophy in the Department of English and Comparative Literature. Chapel Hill 2012).

Nor hath the Lord enstamped his divine image of making just Laws upon any nomethetic power of the most free and Independent Kingdom on earth, so as the breach of lawful promises, Covenants, Contracts, which are against the Law of God, of nature, of nations, should, or can be the subject matter of any nomethetic power, for God gives no power to make unjust decrees. The pretended liberty is against the Articles, matter, and ends of the Covenant, a Parliamentary power interposed for the not punishing of deformity as touching many Religions, must destroy the commanded nearest uniformity of the one only true Religion.⁴²

The Westminster divines' attack on 'blind obedience' and their solicitude for liberty of conscience as well as unlimited and unchecked reason, should not blind the contemporary reader to a real difference between the seventeenth and twentieth centuries in the matter of liberty. The freedom of conscience of which Rutherford and the Westminster divines spoke was not the modern liberal's openness to all variations of religious or irreligious opinion. God's lordship over the conscience was understood as meaning that the conscience of the Christian was bound to accept whatsoever the Holy Spirit revealed in Scripture; similarly, reject that which was repugnant to divine revelation.⁴³ Rutherford states, "Because the Word of God must be the rule of Conscience, and Conscience is a servant, and a under-Judge only, not a lord, nor an Absolute and independent Sovereign, whose voice is a Law ... Conscience is ruled by Scripture ..."⁴⁴

There was not only the tyranny of the physical but also the serious threat against tyranny over the mind. According to Rutherford, 'self-preservation' is not just physical, but also spiritual; therefore, tyranny over the mind should receive added concern.⁴⁵ The magistrate's natural law responsibility of providing for the safety of the community had everything to do with the preservation of the religious aspect.⁴⁶

⁴² Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 267 (original version).

⁴³ Herz, *Covenant to Constitutionalism: Rule of Law as a Theological Ideal in Reformed Scotland*, 174.

⁴⁴ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 10 (original version).

⁴⁵ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 220. Marshall confirms that according to Rutherford, the old Roman maxim, *salus populi, suprema lex*, implies that, "God is the author of civil laws and government, and his intention is therein the external peace, and quiet life, and *godliness* of his church and people ...", *ibid.*, 48 (Author's emphasis).

⁴⁶ According to Rutherford, natural law was similar to reason regarding the precepts of the first Table. It was in line with reason to believe that blasphemy was to be opposed by the civil ruler. Blasphemy was, according to the Rutherford, a violation of the law of nature, Rutherford's *A Free Disputation Against Pretended Liberty of Conscience* cited in Crawford Gribben, "Samuel Rutherford and Liberty of Conscience", *Westminster Theological Journal*, Vol. 71, (2009), 370. From this can be deduced that the wrongness of blasphemy was as reasoned as can be. The same can be said of the idea of self-

By ‘safety of the people’, Rutherford includes the spiritual well-being of the people.⁴⁷

In the words of David Field:

The good and safety of the people was to be secured by preserving their liberty and natural equality and by restraining and punishing the evildoer, but, above all, it was secured by protecting and supporting the church in her calling to promote the true worship of the true God. If a civil government – against the liberty and natural equality of the people – imposed what was diametrically opposite to that people’s good and safety, peace and salvation, then that civil government had altogether missed the end of government.⁴⁸

This threat against the maintenance of the true religion did not only arise from Catholicism before and during sixteenth-century Europe,⁴⁹ but also from other

preservation and self-defence. Also, the law of nature teaches that there is a God, that He created and governs all things, that there is but one God, infinitely good, most just, rewarding those who do good, and that one must love your parents, obey your superiors, and that one ought not to injure anyone unjustifiably. These are all norms that ascribe towards being in line with reason. Natural law is God’s law and it is known in man’s reason, Omri K. Webb, *The Political Thought of Samuel Rutherford*, (A dissertation submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the Department of Religion in the Graduate School of Arts and Sciences, Duke University, 1963), 91.

⁴⁷ Webb, *The Political Thought of Samuel Rutherford*, 42.

⁴⁸ David Field, “‘Put not your Trust in Princes’ . Samuel Rutherford, the four causes and the limitation of civil government”, 83-151, in *Tales of Two Cities. Christianity and Politics*, Stephen Clark (ed.), (Leicester, England: Inter-Varsity Press, 2005), 96. Also see *ibid.*, 95.

⁴⁹ According to Rutherford, “Now it is clear, a worshipping of bread and the mass commanded, and against law obtruded upon Scotland, by influence of the counsel of known papists, is to us, and in itself, as abominable as the worshipping of Dagon or the Sidonian gods; and when the kingdom of Scotland did but convene, supplicate, and protest against that obtruded idolatry, they were first declared rebels by the king, and then an army raised against them by prelates and malignants, inspired with the spirit of antichrist, to destroy the whole land, if they should not submit, soul and conscience, to that wicked service”, *Lex, Rex*, 182(2) and, “The king of Britain was not mad when he declared the Scots traitors (because they resisted the service of the mass) and raised an army of prelatical cut-throats to destroy them ...”, *ibid.*, 37(1). John Marshall states, “The king sought to impose the prayer book and ‘the idolatry of the mass’ upon the people of Scotland. The people resorted to supplication. The king refused their petition and continued his efforts to force these elements on the people. When the people refused to receive them, the king invaded the country. The next step would have been to flee, but flight was physically impossible. Even though a colony of Englishmen went to New England, it is patently ridiculous to think an entire nation could flee to distant shores”, Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 128. Also see *ibid.*, 214. Robert Letham places the threats in a nutshell by referring to the development of Arminianism, Antinomianism and the Laudian attempt to wrest power in the interests of strict conformity to the Prayer Book and the canons of the Church (which was fresh from the past), Letham, *The Westminster Assembly. Reading its Theology in Historical Context*, 61. Also see Paul J. Smith, *The Debates on Church Government at the Westminster Assembly of Divines, 1643-1646*, (Submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy, 1975), 52, 61-62, 87 and 93; and T Mockett, *A View of the League and Covenant, for Reformation, defence of Religion, the Honour and Happynesse of the King, and the Peace, Safety and Union of the three Kingdoms of England, Scotland, and Ireland, to be taken by all sorts, in all the said Kingdoms; in which, that Covenant is Analysed, opened, proved, and fully cleared from 24 Objections and Quaeres made against it, by such as either out of conscience or malignity, seruple at, With an appeal to Conscience* (Printed for C. Meredith: London, 1644), 20-23. All the above confirms an understanding of the trials

religious sectors during the sixteenth century. Opposition to unfettered tolerance as well as the formation of various different churches (denominations) instead of a national church was axiomatic to the formulation of Rutherford's constitutional, political and legal thought. Not only is this evident from Rutherford's *Lex, Rex* and *A Free Disputation Against Pretended Liberty of Conscience*, but also from his concise and informative thought on church government.

The principles of religious toleration were both held and practised in Scotland by the Presbyterian Church, both before Independency had come into existence, and during the very time of the struggle between the two parties in England. Reflected in the Westminster Assembly was also the Presbyterian Divines' clear support of a tolerant approach.⁵⁰ However, the fears of the Presbyterians that the position of the Independents would stimulate heresies through their pleas for toleration and that this would endanger the religious, political and social fabric of the Commonwealth, were clearly reflected in their sermons and petitions from 1645.⁵¹ Such fears were not without qualification, because the writings of the Independents at the time undoubtedly widened the concept of toleration to include a greater variety of opinion.⁵²

and fears that confronted Rutherford, his colleagues and the Reformed faith in Scotland, resulting in a similar situation as that which originally took place at the beginning of the Reformation. The Protestant Reformation was essentially a fight for freedom of the individual conscience from intrusive canon laws and clerical controls, freedom of political officials from ecclesiastical power and privilege, freedom of the local clergy from central papal rule and oppressive princely controls, John Witte Jr, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, (Cambridge: Cambridge University Press, 2007), 77. Also see Flinn, *Samuel Rutherford and Puritan Political Theory*, 51.

⁵⁰ Hetherington, *History of the Westminster Assembly of Divines*, 333. Stephen Perks, in his critique on John Coffey's criticism directed towards the Reformers and many Puritans regarding the assumed 'intolerant' attitude of these Reformers and Puritans, states, "It should be remembered that the belief that non-believers should *not* be compelled to profess faith in Christ but won by sound doctrine and a good conversation was also the position of the Reformers and many of the Puritans ...", Stephen C. Perks, *A Defence of the Christian State*, (Taunton, England: The Kuyper Foundation, 1998), 83. Also see Robert Paul's reference to Gillespie's support of accommodation (as distinguished from 'toleration'), Robert S. Paul, *The Assembly of the Lord. Politics and Religion in the Westminster Assembly and the 'Grand Debate'*, (T. & T. Clark: Edinburgh, 1985), 454.

⁵¹ G. Yule, *Puritans in Politics. The Religious Legislation of the Long Parliament 1646-1647*, (Melbourne: Sutton Centenary Press, 1981), 216.

⁵² Yule, *Puritans in Politics. The Religious Legislation of the Long Parliament 1646-1647*, 211-212. The Independents were in a manner compelled to become the head sectarian body, and to defend not only their own religious liberties, "but also the liberty claimed by the most wild and monstrous sects to hold and to teach errors the most immoral and blasphemous, – of which they by no means approved, or rather, which they strongly condemned, but could not consistently oppose. They were thus lead to advocate a toleration in theory which they never granted where their own power was predominant, as in New England ..." Hetherington, *History of the Westminster Assembly of Divines*, 195. It is

Glenn Moots, referring to amongst others, Rutherford's, *A Free Disputation Against Pretended Liberty of Conscience*, comments that the Presbyterians criticised the Independents as encouraging practical antinomianism by neglecting the Mosaic Law in the covenant of Grace.⁵³ George Gillespie argued that the Independents purported to find many inconveniences in the subordination of assemblies, but he could imagine, "... a hundred inconveniences against independency, and from convenience we can plead the necessity of subordination. Inconveniences may fall out in any of God's ordinances. We must endeavour the best way to prevent these inconveniences".⁵⁴ The Parliament at Westminster had to choose either to (i) retain the Prelatic system with all the tyranny and oppression, which had become intolerable;⁵⁵ or (ii) to adopt the Presbyterian; or (iii) to have no national church at all, with the imminent peril of national anarchy.⁵⁶

interesting to note that the *Apologeticall Narration* of 1643 (written by the Independents; Thomas Goodwin, Jeremiah Burroughs, William Bridge, Philip Nye and Sydrach Simpson) does not include one word promoting the toleration of serious error, let alone blasphemy. All that they argued is that their churches be accommodated within any national church set-up – in fact, both Burroughs and Nye teach elsewhere that idolaters should die, Martin A. Foulner, "Goat Hunting with Samuel Rutherford. A Response to 'Liberty of Conscience: A problem for Theonomy' by Harold G. Cunningham", *Christianity and Society*, Vol. 8, 4(1998), 20. Foulner adds, "John Goodwin was altogether different from the Independents at the Assembly, who distanced themselves from him. He advocated complete toleration of error, denying the right of the civil magistrate to punish idolatry, blasphemy or heresy ... So far as the claims of Theonomy are concerned there was unanimity between the Presbyterians and the Independents at the Assembly ...", *ibid.*, 20. Rutherford knew that Independents agreed with him regarding the fact that Christ did not die to purchase liberty of conscience, so that men might be free to become Arians and deny the divinity of Christ, but that He died to purchase liberty from sin. Rutherford knew that the Independents "were as zealous to defend the authority of the first table of the law as he was. They knew that liberty of conscience as to any portion of the Decalogue was really liberty of sinning. Hence they too would recognize the dangerous implications of toleration ...", Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 210.

⁵³ Glenn A. Moots, *Politics Reformed. The Anglo-American Legacy of Covenant Theology*, (Columbia and London: University of Missouri Press, 2010), 96.

⁵⁴ Smith, *The Debates on Church Government at the Westminster Assembly of Divines 1643-1646*, 306.

⁵⁵ The seventeenth century in Europe was the century of the victories of the counter-reformation, spearheaded by Spain in the first half of the century and France in the second. Protestantism had to fight for its survival in this century. This was the context for fear of popery in England, which found itself thrust into the front line against the European counter-reformation advance, Jonathan Scott, *England's Troubles. Seventeenth-Century English Political Instability in European Context*, (Cambridge: Cambridge University Press, 2000), 30.

⁵⁶ Hetherington, *History of the Westminster Assembly of Divines*, 100. There were differing motives for the demand for a further reformation of the Church of England. The three that were apparently the most influential were, a genuine commitment to Puritan ideology regarding the proper form of the Christian Church; a fear of the expansionist aims of Spanish Roman Catholicism; and hostility towards the policies and activities of the existing hierarchy in the Church of England, Wayne R. Spear, *Covenanted Uniformity in Religion: The influence of the Scottish Commissioners upon the Ecclesiology of the Westminster Assembly*, (Submitted to the Graduate Faculty of Arts and Sciences in partial fulfilment of the requirements for the degree of Doctor of Philosophy, University of Pittsburgh, 1976), 19. There was a growing fear of a resurgence of Roman Catholicism, backed by the military power of Spain.

In the ordinance for calling the Assembly (dated 12 June 1643), the following reasons (which was the view of the English Parliament) were formulated in order to establish the need for such a reconstruction,⁵⁷

The present Church-government by archbishops, bishops, their chancellors, commissaries, deans, and chapters, archdeacons, and other ecclesiastical officers depending upon the hierarchy, is evil, and justly offensive and burdensome to the kingdom, a great impediment to reformation and growth of religion, and very prejudicial to the state and government of this kingdom.

The proposal by Alexander Henderson regarding the importance of unity in religion (which disclaimed any intent to dictate to the English nation), received a favourable response from the House of Commons in that the latter thanked the Scots for such an expression of their desire for unity of religion. The House of Commons also assured the Scots that they intended to proceed with the reformation of the church in due course.⁵⁸ One material factor that would cause the members of the Assembly to move more rapidly towards the Scots was the increasing number of sects in England; to

These fears had been fuelled during the last years of James I by the reports of his negotiations with Philip III of Spain for the marriage of Prince Charles to the Spanish Infanta, involving significant concessions to the Catholics in England (Spear refers to Godfrey Davies', *The Early Stuarts 1603-1660*), *ibid.*, 23. Referring to S. R. Gardiner's, *History of England*, Spear observes that in the debate on the Grand Remonstrance in 1641, a condemnation of errors and superstitions in the Book of Common Prayer was rejected, while a charge that the Bishops had introduced idolatry and Popery into the Church was approved by a vote of 124 to 99. These votes indicate that the number of ideological Puritans (who would of supported first measure) was less than a majority, but that there were many more members of the House of Commons who were hostile to the Bishops, *ibid.*, 23. Spears adds, by referring to Davies', *Early Stuarts 1600-1660*, that the "Irish Massacre," (in this uprising of Irish Catholics against English settlers, between 4000 and 37000 were killed, according to estimates by modern historians) which occurred while the Grand Remonstrance was under discussion, was held forth as a sample of what the papists intended for England, *ibid.*, 24.

⁵⁷ Spear, *Covenanted Uniformity in Religion: The influence of the Scottish Commissioners upon the Ecclesiology of the Westminster Assembly*, 16. Also see Yule, *Puritans in Politics. The Religious Legislation of the Long Parliament 1640-1647*, 106-107. Around 1687, Alexander Shields writes that, "This is the case of the sometimes renowned, famous, faithful, and fruitful, Reformed, Covenanted church of *Scotland*, famous for unity, faithful for verity, fruitful in the purity of doctrine, worship, discipline, and government; which now for these 27 years past, under the domination of the late Tyrant, and present usurper of *Britain*, hath been so wasted with oppression, wounded with persecution, rent with division, ruined with defection, and now she is as much despised, as there was before admired: and her witness and testimony for reformation, is now as far depressed, and suppressed in obscurity as it was formerly declared and depreciated in glory and honour", Alexander Shields, "Preface", in *A Hind Let Loose, or An Historical Representation of the Testimonies of the Church of Scotland for the Interest of Christ. With the True State Thereof in All Its Periods* (1687), <http://www.gutenberg.org/files/37137/37137-8.txt> (accessed 15 December 2012). It is precisely this state of affairs that Rutherford and the rest of the Scottish Divines were fearful of. Also see David W. Hall, *Windows on Westminster. A look at the men, the work and the enduring results of the Westminster Assembly (1643-1648)*, (Norcross, GA: Great Commission Publications, 1993), 142.

⁵⁸ Spear, *Covenanted Uniformity in Religion: The influence of the Scottish Commissioners upon the Ecclesiology of the Westminster Assembly*, 40-41 (Spear refers to William Shaw's, *A History of the English Church During the Civil Wars and under the Commonwealth 1640-1660*).

tolerate groups such as Rantes, Seekers, Antinomians and Socinians was unthinkable for the majority of serious people in the seventeenth century. Such toleration would have destroyed the medieval dream of unity for which the greater part of the population yearned forever. The strength of medieval society had been in its certainty, and the theological debates of the period, as an attempt to establish an undisputed authority offering the same kind of certainty for their own time, need to be understood.⁵⁹ Rutherford's concerns were qualified regarding his aversion towards sects. A letter from Rutherford's time at the Westminster Assembly also attests to this concern, Rutherford writing:

There is nothing here but divisions in the Church and Assembly; for besides Brownists and Independents (who, of all that differ from us, come nearest to walkers with God), there are many other sects here, of Anabaptists, Libertines who are for all opinions in religion, fleshly and abominable Antinomians, and Seekers, who are for no church-ordination, but expect apostles to come and reform churches; and a world of others, all against the government of presbyteries.⁶⁰

Preachers in Rutherford's time were interpreting the Bible without any regard for problems in translation and the need for historical understanding.⁶¹ George Gillespie also saw clearly that once the principle of toleration was granted there would be no logical way to stop short of absolute toleration of all opinion, religious and otherwise.⁶² At the time, the establishment of religion was a universally accepted fact and posed nothing foreign. Wayne Spear states:

What William Haller says of the Elizabethan era was still applicable in the time of Charles I: 'The continuance of ordered society was as yet inconceivable without the

⁵⁹ Paul, *The Assembly of the Lord. Politics and Religion in the Westminster Assembly and the 'Grand Debate'*, 47. According to Robert Paul, "The Scots had also received a letter from some London ministers indicating their desire to see Reformed churchmanship established in England and a form of church government uniform with that of the Scottish Church", *ibid.*, 66 (Here Paul refers to Baillie's *Letters and Journals*). The primary concern of the Puritan majority was the disintegration of orthodox religion in London and in the parts of the country under parliamentary control, *ibid.*, 176. Also see *ibid.*, 75. Paul adds, "From Dering's remarks we may judge that the growing popularity of convening such a synod was as much due to conservative fears about England's loss of religious unity as it was two radical plans to change the structure of the Church, and Dering's approval suggests that it had the support of moderate opinion. Above all, we note the sense of urgency, for 'unless this Council be very speedy, the disease will be above the cure'", *ibid.*, 60. Also see *ibid.*, 115.

⁶⁰ Cited in Michael Brown, "A Half Reformation: English Puritanism According to Samuel Rutherford (1600-1661)", *Puritan Reformed Journal*, Vol. 2, 2(2010), 149.

⁶¹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 146. Also see *ibid.*, 147 and 152.

⁶² Culbertson, *'For Reformation and Uniformity': George Gillespie (1613-1648) and the Scottish Covenanter Revolution*, 165.

Christian church, and the church was inconceivable except as a single comprehensive institution uniform in faith and worship'. It did not occur to the Parliament to ask whether or not there should be an establishment of religion in England. The only question was regarding what form the establishment should take.⁶³

If this were the case, then there was even more reason to not differentiate between the law, politics and religion regarding the context at the time. Theory on constitutionalism, politics and the law was integrated into ideas related to the establishment of religion. The English gave in, and the Solemn League and Covenant, as finally agreed, was not a mere alliance between two nations or parties, as Philip Nye was to point out in his sermon when it was signed at Westminster; "it was an oath of 'fealty and allegiance unto Christ the King of Kings', solemnly sworn by both sides".⁶⁴ Bearing this in mind, one doubts whether John Coffey's observation that "the Scots are usually seen to have alienated opinion south of the border by their arrogant attempt to impose their ecclesiastical system, and their hatred of toleration and Independency", is sufficiently nuanced.⁶⁵

⁶³ Spear, *Covenanted Uniformity in Religion: The influence of the Scottish Commissioners upon the Ecclesiology of the Westminster Assembly*, 17. A reminder of the clause of the Solemn League and Covenant which deals with religion would be apt to mention here namely, "that we shall sincerely, really and constantly, through the grace of God, endeavour in our several places and callings, the preservation of the reformed religion in the Church of Scotland, in doctrine, worship, discipline and government, against our common enemies; the reformation of religion in the kingdoms of England and Ireland, in doctrine, worship, discipline and government according to the Word of God and the examples of the best reformed Churches; and we shall endeavour to bring the Churches of God in the three kingdoms to the *nearest* conjunction and uniformity in religion, confession of faith, form of Church government, directory for worship and catechising, that we and our posterity after us, may as brethren live in faith and love, and the Lord may delight to dwell in the midst of us", (Author's emphasis). Also see John Morrill, *The Nature of the English Revolution*, (New York: Longman Publishing, 1993), 107. Rutherford also emphasised this understanding that perfect unity of religion is not possible and that what should be sought after is uniform conformity to religion "as far as is possible". In his *A Free Disputation Against Pretended Liberty of Conscience*, Rutherford refers to endeavouring "the nearest conjunction and uniformity in Religion ...", *ibid.*, 271 (original version), and "nor do we plead for absolute identity in doctrine and worship ...", *ibid.*, 256.

⁶⁴ C. V. Wedgwood, "The Covenanters in the First Civil War", *The Scottish Historical Review*, Vol. 39, No. 127, Part 1 (Apr., 1960), 7. The main clause of the new Covenant concerned religion, and that the express purpose of the alliance was to preserve both countries alike from the yoke of prelacy, *ibid.*, 7.

⁶⁵ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 201. According to William Hetherington the Scottish Divines, "knew what had taken place in Germany, when the peasantry were roused to insurrectionary tumults by the licentious principles and harangues of the Anabaptists, and they dreaded the occurrence of similar events in England. For such reasons they were exceedingly anxious that a regular and authoritative system of Church government and discipline should be established and put in operation with all convenient speed. This wish was in itself of a truly pious and patriotic nature, even though it could be proved that the means by which it was sought to be realized were not the most judicious that could have been imagined", Hetherington, *History of the Westminster Assembly of Divines*, 328. Amongst the Scots, there was the general spirit of expectation which characterised many of the Puritans that the work of reformation, which had emanated from the

Having come out of a tyrannous political dispensation, it was a concern for especially the Scottish Divines that whatever was remotest from such a system was best. People, strongly excited on the subject of religion, and uninstructed in its substantial truths, would eagerly adopt any theory that was promulgated, thereby creating an easy context for any man who possessed sufficient fluency of speech to impose upon an excited and ignorant audience.⁶⁶

The tension between *freedom* and *authority* and attempts to achieve the union of the two, are the permanent conditions of man. One is reminded of this tension also in the context of the Christian Republic, namely that Luther and other Protestants soon came to realise that structures of law and authority were essential to protecting order and peace, even as guarantees of liberties and rights were essential to preserving the message and momentum of the Reformation. The challenge for early Protestants was to strike new balances between authority and liberty, order and rights on the strength of cardinal biblical teachings.⁶⁷ One of the greatest challenges posed in this regard emanated from the question as to the parameters regarding the ruler's role in the maintenance, protection and furtherance of the true religion. One of Rutherford's central concerns for the *bonum publicum* was the protection and furtherance of the

previous century under Luther and Calvin was going to continue until the papal religion disappeared and all the churches of Christendom were fully reformed in doctrine, worship, and government. Uniformity of religion between Scotland and England was seen as an important part of that greater unity which was hoped for. This was included in Alexander Henderson's concern in a paper, which he prepared for the peace negotiations in 1640, which set forth the Scottish reasons for seeking unity with England in religious matters, Spear, *Covenanted Uniformity in Religion: The influence of the Scottish Commissioners upon the Ecclesiology of the Westminster Assembly*, 331. Also see *ibid.*, 232-233. On reading Robert Paul's observations of the Westminster Assembly, it is not accurate to refer merely to the Scots' hatred of toleration and Independency. In this regard, see more specifically, Paul's, *The Assembly of The Lord. Politics and Religion in the Westminster Assembly and the 'Grand Debate'*, 208, 345, 373, 453-456, 467-468 and 520. Contrary to those who portray the Assembly as designed to bring English practice into conformity with the Church of Scotland, general assemblies of the Church of Scotland at this time were overloaded with changes forced on them from England, for example, the abandonment of the use of the Apostles' Creed and the Lord's Prayer in the liturgy, of reading Scripture without interpretation, of the minister's devotions before the sermon, of deacons reading Scripture – all which had been standard liturgical practices in the Scottish church since Knox, Letham, *The Westminster Assembly. Reading its Theology in Historical Context*, 49. There were English ministers in London who supported Rutherford's view of the state. In December 1647 they published *A Testimony to the Truth of Jesus Christ, and to our Solemn League and Covenant*, cataloguing the "unsound Opinions ... abominable Errours, damnable Heresies, and Horrid Blasphemies ... broached and maintained amongst us here in England, under the notion of New lights and New Truths", Gribben, "Samuel Rutherford and Liberty of Conscience", 357. Also see *ibid.*, 358.

⁶⁶ Hetherington, *History of the Westminster Assembly of Divines*, 151-152. Also see *ibid.*, 149-150 and 327. Regarding 'Religious Worship and the Regulative Principle' (WCF 21), the focus of these statements cannot be understood apart from the draconian legislation that governed worship in the Church of England, Letham, *The Westminster Assembly. Reading its Theology in Historical Context*, 301. See *ibid.*, 301-302 for more on this.

⁶⁷ Witte, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, 28.

true faith. This was of importance and relevance in the context of the inherent conditional nature of the covenanted community, the law and the functions of magistracy.

Chapter 20 of the WCF, which explains ‘Christian Liberty and Liberty of Conscience’, states: “4. And because the *powers which God hath ordained*,⁶⁸ and the liberty which Christ hath purchased, are not intended by God to destroy, *but mutually to uphold and preserve one another*.”⁶⁹ Chapter 26 (of the Communion of Saints) of the WCF states:

1. All saints, that are united to Jesus Christ their Head by His Spirit and by faith, have fellowship with Him in His graces, sufferings, death, resurrection, and glory: and, being united to one another in love, they have communion in each other’s gifts and graces, *and are obliged to the performance of such duties, public and private, as do conduce to their mutual good, both in the inward and the outward man*.⁷⁰

Chapter 23 of the WCF, which explicitly states the functions and obligations of the civil magistrate, refers to the duties of the magistrate as “defending and encouraging them that are good”, which can imply a defence and encouragement of the faith (and therefore of salvation).⁷¹ In fact, the Biblical theory on magistracy is important for the very soteriological reason explained in all of the Reformed Confessions, namely:

Although the light of nature and works of creation and providence do so far manifest the goodness, wisdom, and power of God, as to leave men unexcusable; yet are they not sufficient to give that knowledge of God and of His will, which is necessary unto salvation. Therefore it pleased the Lord, at sundry times, and in divers manners, to reveal Himself, and to declare that His will unto His Church; and afterwards, for the better preserving and propagating of the truth, and for the more sure establishment and comfort of the Church against the corruption of the flesh, and the malice of Satan and of the world, to commit the same wholly unto writing: which maketh the Holy Scripture to be most necessary; those former ways of God’s revealing His will unto His people being now ceased (Chapter 1, section 1, Westminster Confession of Faith).

⁶⁸ Author’s emphasis.

⁶⁹ Author’s emphasis.

⁷⁰ Author’s emphasis.

⁷¹ The Westminster Confession, compared to the Belgic as well as the Second Helvetic Confession, is the only confession that clearly emphasises (as illustrated above) the soteriological implications of the magistrate. This does not mean that the other said confessions do not imply this, only that the Westminster Confession contains more direct references to the soteriological importance of magistracy. Also see Gribben, “Samuel Rutherford and Liberty of Conscience”, 373, which points to the fact that the WCF 23.3 confirms the religious duties of the magistrate.

The above provides a clear understanding emanating from the Westminster Assembly regarding the commitment towards external means and supports a limitation on tolerance and liberty of conscience⁷² pertaining to religious matters. This is of relevance to the quest towards a constitutional model.

During the seventeenth century in Scotland, the *Confession of Faith* provided a clause acknowledging that magistrates were to uphold the “maintenance of the trew Religioun, and for suppressing of idolatrie and superstitioun”.⁷³ ‘High Presbyterians’ (such as Rutherford) in the 1640s were like sixteenth-century Presbyterians; although they warned magistrates not to interfere in the church’s independent spiritual jurisdiction, they invited princes and parliaments to use their civil powers to defend the true church.⁷⁴ In sixteenth-century England, Presbyterians asked magistrates to reform the church by establishing “a right ministerie of God, & a right government of his church, according to the scriptures ...”⁷⁵

The office of magistracy, as well as that of pastor, was obligated to serve as external means towards the maintenance of the true religion as part of its eschatological and soteriological goals. The common interest was understood as ascribing towards something very religious, not merely the secular notion of the sum of consensus of all the individuals in society. Rutherford understood the Christian Republic as a covenanted entity with a responsibility towards achieving the Divine Will. This could only be attained by securing that the believer remained loyal to the tenets of the true faith. The first Table of the Decalogue was as important as the second Table. The believer’s faith and consequent knowledge were as much part of constitutional, political and legal concerns as they were to theology. Belief (faith) and conscience as

⁷² Hall, in his views on the criticism levelled against the so-called ‘intolerance’ of the divines at the Westminster Assembly refers to C. S. Lewis’ reply to critics who encouraged excessive openness of mind, stating that: “An open mind, in questions that are not ultimate, is useful. But an open mind about ultimate foundations ... is idiocy. If a man’s mind is open on these things, let his mouth at least be shut”, Hall, *Windows on Westminster. A look at the men, the work and the enduring results of the Westminster Assembly (1643-1648)*, 166.

⁷³ Kathleen Halecki, *Scottish Ministers, Covenant Theology, and the Idea of the Nation, 1560-1638* (Submitted in partial fulfilment of the requirements for the degree Doctor of Philosophy in Interdisciplinary Studies with a Concentration in Arts & Sciences and a Specialization in Early Modern Scottish History at the Union Institute & University Cincinnati, Ohio February 2012), 57. Also see *ibid.*, 58.

⁷⁴ Fann, *Stories of God and Gall: Presbyterian Polemic during the Conformity Wars of Mid-Seventeenth-Century England and Scotland*, 70.

⁷⁵ Fann, *Stories of God and Gall: Presbyterian Polemic during the Conformity Wars of Mid-Seventeenth-Century England and Scotland*, 70.

well as the protection thereof were understood as having much overlap with one another; freedom of belief and freedom of conscience were understood to have, in many respects, a similar meaning. This soteriological aspect in Rutherford's covenanted political and legal thinking found expression in medievalist thinking where

[t]he church was called upon to guard and protect that ineluctable personal sphere, where by practising what his religion preached a man might live his faith and thereby become just and righteous to that limited extent which might permit him to hope for divine grace and salvation. And since the church needed helpmates in order to fulfil this function of guardian protector, the estates of the people became a decisive institutional instrumentality. Medieval constitutionalism became the government 'by and with' estates, which for English-speaking peoples is epitomized in the growth of parliamentary institutions.⁷⁶

As stated earlier, the understanding in support of the maintenance and protection of the conscience in the Christian community had everything to do with furthering the cause of the spiritual and the hereafter. Concerns regarding the external maintenance and protection of doctrinal purity could not be ignored; they formed an integral part of biblical political and legal theory. Constitutional thinking had to address and serve this concern as well. Insensitivity towards this insight would also result in a diluted understanding and application of the covenantal conditions reflected in the Decalogue. The seventeenth-century Scots saw the issue of tolerance as one of life and death for their nation. The Scots' political organisation was so weak that the General Assembly of the Church played something of the role in their life that Parliament did in England. The Scots saw the welfare of their country bound up with the destiny of the entire Reformed church in Europe and fervently believed that God would not bless a religiously disobedient kingdom – "For as the Scots' Commissioners said in 1646 to Parliament, Unity and uniformity in matters of religion was the 'chieftest aspect of the Covenant'."⁷⁷

⁷⁶ Carl J. Friedrich, *Transcendent Justice. The Religious Dimension of Constitutionalism*, (Durham, N. C.: Duke University Press, 1964), 22.

⁷⁷ Yule, *Puritans in Politics. The Religious Legislation of the Long Parliament 1640-1647*, 212. Also see *ibid.*, 221-222 where reference is made to Alderman Bruce's petition of also the citizens, which was presented to the Commons, and in which was stated that despite the Covenant to reform religion, there was the proliferation of 'Errors Schisms and Heresies'. Yule refers to some substantial works against toleration in Britain which were published around the time, see *ibid.*, 222.

It is interesting to note that the Scottish commissioners had always caused their publications to be laid before the Assembly in order to render them the subjects of fairly discussion, whilst the Independents addressed their production to the Parliament without formally giving copies to the Assembly.⁷⁸ The exclusion of most Scottish lords from the making and execution of Crown policy created hostility between them and Charles I. This negative and harmful feeling led to further scepticism about Crown policy and to a suspicion about its intent, which in turn, developed into a questioning of the Laudians' and the bishops' undue influence on the structure and function of the Crown. This is interpreted as relating to that of Erastianism versus Presbyterianism. In large part, the Scottish attitude resulted from their long Reformation struggle against the religious meddling of the monarch supported and assisted by the episcopate. From this position, the Scots realised the future necessity of carrying their Reformation struggle into England.⁷⁹

Unlike today, in sixteenth- and seventeenth-century Europe, conscience was understood as a guarantee that the individual would not be coerced into actions that would be sinful to God. In other words, conscience had a specifically theological

⁷⁸ Hetherington, *History of the Westminster Assembly of Divines*, 183. Hetherington also states that, although the Scottish Divines “refused all compromise of fundamental principles, they were exceedingly desirous to remove everything in minor matters to which their brethren could not readily assent, or from which they dreaded an interference with their own conscientious scruples”, *ibid.*, 207. When the subject of toleration was under discussion in the Westminster Assembly, the true principles of religious liberty were avowedly held and publicly taught by the Presbyterian divines, “the very men who are so vehemently accused of intolerance, – at least as distinctly and earnestly as they were by the Independents”, *ibid.*, 333. The willingness of the Scottish Commissioners to debate the biblical grounds of the details of church government in the Assembly, and their constant efforts to seek accommodation with the Independents, give credence to George Gillespie’s later claim made to the Assembly that, “we came not hither presuming to prescribe anything to you, but were willing to receive as well as offer light, and to debate matters freely and fairly from the word of God, the common rule both to you and us”, Dedication of George Gillespie’s *Aaron’s Rod Blossoming* (London, 1646), reprinted in, *The Presbyterian’s Armoury* (Edinburgh, 1846), II – reference in Spear, *Covenanted Uniformity in Religion: The Influence of the Scottish Commissioners upon the Ecclesiology of the Westminster Assembly*, 50-51. The acceptance by the Scots of the Form of Church Government, in spite of its defects, is evidence of the good faith in which many of the Scottish leaders entered into the Solemn League and Covenant, *ibid.*, 346-347. Also see Smith, *The Debates on Church Government at the Westminster Assembly of Divines 1643-1646*, 311-312. Bearing all this in mind, as well as, among others, the Scottish Divines’ (with special reference to Rutherford) exclusion of the application of the ceremonial laws for today (see for example, Foulner, “Goat Hunting with Samuel Rutherford. A response to ‘liberty of conscience, A problem for theonomy’ by Harold G. Cunningham”, 17), it is doubted whether Coffey is accurate in stating that, “Rutherford insisted on the binding authority of the Old Testament teaching that the magistrates of a covenanted nation must not permit the slightest deviation from the true religion ...”, Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 157.

⁷⁹ Douglas H. Worthington, *Anti-Erastian Aspects of Scottish Covenanter Political Thought 1637 to 1647*, (A doctoral dissertation presented to the Graduate Faculty of the University of Akron in partial fulfilment of the requirements for the degree Doctor of Philosophy, 1978), 173-174. Also see *ibid.*, 185-189 and 234-241.

meaning.⁸⁰ However, the conscience housed in the human also had a fragile side to it. The parameters of liberty of conscience should be was a highly debated theme during the Reformation, and the Westminster Assembly in which Rutherford participated was no exception to this. For example, this was reflected in clashes between the views of the Scottish Presbyterians and the Independents pertaining to forms of ecclesiastical structures. Views on a Scriptural model on the ideal relationship between state and church formed an important facet of constitutional thinking at the time, and received different proposals from the different denominations during seventeenth-century Britain. This was a matter of concern, as it had foundational implications for constitutionalism, politics and the law within the Christian Republic.

To Rutherford, religion and its expression had limits and the relevance of the duties of the magistrate was part of the equation in setting these limits, with the support of a proper interpretation of the Divine law. Resultant from such an understanding is the argument that confirms the importance of the first Table (together with that of the second Table) in the regulation of society. Natural revelation *includes* the moral obligations contained in the first Table, just as much as it contains those of the second Table.⁸¹ All the Mosaic laws (in their moral demands, in distinction from their redemptive provisions) are reflected in general revelation.⁸² Surely, the first Table instructs the magistrate to attend to religion as well in the Christian Republic.

The community's covenant with God (in accordance with the Decalogue) was to be understood as an extension of the individual covenant, based on a specific belief in accordance with the true religion, and with the end goal of seeking God's blessing and

⁸⁰ Robert K. Vischer, *Conscience and the Common Good. Reclaiming the Space between Person and State*, (Cambridge: Cambridge University Press, 2010), 24.

⁸¹ Greg L. Bahnsen, "Westminster Seminary on Pluralism", 89-111, in *Theonomy. An Informed Response*, Gary North (ed.), (Tyler, Texas: Institute for Christian Economics, 1991), 101. Here Bahnsen refers to Paul who taught that natural revelation condemned the pagan world for failing to glorify God properly and for idolatrously worshipping and serving the creature instead (Rom. 1:21, 23, 25), *ibid.*, 101.

⁸² Bahnsen, "Westminster Seminary on Pluralism", 102. Here Bahnsen refers to, Rom. 1:18-21, 25, 32; 2:14-15; 3:9, 19-20, 23, *ibid.*, 102. In the words of Bahnsen, "Scripture never suggests that God has *two sets* of ethical standards or two moral codes, the one (for Gentiles) being an abridgement of the other (for Jews). Rather, He has one set of commandments, which are communicated to men in *two ways*, through Scripture and through nature (Ps. 19, cf. vv. 2-3 with 8-9). Accordingly, the Gentile nations (and rulers) are repeatedly condemned in Scripture for transgressing the moral standards which we find revealed in the law of Moses – and not simply the summary commands of the Decalogue, but their case-law applications and details as well (e.g., Mk. 6:18)", *ibid.*, 102. See *ibid.*, 102, fn. 22, for Bahnsen's references to numerous examples which come to mind. Bahnsen also reminds one of the fact that natural revelation needs to be checked by special revelation, *ibid.*, 102-103, and therefore there is no 'gap' between Scripture and natural reason.

consequent salvation. Next, the importance of the ruler's covenantal responsibilities towards the maintenance, protection and furtherance of the true religion is further elaborated upon, with special emphasis on the rich legacy of theologico-political federalist thought, and with special emphasis on Rutherford's contribution in this regard.

3. Samuel Rutherford on magistracy and religion

3.1 Introduction

Flavius Josephus⁸³ highlights the 'unity and identity of religious belief' and the 'perfect uniformity in habits and customs' that characterised Israelite theocracy. Regarding the religious duties of the Magistrate in the Hebrew Republic, in ancient Israel there was no clear separation between religion, morals, law and politics; all were parts of one comprehensive system of norms.⁸⁴ The Mosaic law regulated both what one would regard as civil matters and what one would regard as religious affairs – no distinction was drawn between them. The structure of the Israelite commonwealth was perfect, because God was its architect, and in such a commonwealth there was only one source of law (the civil sovereign) and only one jurisdiction (that of the civil magistrate). God therefore endorsed this arrangement and commended it to those who would pursue a godly politics.⁸⁵ Even as far back as Augustine, it was understood that the state was a unitary Christian state, serving

⁸³ Josephus was a wealthy Jew of the priestly class who defected to Rome during the Jewish War (66-73 CE), and then, as a favoured member of the Flavian imperial household, attempted a series of works to explain his own people to the Hellenised world, Eric Nelson, *The Hebrew Republic. Jewish Sources and the Transformation of European Political Thought*, (Cambridge, Massachusetts & London, England: Harvard University Press, 2010), 89.

⁸⁴ Ze'ev W. Falk, "Religion and State in Ancient Israel", 49-54, in *Politics and Theopolitics in the Bible and Postbiblical Literature*, Henning Graf Reventlow, Yair Hoffman and Benjamin Uffenheimer, (eds.), *Journal for the Study of the Old Testament*, Supplementum Series 171, (Sheffield, England, 1994), 49. The kings of Israel, like those of other nations, made use of religious concepts, just as they built temples, to legitimise their rule, as well as to care for the spiritual needs of their subjects. Although religion usually existed independently of the king, by building the sanctuary and maintaining it he got a say in its ritual and appointed its priests. This was a factor in the lack of differentiation and the integration of state and religion, Falk, "Religion and State in Ancient Israel", 49. Also see *ibid.*, 49-54.

⁸⁵ Nelson, *The Hebrew Republic. Jewish Sources and the Transformation of European Political Thought*, 90-91.

interests in which the spiritual was paramount and furthering the cause of salvation by protecting doctrinal purity.⁸⁶

The theologico-political federalists postulated a similar view on ‘unity’ and the ‘covenant’. According to the sixteenth-century Swiss Reformer, Bullinger, church and commonwealth were distinguishable; if at all, only in a very limited sense. Bullinger did not view the commonwealth in terms of church and state, but rather as the people of God gathered together in a Christian society based on the covenant.⁸⁷ According to Bullinger, the church did not exist within society – it *was* society – and both the magistrate and the pastor played their roles within the same sphere. It was the Christian community, whether it was called church or commonwealth. The magistrate is also a minister of God. In fact, the cooperation of the pastor and magistrate in God’s work was the very marrow of the Christian commonwealth.

The task of the Christian magistrate was to keep the commonwealth as a covenanted community, and to encourage and enforce the fulfilment of the covenant conditions, the love of God and the neighbour. Civil righteousness and justice were the matters involved under the condition of piety; consequently, the civil laws of the magistrate, just like the judicial laws of Israel, were simply aids in keeping the condition of piety, while its laws concerning religion were aimed at helping to keep the condition of faith. The magistrate was sovereign in the Christian commonwealth. God would bless the commonwealth if the magistrates were pure and the people were obedient and pious, as in the time of Hezekiah in Judah. According to the tradition of federalism, as rooted in Bullinger’s thought, God’s people needed the magistrate and his laws to govern every aspect of life. The Christian magistrate was sovereign in Christian societies, and it was his duty to enforce the conditions of the covenant. The covenant was therefore the cornerstone of the Christian state.⁸⁸

⁸⁶ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex* (in partial fulfilment for the degree of Doctor of Philosophy, 1995), 255. Also see *ibid.*, 256-259. Interpretations of the works by Aquinas suggest that, in at least some specific contexts, the legitimate concerns of a king include the spiritual well-being of his subjects, Nicholas Aroney, “Before Federalism? Thomas Aquinas, Jean Quidort and Nicolas Cusanus”, 31-48, in *The Ashgate Research Companion to Federalism*, Ann Ward and Lee Ward, (eds.), (Farnham, England, 2009), 36. Also see Cecil N. Sidney Woolf, *Bartolus of Sassoferrato. His Position in the History of Medieval Political Thought*, (Cambridge: Cambridge University Press, 1913), 271.

⁸⁷ J. Wayne Baker, *Heinrich Bullinger and the Covenant*, (Ohio: Ohio University Press, 1980), 110.

⁸⁸ Charles S. McCoy and J. Wayne Baker, *Fountainhead of Federalism. Heinrich Bullinger and the Covenantal Tradition*, with a translation of the *De testamento seu foedere Dei unico et aeterno*, 1534

Bullinger interpreted the Reformation within the larger context of the covenant as a restoration of the covenant, similar to such restoration in the Old Testament under Hezekiah, Jehoshaphat and Josiah.⁸⁹ True reform meant the restitution of the covenant and the restoration of the ancient religion of the patriarchs and Christ, the pattern of which was found in the Old Testament. Restitution of the covenant between a people and God encompassed both the ecclesiastical and the civil, therefore encompassing all matters in society.⁹⁰ As in Israel, the conditions of the covenant applied to society as a whole.⁹¹ Bullinger did not view the commonwealth in terms of church and state, but rather as the people of God gathered together in a Christian society based on the covenant.⁹² This was similar to the views of some of the leading seventeenth-century Scottish Reformers.

Regarding the theologico-political federalists, Bullinger pays much attention to whether the office of the magistrate is obligated towards the care of religion.⁹³ Bullinger refers to Leviticus and Deuteronomy where:

‘... the Lord doth largely set down the good prepared for men that are religious and zealous indeed; and reckoneth up, on the other side, the evil appointed for the contemnors of true religion ...’ Let us hear also what the wise man, Salomon, saith in his Proverbs: ‘Godliness and truth preserve the king, and in godliness his seat is holden up...’ they, which would not have the care of religion to appertain to princes, do seek and bring in the confusion of all things, the dissolution of princes and their people, and lastly, the neglecting and oppression of the poor.’⁹⁴

by Heinrich Bullinger, (Louisville: Westminster/John Knox Press, 1991), 26-27; and Baker, *Heinrich Bullinger and the Covenant*, 66. See *ibid.*, 71-73, for Bullinger’s exposition of the four kings of the Old Testament who were classical models for the magistrates of his own day.

⁸⁹ Baker, *Heinrich Bullinger and the Covenant*, 100.

⁹⁰ Baker, *Heinrich Bullinger and the Covenant*, 102.

⁹¹ Baker, *Heinrich Bullinger and the Covenant*, 107.

⁹² Baker, *Heinrich Bullinger and the Covenant*, 110. The commonwealth of Zurich had the same covenanted relationship with God as Israel under Moses or Joshua, with the Christian commonwealth of Zurich viewed as the new Israel, *ibid.*, 163.

⁹³ Heinrich Bullinger, *The Decades of Henry Bullinger* (Translated by H. I. and edited for the Parker Society by Thomas Harding, Cambridge, 1849-52), 2:323-324 [2 denotes the volume], (referred to as *Decades*). Also see *ibid.*, 2:324-325.

⁹⁴ Bullinger, *Decades*, 2:324. Also see *ibid.*, 2:325-326. Stephen Marshall is also of the view that, if the magistrate must rule towards *godliness*, then all the *means* to this end must be taken care of by the magistrate, Stephen Marshall, *The Power of the Civil Magistrate in matters of Religion, Vindicated* (In a Sermon preached before the First Parliament on a Monthly Fast day), (Printed for Nathaniel Webb, and William Grantham, London, 1657), 2. Marshall refers to the role that the magistrate needs to play as a nursing father in taking care of religion (Isaiah 49:23; 60:10), *ibid.*, 3. Marshall also refers to Psalm 2 and 24 regarding the exhortation to kings and that kings must *open the gates* to Christ, *ibid.*

Bullinger refers to the prophecy of Isaiah, who foretold that kings and princes, after the times of Christ and the revelation of the Gospel, should have a diligent care of the church, and should become the feeders and nurses of the faithful. If, according to Bullinger, the care of religion were left to the bishops alone, it could not have been correct that magistrates were obligated to be feeders, nurses, nourishers, fathers,⁹⁵ and mothers of the church.⁹⁶ Moses was the first magistrate and lawgiver of the Jewish commonwealth, and appointed the first governors and judges in Israel, as well as the first high priest, Aaron.⁹⁷ Even though it was the duty of both prophet and priest to instruct the ruler in God's law (as Eleazar had instructed Joshua, Numbers 27:15-23), Bullinger asserts that the magistrate had complete authority in both ecclesiastical and civil matters – all lawful commands of the magistrate had to be obeyed by prophet and priest.⁹⁸ Joshua, the captain of God's people, although he is set before Eleazar, has the authority to command the priests, and, being a political governor, is joined as if in one body with the ecclesiastical ministers.⁹⁹

The godly kings of Israel always aided and assisted the priests, who were the messengers of the Lord of hosts; false priests, however, they rejected.¹⁰⁰ Bullinger refers to the cities the Levites had to possess, and which were appointed by Joshua for studies' sake, and the cause of godliness.¹⁰¹ Bullinger also refers to King Hezekiah, who was no less careful of the sure payment and revenue of the ministers' stipends than he was of restoring and renewing every office. Then there was Jehoshaphat who sent senators and other officers with the priests and teachers through his entire

⁹⁵ See what the Reformer Martin Bucer says pertaining to the fatherly role of the magistrate, "because the authorities are a father, they must truly and even zealously ward off every trouble from their community, just as a particularly conscientious father is duty bound to keep all trouble away from his house, because the authorities are subject to a higher command and in a wider sense are fathers of the fatherland. They should therefore take responsibility for what individual fathers neglect or are unable to accomplish by way of Christian discipline and urgings toward piety" (*Martini Bucer Opera Omnia*, series 1: *Deutsche Schriften*, 6:2, 177, cited in D. F. Wright, (ed.), *Martin Bucer: Reforming church and community* [Cambridge, 1994], 22) cited in Perks, *A Defence of the Christian State*, 149.

⁹⁶ Bullinger, *Decades*, 2:327. Bullinger refers to Isaiah 49, *ibid.* For Bullinger's reference to the support by the emperors in the early part of the first century A. D. regarding the care of religion see *ibid.*, 2:327-328, 331-333.

⁹⁷ Baker, *Heinrich Bullinger and the Covenant*, 67.

⁹⁸ Baker, *Heinrich Bullinger and the Covenant*, 67.

⁹⁹ Bullinger, *Decades*, 2:328-329.

¹⁰⁰ Bullinger, *Decades*, 2:329. Bullinger refers to numerous examples concerning the magistrate's duty towards ecclesiastical matters. See *ibid.*, 2:330.

¹⁰¹ Bullinger, *Decades*, 2:334.

kingdom, for his desire was to have God's word preached with authority and certain majesty, and that this preaching may be the cause of good works.¹⁰²

Even in the context of the English Reformation, Bullinger repeatedly undertook to address England's rulers in the service of the true religion. He emphasised the civil magistrate's authority in what he called the *cura religionis* (the care of religion)¹⁰³ – “By virtue of his sacred office as the ‘living law’ (*lex animata*), the Prince animates the entirety of his realm, both civil and ecclesiastical. As the very ‘soul’ of the body politic the godly prince is charged with the duty of leading his subjects into the way of true religion and virtue and guarding them against the false.”¹⁰⁴ Bullinger also refers to the ecclesiastical supremacy exercised by the Christian emperors of the early church namely Arcadius and Honorius, Gratian, Valentinian and Theodosius. In this regard, Bullinger quotes substantially from the *Codex Theodosianus* and Justinian's¹⁰⁵ *Novellis Constitutiones* so that Scriptural authority is shown to be reinforced by early church practice and supported by imperial authority.¹⁰⁶

Johannes Althusius, an exponent of federalist thought in the tradition of Bullinger's legacy pertaining to covenantal thought, repeatedly asserted that one of the legitimate

¹⁰² Bullinger, *Decades*, 2:334-335. See 2 Chronicles 31 and 2 Chronicles 17:7-9 respectively. Other examples of the involvement of the magistrates in matters of religion are, King Jehoshaphat, who destroyed the false priests together with idolatry and the profane worshipping of God. King Josiah, having rebuked the Levites, repaired the decayed buildings of the holy temple, 2 Kings 12, *ibid.* Bullinger also refers to 1 Kings 14:9-10; 15:29; 16:2-3, 9-13; 22:34, 2 Kings 9, 10, at *ibid.*, 2:336. Section 2 of Chapter 30 of the Second Helvetic Confession (of 1566) formulated by Bullinger also emphasises the role of the magistrate in religious matters: The chief duty of the civil magistrate is to procure and maintain peace and public tranquility; which, doubtless, he shall never do more happily than when he shall be truly seasoned with the fear of God and true religion, namely when he shall, after the example of the most holy kings and princes of the people of the lord, advance the preaching of the truth, and the pure and sincere faith, and shall root out lies and superstition, with all impiety and idolatry, and shall defend the Church of God. For indeed we teach that the care of religion does chiefly appertain to the holy magistrate. Compared to the Belgic Confession (of 1561) and the Westminster Confession (of 1647), the Second Helvetic Confession (1566) proves to be the most explicit on the positive role that the magistrate should play in the protection and furtherance of the true religion.

¹⁰³ Torrance Kirby, “The Civil Magistrate and the ‘cura religionis’. Heinrich Bullinger's prophetic office and the English Reformation”, 935-950, in *Heinrich Bullinger. Life – Thought – Influence*, (Zürich, Aug. 25-29, 2004, International Congress, Heinrich Bullinger (1504-1575), Vol. II, Emidio Campie & Peter Opitz (Hrsg.), Theologischer Verlag Zürich, [2007]), 936. Also see *ibid.*, 937.

¹⁰⁴ Kirby, “The Civil Magistrate and the ‘cura religionis’. Heinrich Bullinger's prophetic office and the English Reformation”, 937. Also see *ibid.*, 938, 941, 945 and 949.

¹⁰⁵ “Justinian recognises the Imperium and Sacerdotium as the twin gifts of God, proceeding from the same principle for the adornment of human life and differing little one from another. The Sacerdotium ‘rebus divinis inservit,’ the Imperium ‘humanas res regit.’ But the spheres are not ‘distinct and separate’; the Imperium does not restrict itself to temporal matters”, Woolf, *Bartolus of Sassoferrato. His Position in the History of Medieval Political Thought*, 71. Here ‘rebus divinis inservit’ means ‘the matter that serves the divine’ and ‘humanas res regit’ means ‘the matter that rules humanity’.

¹⁰⁶ Kirby, “The Civil Magistrate and the ‘cura religionis’. Heinrich Bullinger's prophetic office and the English Reformation”, 943.

concerns of the state was to encourage true piety.¹⁰⁷ The magistrate, before anything else, and from the very beginning of his administration, should plant and nourish the Christian religion as the foundation of his *imperium*.¹⁰⁸ The magistrate should also validate orthodox canons of faith, constitute regular ecclesiastical jurisdictions, presbyteries and synods, and legislate through them concerning the call, examination and ordination of bishops and pastors and their direction, judgement and removal from office. The magistrate also had to see that the ministers of the church were called legitimately – inwardly and outwardly – elected and confirmed and that those so-called put forth, teach and explain the doctrine of the law and the gospel. In connection with this latter duty, the magistrate should also provide that the minister rightly administers and dispenses the sacraments of faith; that in their presbytery they offer prayers, good counsel and admonitions, and that they – with other presbyters – rightly exercise church discipline.¹⁰⁹ According to Althusius, there was no doubt that the correction and reformation of the church from all error, heresy, idolatry, schism and corruption pertained to the magistrate.¹¹⁰

The encouragement of such true piety or ‘matters of religion’ refers to what extent a Biblical obligation was placed upon the magistrate in playing a *supplementary* role in the protection, maintenance and furtherance of the true Christian religion in a Christian society, beyond the obligations of the magistrate in punishing violations of the first Table (external violations of the true religion).¹¹¹

¹⁰⁷ Althusius refers to the following Scriptural references in support of this, namely, 2 Samuel 12, 24; 2 Kings 20:19; 2 Chronicles 16, 20; 1 Kings 13; 16; 21; 2 Kings 1, 21; Frederick S. Carney, *The Politics of Johannes Althusius*, (An abridged translation of the Third Edition of *Politica Methodice Digesta, Atque Exemplis Sacris et Profanes Illustrata* [The digest on political method and illustrating examples of the sacred and the secular], including the prefaces of the first and second editions and with a preface by C. J. Friedrich, [London: Eyre and Spottiswoode, 1964]), 155. Althusius also, in this context, refers to 2 Chronicles 17; 22; 31; 34; 2 Kings 18; 22; Exodus 32; Joshua 22, *ibid.*, 165.

¹⁰⁸ Carney, *The Politics of Johannes Althusius*, 156. According to Althusius, ecclesiastical administration by the magistrate entails mainly (1) the introduction of orthodox religious doctrine and practice in the realm and (2) the conservation, defence and transmission to posterity of this doctrine and practice. By these two duties the kingdom of God is raised up and preserved among men in this political society. By a religious covenant (*pactum religiosum*) the magistrate, together with the members of the realm commonly and solemnly consenting in councils of the realm, promise to God the performance of this twofold duty, Carney, *The Politics of Johannes Althusius*, 156-157.

¹⁰⁹ Carney, *The Politics of Johannes Althusius*, 160-161.

¹¹⁰ Carney, *The Politics of Johannes Althusius*, 165-167.

¹¹¹ This is more specifically explained by looking at Chapters 23 (article 3), 31 (article 2) and 20 (article 4) of the Westminster Confession of Faith (WCF). Chapter 23 (article 3) reads: “The civil magistrate may not assume to himself the administration of the word and sacraments, or the power of the keys of the kingdom of heaven, yet he hath authority, and it is his duty, to take order, that unity and peace be preserved in the church, that the truth of God be kept pure and entire, that all blasphemies and

Presbyterianism followed Calvin in asserting great authority for the clergy in moral and religious matters of the state, *and in requiring civil rulers to assist in the maintenance of the true church.*¹¹² According to Calvin, the civil government has the God-given burden of maintaining peace and tranquillity so that the church can flourish. This includes “the protection of the outward worship of God, to defend sound doctrine of piety and the position of the church.”¹¹³ The magistrates may enact and enforce laws about religious practice, always subject to the teaching of the Word of God, but he may not take to himself the authority of officially expounding the word or exercising church discipline in any way. The magistrate’s authority in the matter is on the level of the Christian individual or head of a family; not the authority that Christ has delegated to the church.¹¹⁴ Kingsley Rendell reminds one of the context of

heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered and observed. For the better effecting whereof, he hath power to call synods, to be present at them and to provide that whatsoever is transacted in them is according to the mind of God.” Chapter 31 (article 2) reads: “As magistrates may lawfully call a synod of ministers, and other fit persons, to consult and advise with about matters of religion; so if magistrates be open enemies to the church, the ministers of Christ, of themselves, by virtue of their office, or they, with other fit persons upon delegation from their churches, may meet together in such assemblies”, William Young, “The Westminster Confession on the Relation between Church and State”, *The Presbyterian Reformed Magazine*, Vol. 7, (Spring 1992), 20. In this regard, and in answer to the charge made that the teaching of the Confession, in Ch. 31, article 2 is Erastian in allowing the magistrate to call synods, William Young comments: “The anti-Erastian writings of Gillespie explicitly deny any such interference of the civil magistrate in the internal decisions of church assemblies. He clearly states: ‘But we deny that (in a well-constituted church) it is agreeable to the will of Christ for a magistrate either to receive appeals from the sentence of an ecclesiastical court, or to receive complaints ... so as by his authority, upon such complaint, to nullify or make void the ecclesiastical censure’”, (*Aaron’s Rod Blossoming*, 118). Much less would any Westminster divine countenance an effective veto by the magistrate of a decision by a church court ... The difference should be held in mind that is to be made between a church regularly constituted and one in which the situation is abnormal. The Westminster Assembly was itself called by the English Parliament to consult and advise. Furthermore, And the exercise of lawful authority by the magistrate was instrumental in the Reformation of the sixteenth century. The Westminster Confession simply acknowledges the conformity of such actions of civil government with the revealed will of God”, *ibid.*, 24. Also see William Cunningham, “The Westminster Confession on the Relation between Church and State”, 11-12, (Chapter 8 from ‘Discussions on Church Principles’), <http://www.apuritansmind.com/WCF/CunninghamWilliamChurchState.htm> (accessed 23 April 2012), and Marshall, *The Power of the Civil Magistrate in matters of Religion, Vindicated*, 38-39. Chapter 20 (article 4) of the said Confession, refers to the power of the civil magistrate to proceed against persons publishing opinions contrary to the known principles of Christianity, Young, “The Westminster Confession on the Relation between Church and State”, 20. Also see Cunningham, “The Westminster Confession on the Relation between Church and State”, 11-12. This stands in stark contrast to, for example, ‘rigid sphere sovereignty’-views calling for a more *substantial separation* of religious duties from civil duties on the part of the magistrate, as well as the Erastian view of the magistrate having an *overriding* jurisdiction in religious matters.

¹¹² Webb, *The Political Thought of Samuel Rutherford*, 177 (Author’s emphasis). Also see *ibid.*, 153, 154a-154b, 164, 178-179 and 207-208 (also with reference to Rutherford’s insights in this regard).

¹¹³ George J. Gatgounis II, “The Political Theory of John Calvin”, *Bibliotheca Sacra*, Vol. 153, 612(1996), 454.

¹¹⁴ Young, “The Westminster Confession on the Relation between Church and State”, 22. Young refers to Isaiah 49:23 as authority for the magistrate to obligate himself towards the ‘maintenance of the

seventeenth-century Scotland regarding the duties of the magistrate in religious matters, by commenting that, “We have come to regard it as a highly dangerous practice, but this was not so evident in seventeenth century Scotland ... To Rutherford, Kirk and country were synonymous. In fact the General Assembly of the Church of Scotland was much more representative of the nation than Parliament.”¹¹⁵

William Cunningham states:

It is very easy to prove these propositions concerning the writings of Gillespie and Rutherford: – first, that in the general substance of their doctrines, and in many particular statements, they distinctly support the principles in regard to the proper relation of the civil and ecclesiastical authorities now held by the church; and, secondly, that nothing has been produced from their writings inconsistent with the principles now held by the church ... by far the most direct and satisfactory illustration of the meaning intended to be put upon the twenty-third chapter of the Confession by those who originally adopted it as the standard of the church’s doctrine, is to be found in the ‘Hundred and eleven propositions concerning the ministry and government of the Church,’ published, and virtually, though not formally, sanctioned by the Assembly of the Church of Scotland of 1647, the same Assembly which adopted the Confession ... They (for example, George Gillespie) make it manifest, beyond all reasonable doubt, that the Confession was not intended to sanction any ecclesiastical jurisdiction in the civil magistrate, or any right of authoritative interference in the concerns of the church of Christ; and they decidedly purport the principles held by ‘the advocates of the recent proceedings of the church.’¹¹⁶

According to Rutherford, failure in a nation to *enshrine the true religion*, once known in its political constitution invites the most serious threat of all against its safety,

proper religion’. See *ibid.*, 25. Young adds, “As Calvin observes, ‘Something remarkable is here demanded from princes, besides an ordinary profession of faith; for the Lord has bestowed on them authority and power to defend the church and to promote the glory of God’”, *ibid.*, 25. The magistrate, having the highest power (under Christ) over the people whom he rules, a power of life and death and so by his power may do much for the establishment of the honour of God and Christ among his people, Marshall, *The Power of the Civil Magistrate in matters of Religion, Vindicated*, 14. Also see *ibid.*, 15, regarding an interpretation of Romans 13:4 in support of the religious duty of the magistrate. Marshall is of the view that, if the magistrate must rule towards *godliness*, then all the *means* to this end must be taken care of by the magistrate, Marshall, *The Power of the Civil Magistrate in matters of Religion, Vindicated*, 2. Marshall refers to the role that the magistrate needs to play as *nursing fathers* in taking care of religion (Isaiah 49:23; 60:10), *ibid.*, 3. Marshall refers to Psalm 2 and 24 regarding the exhortation to kings and that kings must *open the gates* to Christ, *ibid.*, 3. Also see Cunningham, “The Westminster Confession on the Relation between Church and State”, 13.

¹¹⁵ Rendell, *Samuel Rutherford. A New Biography of the Man and His Ministry*, 139.

¹¹⁶ Cunningham, “The Westminster Confession on the Relation between Church and State”, 15-17. For Cunningham’s further observation of some extracts from Gillespie’s propositions in this regard, see rest of *ibid.*, 15-17.

namely the wrath of God.¹¹⁷ In Rutherford's opinion, one of the best things the magistrate can do for his people is to compel them to attend church. Although the magistrate cannot compel faith or heart duties, he can compel external profession, and for Rutherford this was enough.¹¹⁸ Marshall states:

Yet in the kind of covenanted social structure he (Rutherford) envisioned, though church and state were parallel, neither usurping the prerogative of the other, both state and church would have a common spiritual purpose. That purpose was to be acknowledged equally by both; but it was very clear to Rutherford which party had the right to define that purpose. Despite all his protests to the contrary it is hard to see how the church, on his agenda, could be anything but the senior partner in the national organism.¹¹⁹

This was probably inevitable given the history of the Reformed churches to that point. Even as far back as Augustine, it was understood that the state was a unitary Christian state, serving interests in which the spiritual was paramount and furthering the cause of salvation by protecting doctrinal purity.¹²⁰ According to Augustine, Constantine (306-337 AD) and Theodosius (379-395 AD) were exemplary in vigorously advancing the cause of the Catholic faith, establishing churches and actively

¹¹⁷ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 198 (Author's emphasis). Also see *ibid.*, 261. At *ibid.*, 203, Marshall observes that according to Rutherford, the magistrate must be the nurse-father to the true church.

¹¹⁸ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 257-258.

¹¹⁹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 254.

¹²⁰ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 255. Also see *ibid.*, 256-259. William Young adds an interesting observation pertaining to the history of the Christian faith in the times of the New Testament (therefore preceding the views of the Church Fathers and Aquinas on this subject) stating that the New Testament no longer teaches (in comparison to the Old Testament) the close connection between church and state due to the fact that in the first century the Christian church faced opposition to the point of persecution from hostile magistrates, both Jew and Gentile. However, Divine revelation has taken account of this and has given the church direction on this subject primarily in the Old Testament. Young adds, "The objection that the church may not adopt such a procedure in view of the progress of revelation has no more force than the parallel invalid argument against the singing of the Old Testament Psalms in the Christian church. Nor may we ignore the fact that the New Testament nowhere nullifies the principles of the order set forth in the Old Testament. The argument for infant baptism from the absence of any New Testament negation of the principle of the Abrahamic covenant is a parallel to the conclusion drawn as to the authority of the civil magistrate in religious matters", Young, "The Westminster Confession on the Relation between Church and State", 26. In the words of Thomas Sproull, "As the relation between the church and the state is not adventitious, dependent on the caprice of men, but is settled by the appointment of God, it cannot be changed but by his authority. And as there is no record in his word of a change, the conclusion is that it is the same now as under the former dispensation", Thomas Sproull, *The Loyal Archite; or The Attributes of Legitimate Civil Government*, (A Sermon, Preached by Request, in the Reformed Presbyterian Church, New Alexandria, Pennsylvania, 28 November 1875, Pittsburgh: Bakewell & Marthens, 1876), 9, <http://www.covenanter.org/TSproull/archite.htm> (accessed 23 June 2012).

suppressing pagan rights and destroying images dedicated to pagan deities.¹²¹ According to Augustine, the Christian ruler should place the resources of the state in the service of the Church. This does not mean that government is subordinated to the Church, only the person of the ruler (as both Christian and ruler) exercises his prerogatives in the attainment of the highest ideal known to him namely the good of the Church. To the extent that such a ruler is successful, the people of the 'earthly city' are moved closer to the 'City of God'.¹²² Therefore, in Augustine, one already finds vestiges of support of the religious duties of the civil magistrate understood against the soteriological purposes of both church and state.

Preservation not only referred to this world, but also to an *eternal preservation*. Commenting on Calvin's political theory, R.C. Hancock says that the political order contributes, among other things, to man's supernatural purposes.¹²³ Calvin emphasises the role of the *visible church* in externally developing the internal faith of the believer¹²⁴ and in this regard, the visible church plays an important role in the salvation of the believer. The visible church is the *means* by which God has chosen to make believers.¹²⁵ Although faith is sufficient to give believers perfect assurance of their salvation in the perfect righteousness of Christ and therefore give them perfect freedom from 'works of righteousness', one's justification by faith is nonetheless in need of perpetual renewal and therefore of external means or 'outward helps to beget and increase faith within one, and advance it to its goals'.¹²⁶

Contemporary liberal and post-modernistic schools of thought view the conscience as autonomous, as true and infallible. This is in stark contrast to the Reformation (and many preceding centuries of thinking), where Western Europe was enveloped in Christianity and where truth in the transcendental was more unified. In this regard, although there were various insights regarding the parameters of the conscience and the nature and protection of the conscience in theological and political theory, there were substantial contributions regarding conscience from a biblical perspective. One

¹²¹ George J. Lavere, "The Influence of Saint Augustine on Early Medieval Political Theory", *Augustinian Studies*, Vol. 12, (1981), 7-8.

¹²² Lavere, "The Influence of Saint Augustine on Early Medieval Political Theory", 8.

¹²³ R. C. Hancock, *Calvin and the Foundations of Modern Politics*, (Cornell University Press, 1989), 30.

¹²⁴ Hancock, *Calvin and the Foundations of Modern Politics*, 46.

¹²⁵ Hancock, *Calvin and the Foundations of Modern Politics*, 46.

¹²⁶ Hancock, *Calvin and the Foundations of Modern Politics*, 51.

of the most interesting sections in the sixteenth-century Swiss Reformer, Pierre Viret's *L'Interim* is where he discussed the good and bad points of granting full liberty of conscience to all people. The fact that men abused the privilege they possessed to make up their own minds concerning religion apparently disturbed Viret a great deal. Those who chose the religion which best suited their personal affairs, and those who had grown lax in the worship of their own religion, were denounced by Viret.¹²⁷

Like Rutherford, Viret's insight was based on the assumption (and reality at the time) of an established Christian political community. Similar to Viret, Rutherford's political postulations was not a political tract in order to 'establish' Christianity on the continent or of 'compelling individuals to enter'. Rutherford makes it clear that religion cannot be compelled by the Magistrate.¹²⁸ Looking at Rutherford's thought, Omri Webb states that in a sense, the visible church exists for the invisible.¹²⁹ Alexander Henderson,¹³⁰ towards the close of the 1640s, states:

This unity of religion is a thing so desirable, that all sound divines and politicians are for it, where it may be easily obtained and brought about. And as we conceive so pious and profitable a work to be worthy of the best consideration, so are we earnest in

¹²⁷ Robert Dean Linder, *The Political Ideas of Pierre Viret*, (Geneva: Librairie Droz, 1964), 163.

¹²⁸ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 90-91, 93 and 96 (modern version). Rutherford insisted that *adiaphora* (things indifferent) constituted a sphere in which the consciences of individuals could not be bound by any external power, except where this interfered with the stability of civil society or contravened moral law. According to Rutherford, Christ's rule over this faculty, which was widely conceived to be the spiritual deputy or lieutenant He placed in the soul of each believer, had to be direct and unmediated, Alexandra Walsham, *Charitable hatred. Tolerance and intolerance in England, 1500-1700*, (Manchester & New York: Manchester University Press, 2006), 242. This was a basic understanding emanating from the Reformers. For example, Althusius explained that a magistrate in whose realm the true worship of God does not thrive, should take care that he does not claim imperium over that area of the faith and religion of men that exist only in the soul and conscience; God alone has imperium in this area and to him alone the secrets and intimate recesses of the heart are known. God administers his kingdom, which is not of this world, through his ministers of the Word, and for this reason faith is said to be a gift of God, not of Caesar – faith is not of the will, nor can it be coerced; faith must be persuaded not commanded, and taught not ordered, Carney, *The Politics of Johannes Althusius*, 167. Those who err in religion are therefore to be ruled not by external force or by corporal arms, but by the sword of the spirit; that is, by the Word and spiritual arms through which God is able to lead them to Him. Such people are to be entrusted to ministers of the Word of God for care and instruction. If they cannot be persuaded by the Word of God, how much less can they be coerced by the threats or punishments of the magistrate to believe what some other person believes. Therefore, the magistrate should leave this matter to God, attribute to him the things that are his, and reserve to himself what God had given him, namely *imperium* over bodies, *ibid.*, 167-168. Althusius adds, that although the magistrate must punish heretics, just as any other person, as far as they are delinquent in external actions, the magistrate is forbidden to impose a penalty over the thoughts of men, *ibid.*, 168.

¹²⁹ Webb, *The Political Thought of Samuel Rutherford*, 192.

¹³⁰ One of the Scottish Commissioners to the Westminster Assembly. For more on him see Hetherington, *History of the Westminster Assembly of Divines*, 388-392.

recommending it to your lordships, that it may be brought before his majesty and the Parliament, as that which doth highly concern his majesty's honour and the weal of all his dominions, and which, *without forcing of consciences, seemeth not only to be possible, but an easy work.*¹³¹

This is indicative of the powerful presence of Christianity on the British Continent during the seventeenth century. In addition to this, what has to be understood is, as stated earlier, the threat arising from Catholicism and the monarchy during the sixteenth century. This gave the Scottish Commissioners added impetus to clarify tolerance and liberty of conscience, and to approach these concepts with the greatest circumspection. Henderson made it clear that the reformation in Scotland, which had come at such a cost, could potentially be threatened if Episcopacy were to be retained in England. This necessitated a reconsideration of concepts such as tolerance and liberty of conscience. This threat was confirmed by Catholicism's opposition to the government of the Reformed Churches; their close proximity to the king living in England; the self-esteem they had resulting from their own learning; and the consanguinity of their hierarchy with the Church of Rome.¹³²

One of the foremost endeavours of the Westminster Assembly in seventeenth-century England was to protect the belief-aspect (and conscience) of man and hereby solidify man's covenantal relationship in both an individual as well as in a collective sense. The Scottish divines contributed in this regard. Not doing so would threaten a mutual relationship between God and society. The political and legal arena is brought before the choice between implementing the totally free exercise of the conscience by and according to man himself, or by living in obedience to God, which implies living according to the moral law as best possible through utter gratitude for Christ's sacrifice. The latter implies a limitation on the free exercise of the conscience, but which works towards the satisfaction of the divine law, as imprinted in man's being since time immemorial. What is important for purposes of the magistrate's role in the protection of the conscience is Luther's comment that "a Christian's conscience needs

¹³¹ Alexander Henderson, "Our Desires Concerning Unity in Religion, and Uniformity of Church Government, as a Special Mean to Conserve Peace in his Majesty's Dominions", A statement by the Scottish Commissioners, of the views and desires entertained by the Church and State of Scotland, submitted to the Lords of the Treaty in the beginning of 1641 in Hetherington, *History of the Westminster Assembly of Divines*, 375.

¹³² Alexander Henderson in Hetherington, *History of the Westminster Assembly of Divines*, 378.

to be properly formed and instructed, even though, by faith in Christ, the conscience is free ...¹³³

According to Rutherford, there is liberty of conscience, which is the domain of God; yet the magistrate must see to it, from an external angle, that this internal content is not weakened. As stated earlier, the importance of maintaining and protecting religion in a Christian society is aligned to the view that violence and the use of revolution to institute closer conformity to the will of God is not to be imposed by force upon an unwilling *society*. However, in a Christian society, the civil law should be upheld (although there will be some individuals who would not agree, which is the case in any society).¹³⁴ Therefore, Christian civil law in a Christian society would serve as a secondary means to protect and maintain the Christian ethos of such a society, which includes the protection and maintenance of the true religion and consequently of the Christian individual's conscience. This is aligned with Rutherford's understanding.

3.2 The limits of toleration

Limitations on both tolerance and liberty of conscience need to be understood contextually, the Westminster Assembly having had much reason to counter the threat of a repetition of the abuses preceding and continuing into seventeenth-century Europe. Nevertheless, this also gives the message of approaching toleration and liberty of conscience with the necessary sensitivity to prevent unconditional acceptance and application of these concepts. Human nature has taught that due to *man's failings*, in other words, due to man's *sin*, he requires a life of limitations, the latter to be understood in a reasonable sense. J. Budziszewski comments: "[W]e are neither simply good nor simply bad, but created good and broken. We are not a sheer ugliness, nothing so plain, but a beauty ruined."¹³⁵ This implies that society requires government and consequently the law to tend also to spiritual matters due to man's weakness in completely being able to tend to spiritual matters in addition to civil

¹³³ S. Joel Garver, "Liberty of Conscience in Catholic, Reformed, and Contemporary Perspective", 10, <http://www.goelgarver.com/writ/theo/conscience.htm> (accessed 10 March 2013). Also see *ibid.*, 12.

¹³⁴ Greg L. Bahnsen, "The Theonomic Position", 21-53, in *God and Politics. Four Views on the Reformation of Civil Government*, (Phillipsburg, New Jersey: Presbyterian and Reformed Publishing Company, 1989), 52.

¹³⁵ J. Budziszewski, *The Revenge of Conscience. Politics and the Fall of Man*, (Dallas: Spence Publishing Company, 1999), 5.

matters. At the heart of the role of constitutionalism is the maintenance the true religion due to this very weakness ingrained in man.

Following in the wake of for example, Grotius, Bodin, Williams and Milton, it was John Locke's attempt at limiting dogma to the absolute minimum in particular that provided the absence of a heavy theological superstructure,¹³⁶ which had an influence on how the functions of the civil ruler regarding how religious matters are understood. This had a profound influence on subsequent constitutional, political and legal Western thinking. Liberalism and the Enlightenment were born of the desire to escape the conflict generated by religious disputes. In this regard, toleration is the preferred implementation of that desire, being a device for placing religious issues out of the public agenda so that civil business might proceed undisturbed by what had turned out to be intractable oppositions.¹³⁷ Because, according to Locke, the magistrate lacks the authority and wisdom to distinguish the false from the true, as well as because even if the magistrate were to declare an official doctrine and compel its profession, that profession would neither produce nor alter the *inward* persuasion that is the mark of the true church. What matters to the magistrate are the care and protection of 'outward things such as money, land, houses and the like.'¹³⁸

Locke did not call for the rejection of the orthodox religion, but assumed the validity of Christianity and used it as a premise to argue for toleration of religious dissenters. However any attempt to enforce orthodoxy through repression was futile and perhaps even counterproductive,¹³⁹ and would not produce nor alter the *inward* persuasion that is the mark of the true church. This understanding forms the basic structure of liberal political theory, which reflects a firm distinction between the public and the private realms, "and a determination to patrol the boundaries between them so that secular authorities will not penalise citizens for the thoughts they have or the opinions they

¹³⁶ Paul Johnson, *A History of Christianity*, (London: Weidenfeld and Nicolson, 1976), 339-340. Also see Sanford Kessler, "John Locke's Legacy of Religious Freedom", *Polity*, Vol. 17, 3(1985), 489-490.

¹³⁷ Stanley Fish, "Mission Impossible: Settling the Just Bounds between Church and State", *Columbia Law Review*, Vol. 97, 8(1997), 2271.

¹³⁸ Fish, "Mission Impossible: Settling the Just Bounds between Church and State", 2260.

¹³⁹ Steven D. Smith, "The Restoration of Tolerance", *California Law Review*, 2(1990), 309-310.

express (no censorship), and religious authorities will not meddle in the worldly affairs of their parishioners (no theocracy)”¹⁴⁰.

This approach was a continuation of the influential views of, among others, Grotius and Milton and many years before pertaining to the elevation of reason in line with the Stoic tradition to which Aquinas also gave much attention. The Reformers such as Calvin, Bullinger and Rutherford clearly understood the risks involved in moving towards a ‘minimised’ dogma spurred on by the spirit of an overdose of toleration. The results speak for themselves from the eighteenth century onwards, a fulfilment of John MacArthur’s view that,

When tolerance is valued over truth, the cause of truth always suffers. Church history shows this to be so. Only when the people of God have mounted a hardy defense of truth and sound doctrine has the church flourished and grown strong. The Reformation, the Puritan era, and the Great Awakenings are all examples of this. The times of decline in the history of the church have always been marked by an undue emphasis on tolerance – which leads inevitably to carelessness, worldliness, doctrinal compromise, and great confusion in the church.¹⁴¹

As touched upon in Chapter 1, in the middle of seventeenth-century Britain there were sceptical views regarding religious truth in the public sphere and the Presbyterian view that the Bible offers a truth for public application and the instilling of such truth in society (albeit not by force). A heightened sense of scepticism towards an objective truth of Scripture automatically led to an over-emphasis of the toleration of different Scriptural interpretations. Believing that there is no objective or standard Scriptural truth resulted in a relativism of biblical meaning and this was a concern to Rutherford. In the words of Rutherford, “For the doctrine of toleration cultivates and emphasises a sceptical spirit concerning the certainties of revealed

¹⁴⁰ Fish, “Mission Impossible: Settling the Just Bounds between Church and State”, 2260. In fact, the battle between the state and the religions thus becomes a struggle over competing ways to understand reality – a fight over epistemology – resolved not through logic but through power, Stephen L. Carter, “The Supreme Court, 1992 Term-Comment: The Resurrection of Religious Freedom”, *Harvard Law Review*, 107, 1(1993), 140.

¹⁴¹ John F. MacArthur, *Reckless Faith. When the Church Loses its will to Discern*, (Wheaton, Illinois: Crossway Books, 1994), 22.

truth. It questions the infallibility of the necessary truths with which God has endowed his Church. It destroys faith in the Bible ...”¹⁴²

John Rawls speaks of the ‘fact of oppression’ as a community united in affirming one and the same comprehensive doctrine, which consequently requires the oppressive use of state power necessary for political community. Rawls refers to the society of the Middle Ages, more or less united in affirming the Catholic faith, and with the Inquisition whose suppression of heresy was needed to preserve that shared religious belief.¹⁴³ According to Rawls, political liberalism developed in reaction to the Reformation and its aftermath. After the savage religious wars of the sixteenth century, European civilization discovered a new social possibility, the possibility of a reasonably harmonious and stable plural society. Before then it seemed natural to believe that social unity and concord require agreement on general and comprehensive religious, philosophical, or moral doctrine.¹⁴⁴

However, what Rawls fails to see in this regard, is emphasised by David Schaefer in the following: “Any real threat to our regime of toleration today comes not from religious fanatics demanding the imposition of some specific doctrine on their fellow citizens but rather from militant secularists, driven by ideological principles like Rawls’s, determined to wipe out any references to God in the public sphere, merely so that their sensibilities won’t be offended”.¹⁴⁵ In addition, ‘tolerance’ is not supposed to be an end in itself. Rawl’s negative sentiments regarding traditional religion, more specifically, Christianity, are made even clearer in his reference to Luther and Calvin as being as dogmatic and intolerant as the Roman Church had been.¹⁴⁶ In addition, persecution and intolerance need to be approached more sensitively when looking at

¹⁴² Rutherford’s *A Free Disputation Against Pretended Liberty of Conscience* cited in Estrada, “Samuel Rutherford as a Presbyterian Theologian and Political Thinker”, 11.

¹⁴³ John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993), 37. Also see John Rawls, “Justice as Fairness: Political not Metaphysical”, Vol. 14, 3(1985), 249.

¹⁴⁴ Paul F. Campos, “Secular Fundamentalism”, *Columbia Law Review*, Vol. 94, 6(1994), 1821.

¹⁴⁵ David Lewis Schaefer, *Illiberal Justice. John Rawls vs. The American Political Tradition*, (Columbia and London: University of Missouri Press, 2007), 257. The best explanation for the fear of public action motivated by religious belief rests on the reliance of liberalism on dialogue and rationality as indispensable components of its political theory, and the often unstated premise of many liberal theorists that reasoning and religious belief are mutually exclusive means for understanding the world”, Stephen L. Carter, “Evolutionism, Creationism, and Treating Religion as a Hobby”, *Duke Law Journal*, Vol. 1987, 6(1987), 986.

¹⁴⁶ Rawls, *Political Liberalism*, xxiii.

sixteenth- and seventeenth-century Europe and, more specifically, at the plight of the Scottish during this time.¹⁴⁷ This was elaborated upon in especially Chapter 1.

However, ‘tolerance’ may be what liberalism claims for itself in contradistinction to other, supposedly more authoritarian views; but liberalism is tolerant only *within* the space demarcated by the operations of reason. No one who steps outside that space will be tolerated. In this regard, liberalism does not differ from a type of ideological fundamentalism, for any ideology must be based on some foundational conception of what the world is like, “and while the conception may admit of differences within its boundaries ... it cannot legitimise differences that would blur its boundaries, for that would be to delegitimise itself.”¹⁴⁸ Those who preach toleration or open-mindedness or mutual respect, know that there are some ideas they cannot tolerate or be open to or respect, and therefore they must find a way of keeping such ideas off the agenda while still proclaiming that they are practising toleration, open-mindedness, and mutual respect.¹⁴⁹ In addition, tolerance has no moral content; what determines what to allow or not to allow is not tolerance. For example, theft and murder are not

¹⁴⁷ According to William Young: “It is necessary ... to dispose of the ambiguity found in the charge of intolerance and persecution. These words call up frightful images of the Spanish Inquisition, the fires of Smithfield and the Massacre of St. Bartholomew. It might be simply asked in reply where in the history of Scottish Presbyterianism has there been a parallel to such atrocities, except in the treatment of the Covenanters by the Prelatists? The doctrine of the Reformers and the Puritans has never borne such gruesome fruit. The substantial element underlying the charge concerns the principle that the civil magistrate may and should adopt the entire divine law as the norm to which he must conform in making and enforcing laws. His actions should be directed toward the public observance of the precepts in both tables of the decalogue. The specific means to be used are not prescribed by the general principle, but they must fall within the limited province of the authority delegated by the sovereign God to human governments. Laws with respect to the Sabbath involve nothing of intolerance or persecution more than laws prohibiting murder, adultery or theft. The limits of the authority of the civil magistrate require a restriction with respect to the second table of the law *as well as the first*. The government cannot enforce the tenth commandment, for the duties required and the sins forbidden are purely spiritual, being located in the inner recesses of the heart, over which no human government, not even the church has jurisdiction. It goes without saying that the spiritual or inward requirements of the first table of the law fall outside the province of the civil magistrate. But outward displays of idolatry, public blasphemy and Sabbath desecration may be subjects of legislation, and will be in a Protestant nation”, Young, “The Westminster Confession on the Relation between Church and State”, 22-23. In this regard, William Young provides a good summary of a more nuanced view on the political theory of the Scottish Divines, something that is also postulated in many sections of this thesis.

¹⁴⁸ Stanley Fish, “Liberalism Doesn’t Exist”, *Duke Law Journal*, Vol. 1987, 6(1987), 1000. J. Budziszewski states that, “tolerance cannot be neutral about what is good, for its very purpose is to guard goods and avert evils”, Budziszewski, *The Revenge of Conscience*, 46.

¹⁴⁹ Fish, “Mission Impossible: Settling the Just Bounds between Church and State”, 2292.

allowed because of a theory of harm, and not because of tolerance.¹⁵⁰ This gives tolerance some or other pre-suppositional point of authority.

James Willson asks whether it would make sense to state that he is an intolerant man who contends that God has given laws to the universe and therefore has a right to rule by His law and government?¹⁵¹ There should be added sensitivity when applying the word ‘tolerant’, this being emphasised when taking into consideration Willson’s observation, namely:

There is perhaps no word in the English language, more abused than the word *tolerance*.¹⁵² If a writer is found vigorously supporting any cause which he believes to be right, and endeavoring to show that the opposite must be wrong, he is immediately styled *intolerant*. This is more especially the case in matters of religion. If he is firmly persuaded that the system of doctrines which he believes, is the system of the Bible, he is considered a bigot. If he endeavors to demonstrate that anything is error, he is marked for intolerance.¹⁵³

Bearing this in mind, William Hetherington provides a good argument supporting the fact that the aims of the Scottish Divines at the Westminster Assembly were not to be viewed as intolerant. In this regard, Hetherington states,

Many thousands have been oppressed, persecuted, and put to death, for maintaining and promoting God’s revealed truth; many thousands have suffered equal extremities for maintaining and promoting satanic falsehood; and many thousands have sustained all degrees of punishment for the perpetration of immorality and crime. But who will assert that the same principle appears in all these cases? Who will say, that because it is right to suppress and punish the commission of crime, therefore it is right to suppress and punish men for asserting religious truth? Or, that because it is wrong to suppress truth, therefore it is wrong to suppress crime, or discountenance error? But men try to escape from such reasoning, by asserting that truth cannot be ascertained with certainty; and that therefore

¹⁵⁰ Stephen L. Carter, *Civility. Manners, Morals, and the Etiquette of Democracy*, (Basic Books, 1998), 213.

¹⁵¹ James R. Willson, “Essay on Tolerance”, <http://www.covenanter.org/JRWillson/tolerance.htm> (accessed 10 September 2012). Willson adds, “If society be God’s creating, and not a creature of the creature, then God has a right to prescribe the laws by which society shall be governed. It would seem that wherever there are relations among men, the laws regulating these relations, belong to divine government, *ibid*.”

¹⁵² Writing on the cause of the Scottish Divines at the Westminster Assembly in the middle of the seventeenth century, William Hetherington, regarding ‘tolerance’ comments that, “the term itself, *toleration in matters of religion*, is one which has rarely been defined with that care and exactness which its great importance demands; consequently, the whole subject is liable to every sort of sophistical perversion ...”, Hetherington, *History of the Westminster Assembly of Divines*, 328.

¹⁵³ Willson, “Essay on Tolerance”.

it is best to give equal toleration to all opinions, lest a grievous mistake should be committed, and truth suppressed instead of error. This is the language of scepticism, and the principle which it promulgates is not toleration, but latitudinarian laxity and licentiousness. Such language really implies, either that God did not intend to convey saving truth in a manner intelligible to the minds of men, or that he failed in his intention. But since few will be found reckless enough to maintain such opinions in their naked deformity, the advocates of sceptical laxity have recourse to every kind of evasion, in order to conceal alike the nature of the principle which they support and of that which they oppose. And, unhappily, these evasions are but too consonant to the character of the fallen mind of man, which is ‘enmity against God, and is not subject to the law of God, neither indeed can be’. This is a truth which the sincere Christian feels and knows, but which philosophers and politicians reject, despise, and hate.¹⁵⁴

Jacobus Arminius also argued for broad toleration of doctrinal differences,¹⁵⁵ whilst Hebraist Erastians defended toleration out of the deeply held *religious* conviction that God himself established the practice in his perfect commonwealth. This Eric Nelson states in order to prove that religious toleration did not emerge out of a process of secularisation (secularisation to be understood in the sense of aspiring towards an exclusion of political theology).¹⁵⁶ For Richard Hooker, as for Erastus, the *civil* character of all binding religious law argues for a narrowing of the range of cases in which religious matters should be legislated.¹⁵⁷ Grotius argued that in legislating religious matters the supreme magistrate ought to be motivated by the practical utilitarian need to foster ‘harmony,’ order and civic peace; not the desire to impose doctrinal uniformity (an effort that, on his account, tends to the disturbance of commonwealths).¹⁵⁸ Rutherford refers to the Independents in England and the Anabaptists as having sided with, among others, Grotius who was “the enemy of Synods”.¹⁵⁹ This view held by Grotius and others, lead to a pragmatic and utilitarian line of thinking that prioritised peace and harmony in the community, eventually

¹⁵⁴ Hetherington, *History of the Westminster Assembly of Divines*, 329.

¹⁵⁵ Nelson, *The Hebrew Republic. Jewish Sources and the Transformation of European Political Thought*, 97.

¹⁵⁶ Nelson, *The Hebrew Republic. Jewish Sources and the Transformation of European Political Thought*, 128. Also see *ibid.*, 88.

¹⁵⁷ Nelson, *The Hebrew Republic. Jewish Sources and the Transformation of European Political Thought*, 97.

¹⁵⁸ Nelson, *The Hebrew Republic. Jewish Sources and the Transformation of European Political Thought*, 104. Hugo Grotius did however believe that religion is useful for civil society in that it encourages private morality and the cultivation of civic virtue, *ibid.*, 104-105.

¹⁵⁹ Rutherford, “A brotherly and free Epistle to the patrons and friends of pretended Liberty of Conscience”.

leading to a public sphere devoid of religious content and activity, due to its commitments towards a higher degree of accommodation. This posed a real threat to the maintenance and protection of the true religion, and there were many who were concerned in this regard, for example Rutherford.

The challenges related to the ordering of society that arose during sixteenth- and seventeenth-century Europe included questions related to the maintenance and protection of the true religion. The Scottish Divines argued for the maintenance and protection of the true religion as reflected in the *Westminster Confession of Faith* and believed that Britain was to be unified in its support of this doctrine. As stated above, one of the primary goals of the Westminster Assembly was to protect the belief-aspect of man (which implied the protection of the individual believer's conscience) and the belief aspect of society. This necessitated a limitation of absolute tolerance and liberty of conscience, considering man's weakened nature. Countering this understanding, as stated above, was the school of thought proclaiming the primacy of practical utility, placing the attainment of peace and order at the forefront, and this could only be achieved by accommodating different beliefs within society. This had implications for the role of the magistrate and the nature of the law, also in the context of the covenant.

3.3 Samuel Rutherford and the protection of religion

In Chapter 1, the depravity of man against the background of constitutional, political and legal theory was elaborated. The depravity of man is also relevant to politics and the law in the context of religion and the magistrate's role in this regard. Man's sinful nature necessitates the external protection and maintenance of religion, which implicates the responsibility of the ruler (albeit in a different form as that which is expected from the church). Prominent Reformed political and legal theorists of the sixteenth century such as Bullinger and Althusius emphasised the positive role of the magistrate in the external maintenance, protection and furtherance of religion in the Christian Republic. Due to the Fall, man's capacity to reason was affected, requiring the presentation of more specific forms of knowledge as is found in Scripture. Because conscience can be mistaken for fancy, novelty, or heresy, it must be informed, "the more of knowledge, the more of conscience, as the more of fire, the

more heat.”¹⁶⁰ Nature’s light in man is insufficient in providing man with a more detailed knowledge of the true religion. This thinking differed from that of Grotius and Milton. According to Reformers such as Bullinger, Althusius, Calvin and Rutherford, Divine revelation and redemption was the means by which man’s defective reasoning was restored. This understanding was in contrast to the Enlightenment support of the overwhelming importance of reason as separated either from religion or as being complementary to a minimised and diluted religious doctrine.

The external maintenance of religion can only be properly understood against the background of man’s sinful nature. In this regard, *the problem of man’s sin is highlighted as a central cause towards the establishment of a political and legal system*. In other words, sin does not negate any political exercise, but in fact strengthens the need for a true and effective political and legal theory.¹⁶¹ The same can be said of seeking an effective constitutional model. Already during the German Reformation, reformers confronted this matter. Martin Luther was torn between his belief in man’s essential wickedness and his belief that wickedness itself, and the earthly realm which embodies it, are ordained of God.¹⁶² The Lutheran reformers taught that it was the duty of Christians “to work the work of God in the world”. However defective the will and reason were; Christians had to do as much good and attain as much understanding as possible.¹⁶³ According to Rutherford, precepts of the law of nature were originally inscribed upon the heart of Adam at his creation, although now dim and distorted due to sin. Enough light exists, says Rutherford, to

¹⁶⁰ Rutherford’s *A Fee Disputation Against Pretended Liberty of Conscience* cited in Gribben, “Samuel Rutherford and Liberty of Conscience”, 365.

¹⁶¹ Herman Dooyeweerd, *The Christian Idea of the State*, John Kraay (trans.), (Nutley, New Jersey: The Craig Press, 1978), 40. John Witte points to the landmark study on *The American Commonwealth*, by James Bryce who wrote, “Someone has said that the American government and constitution are based on the theology of Calvin and the philosophy of Hobbes. This at least is true, that there is a hearty Puritanism in the view of human nature which pervades the instrument of 1787. It is the work of men who believed in original sin, and were resolved to leave open for transgressors no door which they could possibly shut. Compare this spirit with the enthusiastic optimism of the Frenchman of 1789. It is not merely a difference of race temperaments; it is a difference of fundamental ideas”, Witte, *The Reformation of Rights. Law, Religion, and Human Rights in Early Modern Calvinism*, 319.

¹⁶² Harold J. Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, (Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 2003), 42.

¹⁶³ Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, 42.

render everyone without excuse for failing to know God and obey that law; at the same time, enough light exists to enable them to construct an ordered society.¹⁶⁴

Rutherford was a strict adherent of Presbyterian Calvinism, which emphasised the inherent problem of human depravity. Because of the Fall, humankind's faculty for reasoning was corrupted and incapable of purely rational judgments. Divine revelation and redemption was the sole means by which man's defective reasoning was restored. By contrast, Locke was an Anglican who attempted to divest himself of his Calvinistic heritage, embraced an optimistic view of human reasoning, and de-emphasised humankind's turpitude.¹⁶⁵ The Puritans (who supported Oliver Cromwell and the Scottish Calvinists) felt that republicanism represented a political recognition of the Bible's realistic teaching about human sinfulness and the ongoing struggle between Christ (who prompted true liberty) and Satan (who represented the worst possible tyranny).¹⁶⁶

John Witte provides a reminder of the Reformation's awareness of the threats of sin and how this assisted in establishing constitutional theory in Western thought. Protestant doctrines of sin were cast into democratic political forms. In other words, the political office had to be protected against the sinfulness of the political official.

¹⁶⁴ Marshall, *Natural Law and the Covenant: The place of natural law in the covenanted framework of Samuel Rutherford's Lex, Rex*, 17. Marshall refers to Omri Webb's referral (in his discussion on Rutherford) to Calvin's acknowledgment that sin has not destroyed the instinct for social life and the ability to construct an ordered society – "When we so condemn human understanding for its perpetual blindness as to leave it no perception of any object whatsoever, we not only go against God's Word, but also run counter to the experience of common sense" (says Calvin in his *Institutes*), *ibid.*, 36. Rutherford also stated that sin did not efface the covenantal instinct in human nature which makes possible the creation of a stable social order; nor did it efface the power of human beings to participate actively in that order, *ibid.*, 71. One needs to distinguish between Rutherford's view of 'man as Fallen and Broken', and 'nature as unbroken and sinless'. Regarding the former, Marshall states that when Rutherford speaks of nature as fallen and broken, he does so in an ethical sense, in connection with man in sin, the 'natural' man, *ibid.*, 115. Regarding 'nature as unbroken and sinless', Rutherford's view is that nature has another visage, which is 'unbroken and sinless'. This is nature considered in its metaphysical constitution; and it is synonymous with the goodness of creation, which sin has not destroyed, *ibid.*, 117 – "Because it is not sinful to be human, neither are the acts associated with humanness sinful, such as eating, sleeping, marrying, and participating in government. Sin has introduced corrupt attributes that adhere to these actions such as domination as a feature of governmental power and pride that refuses to acknowledge the glory of God as the true end of every act. But the corruptions are 'unnatural'; they do not spring from nature itself", *ibid.*, 118. Marshall adds that, "Nevertheless, Rutherford would insist that even nature unbroken and sinless needs grace to perfect it". Rutherford understands this as a clear Scriptural principle, *ibid.*, 118.

¹⁶⁵ Robert Arnold, "Was Samuel Rutherford a Source for John Locke's Political Theories?", (unpublished hard copy in possession of the author. Article was later published in the *Global Journal of Classical Theology*, Vol. 7, 1[2009]), 7.

¹⁶⁶ P. J. D. Jacobs, *The Influence of Biblical Ideas and Principles on Early American Republicanism and History*, (Dissertation submitted in partial fulfilment for the degree Philosophiae Doctor [Theology], Faculty of Theology of the Potchefstroom University of Higher Education, 1999), 36.

Political power, like ecclesiastical power, had to be distributed among self-checking executive, legislative, and judicial branches. Officials had to be elected to limited terms of office. Laws had to be clearly codified, and discretion closely guarded. If officials abused their office, they had to be disobeyed and if they persisted in their abuse, they had to be removed, even if by revolutionary force and regicide.¹⁶⁷ Irreligious philosophies (which are as belief orientated as their religious counterparts) agree on rejecting the Christian doctrine of original sin; however, it is this doctrine of original sin, which presents a profound insight regarding a challenge facing societies. This necessitates constitutional and republican norms to assist in the regulation of society. The need for a constitutional model is spurred on by the frailty of man in seeking and obtaining an ordered, disciplined and moral life.¹⁶⁸

This view of sin and its constitutional antidote were among the driving ideological forces behind the revolts of the French Huguenots, Dutch Pietists, and Scottish Presbyterians against their monarchical oppressors in the later sixteenth and seventeenth centuries.¹⁶⁹ The awareness of sin acted as a catalyst in the development of Republican thought during the Reformation (although in the many centuries preceding the Reformation, attention was given to this issue). The basic condition of human freedom, namely its foundation in the absolute freedom of God, has been violated by human revolt against God, resulting in man's total corruption. Man can only achieve absolute deliverance from this corruption by means of faith in the atoning death of Jesus Christ – but the full realisation thereof is not given in our dispensation. According to Isaiah 5:18 and Hosea 4:6, the first requisite is faith and

¹⁶⁷ John Witte Jr, "The Freedom of a Christian: Martin Luther's Reformation of Law & Liberty", (8 March, 2005, article on the website of Emory Law School, 9). This article is drawn from Witte's Snuggs Lectures at the University of Tulsa, 7-8 March, 2005, 8, http://cslr.law.emory.edu/fileadmin/media/PDFs/Lectures/Witte_Freedom_Christian.pdf (accessed 5 January 2013). Reformed theologians and jurists, aware of the power of sin to corrupt those elected to exercise the power of state, made important contributions to the development of systems of checks and balances which became fundamental to democratic theory and practice, John W. de Gruchy, *Christianity and Democracy. A theology for a just world order*, (Cambridge: Cambridge University Press, 1995), 76. Also see Vischer, *Conscience and the Common Good. Reclaiming the Space between Person and State*, 107, Vischer stating that John Calvin had embraced the republican form of government in light of man's sinfulness, because "it is safer and better to let several people together steer the ship of state so that one may restrain the other when the lust for power might degenerate into tyranny", *ibid.*, 107.

¹⁶⁸ This does not mean that irreligious philosophies reject any form of weakness on the part of man. However, from a Christian religious paradigm as found in Rutherford's time, the weakness of man in the context of the sinful nature of man had much urgency and concern connected to it.

¹⁶⁹ Witte, "The Freedom of a Christian: Martin Luther's Reformation of Law & Liberty", 8.

knowledge.¹⁷⁰ During the Enlightenment, conscience was democratised and seen as the ‘natural law’ present within each person. This was an insight similar to the Enlightenment ideas of universal, natural laws in the world of nature. This was a conscience was freed from its Christian roots and could appear within any religion. In this manner, the way was opened for the kind of cultural and religious pluralism that is experienced today.¹⁷¹

All models of human nature are normative – they are constructed out of philosophical and moral assumptions, and are therefore in principle not testable.¹⁷² Views on human nature influence views on constitutional, and consequently political and legal theory and such views are normative at base level. The contrasting philosophies of Hobbes and Locke, and of Calhoun and Jefferson, demonstrate that any particular system of political thought is a reflection of the view of its author about the nature of man.¹⁷³ The same can be said of, for example, Grotius and Bodin, and of Rutherford and Althusius. In the words of James Madison,

What is government itself but the greatest of all reflections on human nature ... If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by man over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.¹⁷⁴

The Founding Fathers took a highly sceptical view of political power in all its aspects because of their views on human sin and frailty. This approach resulted in devising a system in which every form of political power was subject to the most careful limits,

¹⁷⁰ H. G. Stoker, “The Essence of Human Freedom”, par. 2.1.1.9, p. 9 in ‘*Uit, deur en tot – God is alle dinge*’, *Werke van Prof. Dr. H. G. Stoker*, (file://N:\Stokerdokumente\2_1_1\2_1_1_9 THE ESSENCE OF HUMAN FREEDOM...9/28/2007).

¹⁷¹ Coward and McLaren, “Introduction”, 2. The authors further observe that Voltaire, Shaftesbury, and Bishop Butler added to the development of the Enlightenment conception of conscience as the universal moral ‘inner voice’ of human nature – a movement which culminated in Rousseau and Kant, who both eliminated the elements of grace and expert advice from conscience. To them the ‘inner voice’ of conscience possesses illumination, conviction, rational persuasion, and has been universalised and democratised, *ibid.*, 3.

¹⁷² Andrew Heywood, *Political Theory. An Introduction*, 3rd Edition, (Basingstoke: Hampshire, 2004), 16-17.

¹⁷³ Clinton Rossiter, *Six Characters in Search of a Republic*, (New York: Harcourt, Brace & World, Inc., 1953), 97. Thomas Hooker “in placing a little more emphasis on the ... reason in man than on his sinfulness ... on the New Testament than on the Old, Hooker pried open a door that later generations of New England churchgoers swung wide for liberty”, *ibid.*, 19.

¹⁷⁴ Ellis Sandoz, *Republicanism, Religion, and the Soul of America*, (Columbia, Missouri: University of Missouri Press, 2006), 185.

which could only be guaranteed by a Constitution.¹⁷⁵ While the Framers believed in the authority of ‘the people’, they did not believe that simply conferring power on an elected body was in itself a solution to anything. To them the ultimate issue was not where the power came from, or by whom it was exercised, but what was done with it.¹⁷⁶ The Puritans believed strongly in ‘Original Sin’, and consequently translated this into ideas of constitutionalism, the rule of law, and careful safeguards against arbitrary power.¹⁷⁷ In many instances, sin allows man and political institutions to ignore or oppose foundational constitutional and moral norms.

This also does not imply that the Puritans viewed a system of limited government as a guarantee for the materialisation of a perfect ethical communal dispensation. However, what the ideas regarding the realisation of a limited government could provide was an effective structure aimed at limiting unethical men from wielding boundless power over others.¹⁷⁸ This approach is very different from the boundless Hobbesian faith placed in sinful government to wield order in the community. The idea of sinful man humbles one towards the obedience of a higher more credible universal law. Sin allows man to rely on something more powerful and trustworthy than man and reason itself. For the reformers this something could be none other than God, this also being the most rational view to have. Amidst sinful man and a sinful world God gives His law to man, which represents the command of love, for Him and for one’s neighbours, giving rise to a political and legal theory geared towards the provision of peace, love and harmony in society. However, the realisation thereof would not always be possible or would be weakened at times, due to fallible man. This command of love includes the maintenance and protection of the true religion.

In this regard, sin forms part of the bigger picture to which constitutional and consequent political and legal theory endeavours the attainment of the best possible application of this knowledge always pre-empting a threat emanating from the sinful individual and community. The idea of Republicanism as reflected in the works of Rutherford also provided a good model to counter this threat, where the church and magistrate, under the guidance of the Divine law, and made effective by the covenant,

¹⁷⁵ M. Stanton Evans, *The Theme is Freedom*, (Washington, D.C.: Regnery Publishing, Inc., 1994), 253-256.

¹⁷⁶ Evans, *The Theme is Freedom*, 253. Also see *ibid.*, 95-96.

¹⁷⁷ Evans, *The Theme is Freedom*, 97-98.

¹⁷⁸ Evans, *The Theme is Freedom*, 111.

played major roles in this regard. Republicanism holds within it central insights as to how the challenge posed by the frailty of human nature which expands into society as the collectivity of humans, can best be dealt with.

Rutherford reshaped Calvin's definition on the conscience to prevent it bearing even a remote connection with that of the 'Inner Light'. – "Some are extremely devoted to conscience as conscience", but "a conscience void of knowledge is void of goodness;" "Conscience is the power to know in order to obey".¹⁷⁹ Rutherford understood the inextricable relationship between conscience and habit and how, in the course of time, the natural law, the Mosaic law and the principles of the Gospels had been wrought into the fabric of conscience – conscience was historically conditioned, permeating the habits and influencing the judgments of man. Since conscience was not a mystic intuitive sense, nor an 'inner light', but part of the faculty of knowledge and intellectual perception, it could be "acted upon by external forces, purged by forthright correction, cured by continued discipline and informed by proper inculcation of the Word".¹⁸⁰ According to Rutherford, the conscience, "a great but infected gift from God", could only work effectively when regulated by Scripture, which in its plenitude had supplied the fundamentals and non-fundamentals of the religious life.¹⁸¹

Conscience is both the possession of the individual as well as of the community. It is an organ of ethical norms; it is also a ratiocinative faculty – in the words of Rutherford, "Thus conscience, too, operates by means of the syllogism, 'He that killeth his brother hath not life eternall. But I have killed my brother. *Ergo*, I have not life eternall'". According to Rutherford, the regenerate conscience, moreover, is reason perfected – "There is more of reason and sound knowledge in the conscience

¹⁷⁹ W.M. Campbell, "The Scottish Westminster Commissioners and Toleration", *Records of the Scottish Church History Society*, Vol. 9, (1947), 7.

¹⁸⁰ Campbell, "The Scottish Westminster Commissioners and Toleration", 8. This explains Rutherford's understanding that by teaching and by censure men must learn the Way and the Word of God, and therefore say nothing discreditable in a Synod's compulsion of men to morality, uniformity and outward profession of an established faith, Campbell also commenting, "To the charge that his course of action bred hypocrisy he (Rutherford) retorted, that as his conscience was now truly informed the sin lay with the culprit, not with the Synod", *ibid.*, 9.

¹⁸¹ Campbell, "The Scottish Westminster Commissioners and Toleration", 14. This was similar to Luther's view of reason, Luther having argued that all men have "a certain natural knowledge implanted in their minds" that they ought to do to others as they would have others do to them, and this "law of nature" is "the basis of human law." However, human reason is "so corrupt and blind" that it "fails to understand the knowledge native to it", John T. McNeill, "Natural Law in the Teaching of the Reformers", *The Journal of Religion*, Vol. 26, 3(1946), 169.

than in the whole understanding soule, it is a Christall globe of reason, the beame, the sunne, the candle of the soule ...”¹⁸² Rutherford does not see conscience functioning on the private level alone. Conscience has a public dimension; it must speak with one voice in the social order, not simply in moral but also religious questions if utter chaos is to be avoided.¹⁸³

Regarding Rutherford’s understanding of the conscience, one finds that firstly, he discusses the conscience against the background of the *law*. Conscience for Rutherford was primarily an ‘understanding power’ or ‘knowing faculty’. Rutherford followed William Ames’ views on the conscience closely, the latter defining conscience as a man’s judgment about himself insofar as he is subject to God – conscience is used for the practical end of obeying God.¹⁸⁴ *However, the conscience needs to be informed.* The *synderesis* is the treasure house of the conscience storing the principles of the gospel and the law of nature – the *synderesis* involves the recognition of a law.¹⁸⁵ Secondly, the conscience “*acts as witness*, it is a heavenly spy sent to record all the facts pertaining to one’s actions and thoughts”. Thirdly, conscience acts as the *deputy or judge* of God.¹⁸⁶

¹⁸² Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 159-160.

¹⁸³ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 160.

¹⁸⁴ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 161.

¹⁸⁵ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 161-162.

¹⁸⁶ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 162-163. Omri Webb makes a similar observation namely that according to Rutherford, “Conscience is a witness in man to God as the giver of law ... Its function is that of judging man’s moral life. It is ‘a power of the practical understanding, according to which the man is obliged and directed to give judgement of himself; that is, of his state and condition, and of all his actions, inclinations, thoughts, and words.’ The judging itself is a subjective process, but the standard of judgment is objective. It is ‘God’s revealed will expressed to us, either in the Law of Nature, or the Law written, or the Gospel.’ Conscience, then, is that faculty in man which is aware of the law of God, and which judges human activities on the basis of this law. It is both a knowing and judging faculty. The process of knowing is based on intuitive apprehension and on discursive reasoning. Both activities are functions of man’s reason. The activity of conscience is illustrated by the analogy of a syllogism. The major premise is comparable to the immediate apprehension by the conscience of a moral truth: ‘... the power that judgest of the Law of Nature ..., or the principles of right or wrong written in the heart by nature’ In apprehension of the major truth, conscience ‘gives’ the law. The minor premise is comparable to apprehension by the conscience of particular moral facts related to the major truth, such as ‘... actions, words, thoughts, inclinations, habits of sin or grace, and the man’s state and condition.’ In this second act, conscience is a witness to the fact. Finally, the conclusion of the syllogism is comparable to the judgment which conscience makes between the moral truth and the moral fact. Thus, conscience is seen as ‘acting in all three, the acts of Law, a Witsnesse, a

John Marshall also emphasises the point that, according to Rutherford, the whole of Scripture played an important role regarding the *informing* of the conscience. According to Rutherford, the dulling effects of sin upon the conscience necessitates a fuller source of knowledge of the natural law originally inscribed on the human heart – revealed Scripture is the clearest record of that law. Scripture not an adjunct to conscience; it is essential for conscience to become ‘a compleat intire thing’ namely a good conscience toward both God and man. Reason and conscience are not a ‘ruling rule’ but a ‘ruled rule’ – Scripture is the perfect and complete source.¹⁸⁷ Rutherford makes a distinction between the *regenerate conscience in the order of grace* and the *unregenerate conscience in the order of nature*. Although the ‘shadowed light’ is insufficient for personal salvation, it is sufficient for the unregenerate conscience to function in the political realm to obtain peace and order. Both the regenerate and the unregenerate man are under this law of conscience.¹⁸⁸

Rutherford also emphasises the important role that Scripture must play in society by stating that for society to be safe, it has to fear God, and it is only by embracing the totality of revelation (including both Tables of the law and the true religion of the Gospel) that citizens can be equipped with a complete conscience.¹⁸⁹ In other words, it is only a complete conscience that can provide a proper fear of God, and it is

judge”, Webb, *The Political Thought of Samuel Rutherford*, 87-88 (Webb refers to Rutherford’s, *A Free Disputation Against Pretended Liberty of Conscience*, in this regard).

¹⁸⁷ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 165-166. While every sin “is the natural man’s idol, to the extent that it dominates him, the mind itself is perhaps his chief idol.” This is especially so among the learned, where everyone admires what his own brain conceives, no matter how far-fetched. For example, “one could theorize the presence of ten new worlds in the moon or millions of worlds on the other side of this one, he would still count it an admirable thought. Everyone loves to be called Rabbi. The self-deification of reason is the greatest evidence of its corruption. It is our constant temptation to make reason the ethical norm, the ‘ruling rule’ that determines the morality of our actions. We are prone to think that moral evil is inconsistent with our rational nature, as though that were our rule”, *ibid.*, 137. In this regard also see Webb, *The Political Thought of Samuel Rutherford*, 89. To Rutherford, “conscience was far too subjective a guide, since conscience, even when enlightened and activated by the Holy Spirit, is such a delicate mechanism. It is subjected to social pressures, and may well be fashioned by the thought and feeling of the age to which it belongs”, Rendell, *Samuel Rutherford. A New Biography of the Man & His Ministry*, 137.

¹⁸⁸ Webb, *The Political Thought of Samuel Rutherford*, 88-89. According to Rutherford, the regenerate conscience, however, enjoys a threefold advantage. The conscience enlightened by the grace of redemption sees far more clearly the Law of Nature. Furthermore, the regenerate man is better able to follow the law because he does so spontaneously in response to his experience of the grace of God. Finally, he has understanding and love of the Scriptures, where the laws of nature which are ‘treasured up ... are known by the light of a starre of greater Magnitude, to wit, the candle shining in a divine revelation, and this is part of the enlightened and supernatural Conscience’, *ibid.*, 89 (Here Webb also refers to Rutherford’s, *A Free Disputation Against Pretended Liberty of Conscience*).

¹⁸⁹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 196.

Scripture and the *propagation* of Scripture that provides a conscience that is able to fear God and follow His precepts in the covenantal relationship between God and society, and between ruler and ruled. What is also of importance is Rutherford's concern that a broad approach to toleration could enthrone conscience as supreme over Scripture.¹⁹⁰ Not surprisingly therefore, toleration was viewed by Rutherford as a breaking of the covenant.¹⁹¹

The whole point in arguments for toleration was the sceptical view that no one could know infallibly who was right in questions of doctrine.¹⁹² There is the risk that one might view a broad approach to toleration as promoting liberty, but the liberty the Christian should support is that Christ had died to purchase liberty from sin.¹⁹³ It is this view of Christian liberty that the state must promote, and the only way in which this will be possible is by placing the emphasis on Scripture as the complete and perfect source to provide the necessary adherence to the will of God. The liberty Rutherford fought for was not the liberty of modern democracy, but the liberty of men to resist what they conceived to be against the truth of God as revealed in Scripture.¹⁹⁴

Rutherford's *A Free Disputation Against Pretended Liberty of Conscience* championed the cause for freedom of conscience and that neither the magistrate nor the church can force religion upon anyone, only by the spreading of the Word, by religious instruction under the leadership of the Holy Spirit. The duties of magistracy in the external protection and maintenance of the true religion is too often misinterpreted as forceful conversion – as violating the individual's liberty of conscience.¹⁹⁵ Rutherford makes it clear in *A Survey of the Spiritual Antichrist* that

¹⁹⁰ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 209.

¹⁹¹ Rutherford's *A Free Disputation Against Pretended Liberty of Conscience* cited in Gribben, "Samuel Rutherford and Liberty of Conscience", 371.

¹⁹² Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 211.

¹⁹³ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 210. According to Heinrich Bullinger, liberty is nothing else but the state of him that is made free, and such liberation therefore produces a positive relationship between the liberated and the Liberator resulting in 'perpetual service' to him, Bullinger, *Decades*, 3:305-306.

¹⁹⁴ Webb, *The Political Thought of Samuel Rutherford*, 168.

¹⁹⁵ Here one may take note of Andrew Murphy's observation pertaining to the so-called 'anti-toleration movement' of which the Scottish Divines were regarded as supporters of, Murphy stating that, "While no one argued that force could change one's understanding, antitolerationists altered the purported goal of compulsion in matters of religion. In their view, 'a little smart' might lead to a re-examination of false beliefs and an increased receptivity to the truth. Force may only make hypocrites, as tolerationists claimed, but this in itself was not an argument for liberty of conscience, since over the long run '[those

the sword cannot compel minds and convert souls to Christ. However, the magistrate provides the external means to protect the true religion – “The Magistrate then defendeth only, and guardeth the Law of God and Church from pestilent heresie”.¹⁹⁶ Rutherford states in *Examen Arminianismi* that liberty of pure knowledge and opinion ought to be granted by the Magistrate to all people – “In this way the Magistrate should be able to compel no one to supposing or thinking this or that in Religion. Because acts of the mind since they are internal are not subject to the Authority of the Magistrate.”¹⁹⁷ However, this is not to say that the Magistrate is entirely freed from responsibilities towards the external maintenance and protection of the true religion, Rutherford stating:

The Magistrate can command the *information* of the mind, through Teachers and Pastors, but not the *opinion* of the mind ... The power of the Magistrate *directly* and *immediately* upon the conscience is null; yet, *indirectly* and *secondarily* the power of the Magistrate upon the conscience is *accumulative*; because it can command that someone should anxiously and diligently give attention to Orthodoxy by all means. But there is no *private* power; because the King can not deprive a conscience in its liberty of thinking rightly about God, nor can a tyrant do so, nor any created power.¹⁹⁸

Stephen Perks states that non-believers conform to Christian norms because of internal constraint working through the conscience, which implicates common grace.

holding erroneous beliefs] may profit so much by what they hear and see, as to be convinced of the folly of their former ways’. In addition, anti-tolerationists reminded audiences that forcing belief was not the same as the more straightforward power of restraining blatant error and heresy, which mainstream opinion had always granted, and continued to grant, to the civil magistrate”, Andrew R. Murphy, *Conscience and Community. Revisiting Toleration and Religious Dissent in Early Modern England and America*, (University Park, Pennsylvania: The Pennsylvania State University Press, 2001), 156-157.

¹⁹⁶ Rutherford, *A Survey of the Spiritual Antichrist*, Part 2: 261. Also see Samuel Rutherford, *The Divine Right of Church-Government and Excommunication (or A peacable Dispute for the perfection of the holy Scripture in point of Ceremonies and Church Government)*, (Printed by John Field for Christopher Meredith, London, 1646), 499, as well as *ibid.*, 509, 531-532 and 546-547.

¹⁹⁷ Guy M. Richard, “Samuel Rutherford *Of the Civil Magistrate* from *Examen Arminianismi*”, *The Confessional Presbyterian*, Vol. 4, (2008), 272. In his “A brotherly and free Epistle to the patrons and friends of pretended Liberty of Conscience”, in *A Survey of the Spiritual Antichrist*, Rutherford states, “As for the forcing of our opinions upon the consciences of any; It is a calumny refuted by our practice, and whole deportment since we came hither. Our witness is in heaven, it was not in our thoughts or intentions to obtrude by the sword and force of Arms, any Church-government at all on our brethren in England ...”

¹⁹⁸ Richard, “Samuel Rutherford *Of the Civil Magistrate* from *Examen Arminianismi*”, 272. Rutherford similarly states, “It does not follow that the King is a Minister and Servant of the Church, just because he is to look after it in such a way that the Laws and Canons of the Church would be commanded for enforcement; because he plainly commands with regal authority that the Canons of the Church should be commanded for enforcement. Indeed, because the King commands everyone legally and is to look after the Church to ensure that its Pastors preach the Word diligently and that its Canons conform to the Word of God, to this extent the King is a Minister of God but not of the Church”, *ibid.*, 275-276.

However, this only happens where Christianity is able to exert a strong influence upon society, both culturally and institutionally. In a Christian society there is far greater evidence of common grace than there is in pagan societies because the Christian faith, when it is dominant, has an ameliorating effect on the consciences and lives of the population as a whole, including non-believers (and thus on the life of the nation).¹⁹⁹ Here Perks poses the question that if God has the power and authority to restrain men internally through their conscience, “Why does he not have the power and authority to command the magistrate to restrain men outwardly?”²⁰⁰ Rutherford would certainly be in agreement with this.

Rutherford lived at the end of an era in which religion had formed a sacred canopy covering every area of life, and in which the principle of “one realm, one religion” had been taken for granted. To Rutherford, there lay ahead a world in which religious plurality and tolerance would gradually expand, and in which religion would eventually be pushed to the margins of political life.²⁰¹ Rutherford saw the beginning of this trend in England in the 1640s, and he resisted it with all his strength. Rutherford’s books against tolerance of ungodliness perhaps entitle him to be described as one of the last full-blooded defenders of the medieval *Respublica Christiana*. However, the fragmentation of Protestantism was too far advanced, the demands of intolerance too onerous, the attractions of pluralism too great.²⁰² Rutherford’s fear could have been based more on the risk of the ‘defection’ of Scotland and England in joining idolatrous practices, as happened on numerous occasions with Old Testament Israel. In this regard, “the defection of Israel did not consist in rejecting Jehovah as a false god, or in renouncing the law of Moses as a

¹⁹⁹ Perks, *A Defence of the Christian State*, 89.

²⁰⁰ Perks, *A Defence of the Christian State*, 89.

²⁰¹ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 255. Andrew Murphy observes that, “Samuel Rutherford and the Massachusetts Puritans saw religious dissent and toleration as undermining the beliefs and practices necessary to a godly society, while John Locke attributed the social strife that religion had undeniably produced not to religious liberty but to the alienation and resentment that followed the *suppression* of rights to worship. In other words, for Locke religious liberty was a necessary (though clearly not, in its own right, sufficient) prerequisite for an ordered civil society, and the *absence* of toleration constantly threatened to bottle up resentments that would eventually spill over into civil strife ... These claims linking toleration and licentiousness were not merely polemical ploys ... but often evidence of genuine concern for social solidarity exhibited by individuals across the religio-political spectrum in times of great upheaval”, Murphy, *Conscience and Community. Revisiting Toleration and Religious Dissent in Early Modern England and America*, 211.

²⁰² Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 255.

false religion; but in joining foreign worship and idolatrous ceremonies to the ritual of the true God ...²⁰³

European society in the sixteenth and seventeenth centuries reflected temporal and spiritual functions, as each served the Divine law in some way or another. In Calvin's Geneva, for example, as in other societies, all citizens were subject to both civil and spiritual law. Rutherford confirms this clearly regarding the Christian political position in seventeenth-century Britain, "... if the third part of Scotland and England should turn apostates from the religion once sworn, after they had bound themselves in covenant, the question remains, what should the state and parliament do in that case?"²⁰⁴ In addition, Rutherford, in his explanation regarding idolatrous nations, states that there is no authority qualifying the *Christian nation* to make war against non-Christian nations.²⁰⁵ This implies Rutherford's acceptance of seventeenth-century England and Scotland as Christian and his opposition towards the enforcement of religion.

What led to the Reformation, and even many of the political writings of the Reformation, such as *Lex, Rex* and *A Free Disputation Against Pretended Liberty of Conscience*, was the movement of Christianity towards absolutism regarding rulership and idolatry, and a prominent example of this was the *Divine Right of Kings* belief as well as the many human constructs in the worship services. Rutherford's intentions were thus *bona fidei* and godly – either the quest towards a Christian covenanted and republican community during a time when the potential for this was optimal, or a relapse into an ungodly society.²⁰⁶

As stated earlier, the Presbyterian form of ecclesiology understood the dangerous influences that could arise in an ungodly state. More specifically, this would threaten

²⁰³ E. C. Wines, *The Hebrew Republic*, 79, <http://www.contra-mundum.org/books/republic.pdf> (accessed 14 May 2013).

²⁰⁴ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 304 (original version).

²⁰⁵ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 300 (Author's emphasis), (original version).

²⁰⁶ The idea of the Christian covenanted community epitomised by especially Rutherford and Althusius proved to have glimpses of resuscitation in the not-too distant history of political theory in the West in that Rutherford's covenantal thought rested upon idea of sixteenth-century Scotland as the Old Testament Israel, similar to the first Chief Justice of the American Supreme Court, John Jay's idea of nineteenth-century America as Old Testament Israel. According to Jay, God would not bless America's fight for independence unless America was obedient to Him, Jacobs, *The Influence of Biblical Ideas and Principles on Early American Republicanism and History*, 152.

the effective exercise of God's covenant with the community, and provide excessive temptations directed at the individual's liberty of conscience. Liberty of conscience in a liberal context opposes religious influence, yet at the same time provides the potential for influence from a liberal and humanist ideology. There can be no neutrality regarding ideological influence, where for example, liberalism and humanism, vouch for the limitation of religious influence.²⁰⁷ For Rutherford, liberty of conscience could never not be exposed to ideological influence. The covenant, church and magistracy are external means to protect society's existence in conformity to God's will, and therefore the issue was rather how liberty of conscience in the mind of the faithful could be protected from external instruments that countered God's will. In other words, the freedom of the Christian mind was to be protected by the proper external means. This would be the Scriptural and logical thing to do. The Christian freedom of conscience can normally not withstand violent and continuous bombardment of ungodly influences.

Within God's providence are His instruments (or second causes) towards the betterment of this world and individual, as well as the latter's salvation. Even in conversion, God works supernaturally but also through the natural means of the human understanding and will (as second causes),²⁰⁸ however, it is also political society and ecclesiology which act as second causes in the protection, maintenance and furtherance of the human understanding and will. The importance of this external maintenance of religion makes sense when reminded by David Fergusson that today the children of the church are often influenced as much or more by the media as by the ecclesial community. Unless they are deprived of television, web access, and magazines and have the strength to resist massive peer-group pressure, they will struggle to develop a distinctive Christian identity of the kind that is desired, Fergusson adding, "[I]t is doubtful whether this problem can be entirely

²⁰⁷ Therefore, the privatisation of religion in the liberal quest of establishing a neutral public sphere cannot claim innocence in the influencing of minds. It would make interesting reading to have a thorough investigation as to the instances where, in a pluralistic and irreligious society, individuals and groups of individuals suffer from a violation of their consciences. Employees forced to work on religious days, medical staff under pressure to perform medical procedures contrary to their belief, academics told to teach in a neutral context, the payment of television licences although certain programmes contain ungodly material (but which causes the conscience to wonder whether it is right to support commercial institutions which accommodate ungodly substance), educating Christian children and students in secular language and understanding, and so forth.

²⁰⁸ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 162, fn. 80.

overcome”.²⁰⁹ A public sphere that substantially excludes religion cannot be neutral; there must be some or other belief or beliefs occupying the public sphere and this naturally will in many ways influence persons in their frequent exposures and interactions with the public sphere.

Religion must be persuaded by the Word and Spirit, and therefore the magistrate can use no coercive power in punishing heretics and false teachers.²¹⁰ The magistrate must not interfere with the conscience, or the manner of obedience to the law, whether obedience takes place in faith, or against the light of the conscience.²¹¹ Opinions in the mind and acts of the understanding can never be proven by witnesses and therefore neither the magistrates nor the church can censure this. The private and inward elements of these sins are not civil crimes. If a man lusts after a woman he commits adultery (Matthew 5:28), but he will answer to God, not the magistrate.²¹²

Rutherford opposes the view that false teachers need not be punished by the magistrate because they are innocent, their conscience telling them that what they teach is true. Rutherford also opposes the Libertine’s understanding that the judging of heretics to be heretical is a bold intrusion into the Lord’s cabinet counsel – How can God say that one must be aware of the false prophet (Matthew 7:15) if it were arrogance and an intrusion on God’s cabinet counsel to judge a false prophet by his doctrine to be a false prophet?²¹³ Whether the punishing of seducing teachers be persecution for conscience, Rutherford, in answer to Mr. Williams (who said that to molest any for their religion is persecution) states that if this was the case then Jeremiah was a persecutor, for he molested those with rebukes and threats, who out of mere conscience, killed their sons and daughters to Molech. In this regard, Rutherford states that one can therefore also reason that Christ molested Pharisees and Sadducees, who out of mere conscience defended the traditions of men, false interpretations of the law, and denied the resurrection.²¹⁴

²⁰⁹ Fergusson, *Church, State and Civil Society*, 101.

²¹⁰ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 50-51, 314-315 (original version).

²¹¹ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 140 (original version). Also see *ibid.*, 53, 139, 188-190, 217-218, 314-315, 341, 356-357, 390-391, 394 and 405.

²¹² Foulner, “Goat Hunting with Samuel Rutherford. A Response to ‘Liberty of Conscience: A Problem for Theonomy’”, 17.

²¹³ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 402 (original version).

²¹⁴ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 335 (original version).

Rutherford begins his *A Free Disputation Against Pretended Liberty of Conscience* with a critical view on Libertinism, which “savoureth rankly of wide, loose and bold Atheistical thoughts of the majesty of God, as if our conscience had a Prerogative Royal beside a rule ...”²¹⁵ The conscience as only rule or measure is prone to sin, due to its sinful nature.²¹⁶ This understanding is similar to the view which assisted in the establishment of the *Westminster Confession of Faith*, which proceeds from the principle that truth can be distinguished from error; that, although conscience cannot be compelled, it may be enlightened; and that when sinful, corrupt and prone to licentiousness, men may be lawfully restrained from the commission of such excesses as are offensive to public feeling and injurious to the moral welfare of the community.²¹⁷

According to Rutherford, there is a link between ‘conscience’ and ‘knowledge’ – “Conscience void of knowledge is void of goodness ...”²¹⁸. This emphasises the importance of the educative role, especially within the Christian Republic. The Church as well as the State in the Christian Commonwealth, has an interest in the public education, and that the Church and the State strive after the spiritual well-being of the people by means of education. Children are born to parents and upon the latter rests the responsibility, imposed by God, of their training and education. In this regard, the State should lend assistance to the parents in the fulfilment of their duty.²¹⁹ Fundamentals need to be strongly rooted in the believer.²²⁰ It also does not make sense to use natural reason in order to determine certain truths. The only way to get to these truths is by Scripture,²²¹ which implies vigilance regarding the ‘self’ as measure.²²² In this, Rutherford also warns against the absolute authority of natural

²¹⁵ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 2 (modern version).

²¹⁶ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 161 (modern version). Also see 133, 165 and 181-182. Rutherford also refers to the ‘... erroneous conscience ...’, *ibid.*, 197-198, 318, 449 and 473. Rutherford states, “... men are more passive in receiving the impressions of error than truth ...” *Lex, Rex*, xxi (of The Author’s Preface). George Gillespie similarly states, “Men are sooner drawn from truth than from error”, Culberson, *For Reformation and Uniformity’: George Gillespie (1613-1648) and the Scottish Covenanter Revolution*, 173.

²¹⁷ Hetherington, *History of the Westminster Assembly of Divines*, 356.

²¹⁸ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 33-34 (modern version).

²¹⁹ Thiersch, *On Christian Commonwealth*, 58.

²²⁰ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 131-132 (modern version).

²²¹ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 136 (modern version).

²²² Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 40 (modern version).

law. Anything pretending to be moral has God for its author in either the first or the second Table of the law.²²³

Rutherford depicts natural man's reason as fundamentally opposed to Christ. No one has any 'gracious disposition' toward him, "every man hath a forestalled opinion, and a prejudice against Christ ...". The general esteem of Christ present in our culture is the result of social conditioning and education, "people think well of him because they are trained to do so. In a pagan society, such as India, both education and 'corrupt' nature produce hatred of Christ as a false prophet ..."²²⁴ John Marshall, whilst dealing with Rutherford's views on the conscience, observes that Rutherford followed the thinking of William Ames closely. Ames defines conscience as "a man's judgement about himself insofar as he is subject to God – conscience is more than a bare apprehension of truth insofar as things are knowable; it is the power to know things for the practical end of obeying and serving God". If conscience, as a knowing, understanding power is to work, it must be informed.²²⁵ However, the effects of sin upon the conscience necessitate a fuller source of knowledge of the natural law originally inscribed on the human heart. In this regard, Scripture is the clearest record of that law.²²⁶ This emphasises the importance of the proper external maintenance, protection and furtherance of the true faith in the Christian community.

The Independents (Congregationalists), a prominent group within English Puritanism, believed in the church as a voluntary association of like-minded believers, and renounced the support of the civil authority either in reforming itself or in extending its practices to persons of a different kind. The result was that the Independents stepped outside any possible form of national church; church and state becoming two

²²³ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 309-310 (original version).

²²⁴ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 132. This is why Rutherford also emphasises the importance of a 'well-educated' ministry, *ibid.*, 145-146.

²²⁵ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 162.

²²⁶ Rutherford states, "That the inner Cabinet, the natural habit of Moral principles lodgeth, the Register of the common notions left in us by nature, the Ancient Records and Chronicles which were in Adam's time, the Law of Nature of two volumes, one of the first Table, that there is a God, that he createth and governeth all things, that there is but one God, infinitely good, more just rewarding the Evil and the good; and of the second Table, as to love our Parents, obey Superiors, to hurt no man, the acts of humanity; All these are written in the soul, in deep letters, yet the Ink is dim and old, and therefore this light is like the Moon swimming through watery clouds, often under a shadow, and yet still in the firmament ...", *A Free Disputation Against Pretended Liberty of Conscience*, 7 (original version).

societies, not only separate but in principle independent, with the power of coercion concentrated in the state but limited to purposes within the province of secular government.²²⁷ This could be understood as being a breeding-ground for liberal thought, which supported that the private and public sphere/interests be separated from one another. John Milton, whose views were those belonging to the most advanced Independents, not only accepted the Protestant principle that Scripture are the rule of faith but proclaimed that, “every man must interpret Scripture for himself”. From this thinking came the idea that therefore should neither the church nor the magistrate enforce belief in a particular interpretation – “individual conscience is the court of last resort and no sincere believer is a heretic”.²²⁸

The growth of heresies due to the Independents’ plea for toleration was endangering the entire religious and social fabric of the Commonwealth. The fears that the Presbyterians had for Independency were not baseless because, in fact, the writings of the Independents undoubtedly widened the concept of toleration to include a greater variety of opinion.²²⁹ Rutherford is ironic regarding the position of the Independents and the sects by arguing that according to their belief, “you must believe it today to be a truth of God, tomorrow to be a lye, the third day a truth, the fourth day a lye, and so a circle till your doomsday come, so as you must ever believe and learne, never come to a settlement and establishing in the truth; but dye trying, dye doubting, dye with a trepidation and a reserve, and dye and live like a Scepticke.”²³⁰

Throughout the 1640s, the idea of progressive revelation had gained credibility within puritan circles and was popularised by millenniast writers. This idea taught that knowledge (including the proper understanding of the Bible) would be increased as history neared its completion.²³¹ In this school of thought, Milton’s *Areopagitica* (1644) argued for toleration in publishing because each new pamphlet could offer a new glimpse into the purposes of God as history neared its consummation.

²²⁷ George H. Sabine, *A History of Political Theory*, (George G. Harrap & Co. Ltd: London, 1963), 445.

²²⁸ Sabine, *A History of Political Theory*, 510.

²²⁹ Yule, *Puritans in Politics. The Religious Legislation of the Long Parliament 1640-1647*, 216-217.

²³⁰ Rutherford’s *A Free Disputation Against Pretended Liberty of Conscience* cited in Gribben, “Samuel Rutherford and Liberty of Conscience”, 365.

²³¹ Gribben, “Samuel Rutherford and Liberty of Conscience”, 365.

Rutherford's *A Free Disputation Against Pretended Liberty of Conscience* identified this idea as one of the foundational presuppositions of the pro-toleration party.²³²

Lex, Rex was clear on the importance of the safety of the people against the background of the responsibility of the ruler.²³³ This principle forms the crux of his argument from natural law in *Lex, Rex*. Its description however is strictly biblical and theocentric – “God is the author of civil laws and government, and his intention is therein the external peace, and quiet life, and *godliness* of his church and people ...”²³⁴ Here one sees Rutherford equating the ‘preservation of the individual and of society’ with ‘godliness’ (true religion, and anti-idolatrous) as well. Rutherford intimates that magistracy has an important role to play in religion in that those who are by office to be nurse-fathers to the church, to minister to her and:

lend their royal breasts to be sucked by her, and as godly kings are to praise the Lord as godly kings, are to bring gifts and presents to Christ and are to be wise and serve the Lord, and kiss the mediator, and to bring their royal honour to the New Jerusalem, and by whom kings reign, they and their royal sword cannot be excluded from commanding the priests, prophets and teachers to befriend the bride, and décor, and deck her for her Lord and husband, to give wholesome milk to the children, as they would be rewarded of princes as well-doers, or punished as ill doers, and would be protected from grievous wolves, not sparing the flock, nor can they be excluded from all royal and politic guarding of both Tables of the law ...²³⁵

There has to be prayer for kings and all who are in authority, that with the sword they would guard religion, and the church of God from wolves and false teachers, that a quiet and peaceful life in all godliness and honesty may be experienced.²³⁶ The king

²³² Gribben, “Samuel Rutherford and Liberty of Conscience”, 365. Also see D. A. Carson, *The Intolerance of Tolerance*, (Grand Rapids, Michigan: William B. Eerdmans Publishing Company, 2012), 59.

²³³ See for example, *Lex, Rex*, 30(2), 48(1), 57(2), 62(2), 64(2), 70(1)-70(2), 79(2), 83(1), 92(1), 95(1), 97(1), 102(1), 103(2), 105(1), 114(1), 119(2), 121(1), 124(1)-125(1), 126(2), 128(1)-128(2), 137(1), 142(1), 164(1), 182(1), 184(2)-185(1), 187(1), 193(2), 194(2), 203(2), 208(1), 210(1) and 228(2).

²³⁴ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 48. Emphasis in the latter quote is the author's. Compare this with Calvin's emphasis on the parallels of the Second Table to that of the precepts of the natural law. In this regard, Calvin was of the view that, “men have somewhat more understanding of the precepts of the Second Table (Ex. 20:12ff) because these are more closely concerned with the preservation of civil society among them”, Paul Helm, “Calvin and Natural Law”, *The Scottish Bulletin of Evangelical Theology*, (Scottish Evangelical Theology Society & Rutherford House, 1984), 12.

²³⁵ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 217 (original version). Also see Rutherford, *The Divine Right of Church-Government and Excommunication*, 579.

²³⁶ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 229 (original version). In *The Divine Right of Church-Government and Excommunication*, at 592-593, Rutherford states, “... the

has the trust of *preserving life and fostering religion*, and has both Tables of the law in his custody, *ex officio* to see that other men than himself keep the law.²³⁷ Marshall states, “Rutherford believed that denying the civil arm a role in defending true religion was to fall back into the Manichean understanding of the use of *means*. As government is part of nature, it too must testify to the authority of God as he reveals

intrinsic end of the Magistrate is a supernaturall good ... the Prince punishing idolatry, may *per accidens*, and indirectly promote the salvation of the Church, by removing the temptations of Hereticks from the Church; but he doth that, not in order to the conscience of the Idolater, to gain his soul (for Pastors as Pastors do that) but to make the Church quiet, and peacable in her journey to life eternall: but all this is but to act on the externall man by worldly power”. Rutherford distinguishes between the *formal* and *material* power to distinguish between the duties and responsibilities of the magistrate and of the church. Although the material duty of the magistrate is the furtherance of God’s kingdom and the protection of souls, the formal duty of the magistrate is limited to punishing heresies and false doctrine as they disturb the peace of the civil state, *ibid.*, 622-623. Also see *ibid.*, 624.

²³⁷ Rutherford, *Lex, Rex*, 72(1) (Author’s emphasis). Also see Rutherford, *The Divine Right of Church-Government and Excommunication*, 547 and 600-601. George Gillespie did not believe that there ought to be a strict separation between church and state, and eagerly tried to make it clear that princes did have power in ecclesiastical matters, although this power was not without its limitations. In general terms, Gillespie held that the Christian magistrate had a duty to conserve and purge religion, to maintain true religion, and to suppress idolatry and superstition, Culbertson, *‘For Reformation and Uniformity’: George Gillespie (1613-1648) and the Scottish Covenanter Revolution*, 147. More specific examples of how the Christian magistrate needs to assist in religious matters are, the guarding of the ‘outward business’ of the church by ‘external benefits and adminicles’; and not allowing the church’s authority and censures to be ignored – and to this end the magistrate should convocate church synods, give assent to the decisions of synods or require the synod to debate the issues again, and add civil sanctions when necessary to the synod’s determination, *ibid.*, 149. In addition, after the church announced a sentence of excommunication, the magistrate might further punish the excommunicated individual in his person or his estate. The magistrate could also preside over synods regarding human order, but a church officer must preside over the synod’s ecclesiastical actions. Also, the Christian civil magistrate has a duty to ‘provide and maintain schools and colleges’ with learned teachers in order to supply ‘an able, orthodox, and Godly Ministry’ for the church; an obligation to reform and restore true religion when it was corrupted; a right to command ministers to perform the ‘duties of their calling’ (such as preaching the gospel, administering the sacraments, excommunicating scandalous persons, ordaining godly ministers, and meeting in synods to decide spiritual controversies) – yet the magistrate could not take upon himself the performing of these ecclesiastical functions, for they belonged properly to the ecclesiastical power and not to the civil power, *ibid.*, 150-151. Then there were the ‘extraordinary cases’, where the church was in need of reformation and the clergy were corrupted beyond reforming themselves, this necessitating the magistrate to have extraordinary powers to reform the church (such as under Popery and Prelacy), *ibid.*, 151. It is also important to note as to when the Christian magistrate’s authority in religious matters was, according to Gillespie, to be limited. The basic limitation Gillespie placed on civil rulers was that they had no spiritual power within the church, but only the ordinary civil power necessary to conserve and preserve religion, *ibid.*, 152-153. Other examples of the Christian magistrate’s limitation in matters of religion are, that the magistrate may not preach, administer the sacraments, or exercise church discipline; the magistrate could not hinder ministers and elders in the free exercise of church discipline and censures; the magistrate may not judge religious matters such as those a synod would decide; the magistrate may not change ecclesiastical rites and laws or decide matters of faith without the advice and consent of the clergy; the magistrate could not receive appeals from church courts except when extraordinary circumstances, like the persecution of godly ministers necessitated his involvement; magistrates could neither appoint ministers to specific positions within the church nor could they depose ministers since church courts had the responsibility to make these determinations; and magistrates (in contrast to officers of the church) were not to rule or perform any of the functions of their office in the name of the Lord Jesus Christ but in the name of the state, *ibid.*, 153-154.

himself. The insignia of government's authority is the sword. Therefore government must use its God-ordained insignia to further true religion."²³⁸

A king is judged a great mercy to church and state.²³⁹ The king is to be a father and protector of the church of God.²⁴⁰ The king, princes, judges and the magistrates are obliged to God for the maintenance of true religion, and religion is not only the responsibility of the king but of all the inferior judges as well as the people.²⁴¹ The advancement of religion constitutes part of the formal object of one or many governors.²⁴² What the patriarchs and godly princes of Israel and Judah were obliged to do as rulers and princes, all kings and rulers under the New Testament are obliged to do. Godly princes of the Old Testament commanded the putting away of strange gods (as with Jacob), and saw to it that the true God was worshipped (as with Abraham).²⁴³ Rutherford frequently refers to the magistrate's duty regarding the 'maintenance of godliness'²⁴⁴ and of 'both tables'²⁴⁵ in the Christian Commonwealth.

²³⁸ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 217. According to Rutherford, the civil ruler is to ensure that there are preachers of the gospel and that true religion is practised (although the civil ruler must confine his concern to outward acts) – Rutherford believed that the civil ruler may, “censure ministers who preach error and must in turn submit to the Church's rebuke. Rutherford believes that ecclesiastical discipline should be accompanied by civil penalties, although he insists that church and civil judicatures are to be totally separate ... Rutherford expects the civil ruler to test church decisions by Scripture, including matters of church discipline, and he may command the church to re-try a case if he disagrees with the verdict. All this while strictly maintaining separate jurisdictions”, W. D. J. McKay, “Samuel Rutherford on Civil Government”, *Reformed Theological Journal*, Vol. (1988), 58.

²³⁹ Rutherford, *Lex, Rex*, 14(1). Also see Rutherford, *The Divine Right of Church-Government and Excommunication*, 582.

²⁴⁰ Rutherford, *Lex, Rex*, 54(2), 79(1) and 142(2).

²⁴¹ Rutherford, *Lex, Rex*, 55(2)-56(1) and 96(2)-97(1).

²⁴² Rutherford, *Lex, Rex*, 92(1). See, *A Free Disputation Against Pretended Liberty of Conscience*, 177 (original version) (note that there are two pages 177 which is a pagination error) where Rutherford emphasises the duty of magistrates in matters of religion, “The father commands the children now in the state of sin, to learn and hear the judgments and testimonies of God (Genesis 18: 19, Exodus 12: 27, Psalm 78: 3, 5-6, Joel 1: 2-3) and that in order to the rod and bodily punishment (Proverbs 13: 24; 23: 13).”

²⁴³ *A Free Disputation Against Pretended Liberty of Conscience*, 177 (original version). The example of Jacob to be found in Genesis 35:2-4 and that of Abraham in Genesis 18., *ibid.* Rutherford also refers to Menassah, Asa, Hezekiah and Josiah who removed strange gods, *ibid.*, and adds, “Now that they did this as princes, not as privileged types of Christ, and that God requires this at the hands of king Charles, when God shall establish him in his throne, to take order with Arrians, Socinians, Antitrinitarians, Familists, Antinomians, Anabaptists, Seckers ... is evident”, *ibid.*, 180. Even more than a century after Rutherford, one finds Scottish political works that emphasise the religious duties of magistracy. In this regard, see John Thorburn, *Vindiciae Magistratus*, (Printed by D. Paterson, Edinburgh, 1773), 3 and 92-94.

²⁴⁴ See for example, Rutherford, *Lex, Rex*, 44(1)-(2), 48(1), 57(2), 64(2), 83(2), 92(1), 102(1), 105(2), 120(1) and 179(1). Rutherford also states, “So the king cannot judge in all ecclesiastical causes, that is, he cannot, *quoad actus elicitos*, prescribe this worship, for example, the mass, not the sacrament of the Lord's supper. Therefore the king hath but *actus imperatos*, some royal political acts about the worship of God, to command God to be worshipped according to his word, to punish the superstitions or

There is also convincing connotation of the magistrate's duty towards the upkeep of religion reflected in Rutherford's reference to the king as the 'nurse-father' of the community. For example, Rutherford says: "... and that all judges, according to their places, be nurse-fathers to the church ..." ²⁴⁶ and "The king hath a chief hand in church affairs, when he is a nurse-father, and beareth the royal sword to defend both the tables of the law ..." ²⁴⁷

Civil power is *especially* ²⁴⁸ for the external peace and safety of the community (bearing in mind that 'church officers are for the spiritual good of men's souls'), ²⁴⁹ hereby implying that this is not the only reason for civil power and therefore that religious duties also form part and parcel of the magistrate's responsibilities (this especially against the background of Rutherford's other references confirming the religious duties of the magistrate). The 'laws' as such, play a fundamental role in serving religion, ²⁵⁰ and the king is viewed as 'feeder' and 'watchman' over 'life and religion'. ²⁵¹

It is not only the king but also 'all the judges, elders and princes of the land' who have responsibilities pertaining to, amongst other things, religion. ²⁵² Also, "... kings may,

neglectors of divine worship, therefore, cannot the king be sole judge in matters that belong to the college of judges by the laws of Scotland, the lords of session only may judge these matters", *ibid.*, 218(2)-219(1).

²⁴⁵ See for example, Rutherford, *Lex, Rex*, 72(1), 142(1), 215(2) and 222(2)-223(1).

²⁴⁶ See for example, Rutherford, *Lex, Rex*, 105(2).

²⁴⁷ See for example, Rutherford, *Lex, Rex*, 215(2). George Gillespie, also refers to the king as acting as a nurse-father, stating that, "The magistrate ought also to take care of the maintenance of the ministry, schools, poor, and of good works for necessary uses, that religion and learning may not want their necessary adminicles. Finally, he ought to take care that all churches be provided with an able, orthodox, and godly ministry, and schools with learned and well-qualified teachers, such as shall be best approved by those to whom it belongeth to examine and judge of their qualifications and parts. And all of these ways the magistrate ought to be, and the well-affected magistrate hath been, and is, a nursing-father to the church of Christ", George Gillespie, *Aaron's Rod Blossoming* (London, 1646) (Reprint, Harrisonburg, Virginia, 1985), 123(2). Gillespie also confirms the important role that the king or magistrate should play, and states that, "We teach, 'that not only they [the magistrates] are appointed for civil policy, but also for maintenance of the true religion, and for suppressing of idolatry and superstition whatsoever'", George Gillespie, 'To the Candid Reader', xvi, in *Aaron's Rod Blossoming*. Also see *ibid.*, Chapter VIII, 114(2)-124(1).

²⁴⁸ Note, here Rutherford does not state that the civil power is *only* for the external peace and safety.

²⁴⁹ Rutherford, *Lex, Rex*, 6(1).

²⁵⁰ Rutherford, *Lex, Rex*, 32(2).

²⁵¹ Rutherford, *Lex, Rex*, 72(1). Also, "The king must feed the Lord's people", *ibid.*, 199(2).

²⁵² In this regard, Rutherford states, "The kingdom, by God, yea, and church, justice and religion, so far as they concern the whole kingdom, are committed not to the keeping of the king only, but to all the judges, elders, and princes of the land ...", *ibid.*, 96(2)-97(1), "... then must the estates have a power of judging with the king or prince in matters of religion, justice and government, which concern the whole kingdom", *ibid.*, 98(1) and "Inferior judges must maintain the true religion, and suppress idolatry and superstition", Rutherford, *Lex, Rex*, 221(2)-222(1).

and do command synods to convene, and do their duty, and command many duties, never synodically decreed ...²⁵³ Referring to the situation in Scotland, Rutherford says that kings need to “maintain, defend and set forward the true religion.”²⁵⁴ Rutherford goes so far as to state, “A king hath greater outward glory, and may do much more service to Christ, in respect of extension, and is more excellent than the pastor ...”²⁵⁵ The king’s accountability as a result of not having defended the true religion also points to the role that the king has to play in maintaining and defending the true religion.²⁵⁶ Rutherford also speaks of the moral duties regarding religion (and justice) to be performed reciprocally between king and people.²⁵⁷

The magistrate is a minister of God for the good of the people,²⁵⁸ and the genuine and intrinsic end of making kings is not simply governing, but governing the best way, in peace, honesty and *godliness*.²⁵⁹ The king is to be an adopted father, tutor, a politic servant and royal watchman of the state,²⁶⁰ and he should care for the people as fathers do for children, and so to resort under the name of fathers in the fifth commandment. Kings as well as judges are fathers, in defending their subjects from violence and the sword, and fighting the Lord’s battles for them, and counselling them,²⁶¹ and the king has no proper, masterly, or lordly dominion over his subjects; his dominion is fiduciary and ministerial.²⁶² Government in general is to act as a father;²⁶³ a watchman;²⁶⁴ a servant;²⁶⁵ a feeder;²⁶⁶ a fiduciary patron;²⁶⁷ a tutor;²⁶⁸ to

²⁵³ Rutherford, *Lex, Rex*, 215(2).

²⁵⁴ Rutherford, *Lex, Rex*, 219(2)-220(1). Also see *ibid.*, 100(1), 188(1), 222(1), 223(1), 105(1), 118(1), 121(1), 136(1) and 199(1).

²⁵⁵ Rutherford, *Lex, Rex*, 216(1).

²⁵⁶ See for example, Rutherford, *Lex, Rex*, 56(1). Rutherford adds, ‘The king as a man, is not more obliged to the public and regal defence of the true religion than any other man of the land; but he is made by God and the people king, for the church and people of God’s sake, that he may defend true religion for the behalf and salvation of all. If therefore he defend not religion for the salvation of the souls of all in his public and royal way, it is presumed as undeniable that the people of God, who by the law of nature are to care for their own souls, are to defend in their way true religion, which so nearly concerneth them and their eternal happiness’, *ibid.* Also see *ibid.*, 96(1).

²⁵⁷ Rutherford, *Lex, Rex*, 230(1).

²⁵⁸ Rutherford, *Lex, Rex*, 34(1), 70(1)-70(2), 83(1), 102(1), 103(2), 104(2), 106(2), 119(2), 126(2), 132(2), 141(2), 145(1), 153(1), 187(1), 193(2), 194(2), 198(1), 201(2), 227(2) and 228(2).

²⁵⁹ Rutherford, *Lex, Rex*, 44(1).

²⁶⁰ Rutherford, *Lex, Rex*, 59(1).

²⁶¹ Rutherford, *Lex, Rex*, 62(1)-62(2).

²⁶² Rutherford, *Lex, Rex*, 64(2).

²⁶³ Rutherford, *Lex, Rex*, 26(1), 59(1), 62(1)-62(2), 64(2), 102(1), 116(2), 128(1)-128(2), 164(1) and 218(1).

²⁶⁴ Rutherford, *Lex, Rex*, 59(1), 70(1), 182(1) and 197(2)-198(1).

²⁶⁵ Rutherford, *Lex, Rex*, 59(1), 70(1), 79(2), 145(1) and 197(2)-198(1).

²⁶⁶ Rutherford, *Lex, Rex*, 64(2)-65(1) and 132(2).

²⁶⁷ Rutherford, *Lex, Rex*, 72(1).

have marital and husbandry power;²⁶⁹ to be the peoples' debtor for happiness;²⁷⁰ a relative;²⁷¹ a pilot (of a ship);²⁷² and a good and saving shepherd.²⁷³ This confirms the king's responsibility of maintaining, developing and protecting the true religion, which is in the public or common good.

The difference between emphasising the importance of 'heart religion' and the insistence that the state should compel certain religious conformity is, in Rutherford's understanding, dissolved in the importance of the public good, "the magistrate's coercion might do no good to the one compelled to conform, but it would diminish the number of bad examples and unsound teachers in the community and thus protect the community."²⁷⁴ To Rutherford, toleration had an epistemological dimension. In other words, it had to do with truth claims. Rutherford judged that intolerance was in this regard good because the beliefs of his opponents were both erroneous and dangerous.²⁷⁵

Rutherford's defence against false religion was contrary to the approach of the Libertines supporting the view that false teachers may not be rebuked.²⁷⁶ Rutherford's understanding in this regard paralleled the understanding related to Old Testament Israel, namely that if the Hebrews would voluntarily receive Jehovah for their king, and would honour and worship him as the one true God in opposition to all idolatry, then, although God rules over all nations as sovereign of the world, He would bless

²⁶⁸ Rutherford, *Lex, Rex*, 69(1), 102(2), 116(2), 128(1)-128(2) and 153(1).

²⁶⁹ Rutherford, *Lex, Rex*, 69(2) and 116(2).

²⁷⁰ Rutherford, *Lex, Rex*, 103(2).

²⁷¹ Rutherford, *Lex, Rex*, 123(2).

²⁷² Rutherford, *Lex, Rex*, 102(2).

²⁷³ Rutherford, *Lex, Rex*, 179(1)-179(2). Rutherford also states that, "We do not read that kings swear to defend religion in one oath, and to administer judgment and justice in another; for David made not two covenants, but only one, with all Israel . . . The king was not king while he did swear this oath, and therefore it must be a pactional oath between him and the kingdom, and it is true the king receiveth not a crown from the church; yet David received a crown from the church, for this end, "to feed the Lord's people," and so conditionally', *ibid.*, 199(2). Rutherford then refers to Papir. Masse's statement that, '*Ego N. Dei gratia, mox futurus rex Francorum, in die ordinationis mece coram Deo, et sanctis ejus polliceor, quod servabo privilegia canonica, justitiamque et jus unicuique Praelato debitum, vosque defendam, Deo juvante, quantum potero, quemadmodum rex ex officio in suo regno defendere debet, unumquemque episcopum ac ecclesiam, et administrabo populo justitiam et leges, uit jus postulat*', *ibid.*, 199(2) – English translation reads as follows, 'I who will soon be king of the French through the grace of God, do promise on the day of my inauguration, that I will defend the canonical privileges, justice and the law which is befitting every cardinal, as well as you, with the help of God and the best of my abilities. This is how every king according to his office should act towards every field of the bishop and the church. And I will serve justice and laws towards the community.'

²⁷⁴ Carson, *The Intolerance of Tolerance*, 60.

²⁷⁵ Carson, *The Intolerance of Tolerance*, 60.

²⁷⁶ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 184 (original version).

the Hebrew nation with a more particular and immediate protection.²⁷⁷ “Libertines say men have made apologies and confessions of faith for their own defence as Steven and Paul but they enjoined not these by authority and command as a rule of faith upon others, and wrote them not as a fixed standard of the faith of others, and that warrants no Church to impose a faith upon others”.²⁷⁸ To this Rutherford replies, “... and so I look at a form or confession of faith as a necessary apology for clearing of the good name of a Church defamed with heresies, and new sects...”²⁷⁹ The Libertine’s view in this regard contradicts Scripture, because they give rise to many faiths, this in opposition to the bible saying that there is but one faith.²⁸⁰

Rutherford’s views with respect to the magistrate’s duties in relation to the church are grounded in his doctrine of the visible church.²⁸¹ The visible church was a great republic of which individual congregations are members, and particular churches as members of the Catholic Church, are more or less pure according as they administer the ordinances, preach the doctrine, and conduct public worship more or less purely.²⁸² The visible church, according to Rutherford, was one.²⁸³ The visible church exists for the building up and edification of the invisible; it is God’s instrument for the production of God’s beloved fellowship in the covenant of grace.²⁸⁴ The church as a visible society of men, and takes her place along with various other institutions in the state. Like the family and such economic institutions as private property, the proper establishment and maintenance of the church is under the watchful care of the magistrate, since the health and well-being of the whole community are within its jurisdiction.²⁸⁵

²⁷⁷ Wines, *The Hebrew Republic*, 66.

²⁷⁸ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 65 (modern version).

²⁷⁹ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 65 (modern version).

²⁸⁰ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 67 (modern version).

²⁸¹ Webb, *The Political Thought of Samuel Rutherford*, 185.

²⁸² Webb, *The Political Thought of Samuel Rutherford*, 186-187. Webb further points to Rutherford’s view (in *A Survey of the Summe of Church-Discipline penned by Mr. Thomas Hooker, Late Pastor of the Church at Hartford upon Connecticut in New England*) that by this God intends “the organic body of man, and not a hand only” – to deny this would be “as if a man would say there be two hands, ten fingers, two feet, head, eyes, ears, etc., but should deny that there be an whole organick body ...”, *ibid.*, 186. Also it cannot be, says Rutherford, that the, “catholick integral Church is genus, and the Congregations species ...”, for if this were so, any individual congregation “should be the whole integral Catholick church, and the little finger the whole body of John”, *ibid.*, 186.

²⁸³ Webb, *The Political Thought of Samuel Rutherford*, 188.

²⁸⁴ Webb, *The Political Thought of Samuel Rutherford*, 196.

²⁸⁵ Webb, *The Political Thought of Samuel Rutherford*, 201-202.

From the above it is clear that to Rutherford, the role of the magistrate in the maintenance, protection and furtherance of the true religion was an important facet of the Christian Republic and was centrally applicable to constitutional thought at the time regarding the relationship between church and state. The depravity of man not only necessitated political authority and power in matters civil and physical, but also in matters pertaining to religion and the protection of the conscience. The constitutional quest towards the attainment of the common good, towards justice, peace and order within society had as much a religious aspect to it as it had a civil one. The ruler, together with the law, served as an external means towards maintaining and protecting the true religion, which in turn had a soteriological aim attached to it. In this regard, the toleration of different beliefs was given limits.

3.4 Conclusion

Seventeenth-century debates on the relationship between church and state formed a central part of constitutional theory at the time. The magistrate in the Hebrew Republic was required to ascribe towards a Godly politics in a society where there was unity of religious belief. The kings of Old Testament Israel always supported the priests. For example, King Hezekiah took care of the payment and revenue of the ministers' stipends and assisted with the restoring and renewal of every office in this regard. King Jehoshaphat sent senators and other officers with the priests and teachers through his entire kingdom, for he desired that the preaching in this regard might result in good works. Augustine understood the Christian state as accommodative towards spiritual interests in the context of the protection of doctrinal purity, which assisted the cause towards salvation. The prominent theologico-political federalist of the sixteenth century, namely Bullinger, did not view the Christian commonwealth in terms of church and state as completely separate institutions, but rather as the people of God gathered in a Christian society based on the covenant, where the cooperation of pastor and magistrate was the very essence of the Christian Republic. God's people needed the magistrate and the law to govern every aspect of life, which included the religious aspect. Part of the magistrate's duty was to take diligent care of the church and to be 'the feeders and nurses' of the faithful. The republican principles described in Chapter 1 were inextricably connected towards the 'purity of religion' enterprise. Bullinger repeatedly undertook to address England's rulers in the service of the true

religion, also emphasising the magistrate's authority pertaining to the care of religion. Althusius and Rutherford, for example, continued in this line of thinking.

The threats emanating from the Roman Catholic Church (as well as the monarchy) during the sixteenth century gave the Scottish Commissioners reason to clarify tolerance and liberty of conscience and this issue was inextricably connected to the role of the magistrate in the external care of religion. Limitations on both tolerance and liberty of conscience require an understanding of the context at the time, and the Westminster Assembly was justified in its opposition against the threat of a repetition of the abuses (religious) preceding the seventeenth century. A heightened sense of scepticism toward an objective truth of Scripture led to an over-emphasis of the toleration of different interpretations of Scripture. This development towards Biblical relativism and diversity was a serious concern to Reformers such as for example, Calvin, Bullinger and Rutherford (and the rest of the Scottish Divines).

What also became of urgent relevance in this regard was the depravity of man – the problem of man's sin is emphasised as a central cause towards the establishment of a constitutional system. The idea related to the depravity of man motivated the need for politics and the application of the law. This understanding was also of relevance for the maintenance and protection of the true faith. Nature's light is insufficient to provide proper knowledge and this had implications for the living of a Godly life geared towards salvation and the glorification of God. Conscience to Rutherford was guided by historic tradition, natural law, the Mosaic law and the principles contained in the Gospels and the conscience according to Rutherford could only function effectively when functioning in accordance with Scripture. Therefore, the fact that the conscience needed to be informed implied the relevance of seeking a constitutional model. In addition, there were a rapidly growing number of sects and denominations during the early part of the seventeenth-century England.

Although the magistrate did not have the authority to enforce religion upon the individual, he was expected to play an important role in the external maintenance, protection and furtherance of the true religion in the Christian Republic. Against the background of God's providence are His instruments towards the improvement of the temporal world, the individual therein as well as his or her salvation. The magistrate was included as a second cause in the maintenance and protection of religion. In

contrast to this was a more enlightened development in seventeenth-century Britain by which the emphasis was placed on the ‘inner light’ within man and which understood this source of authority as superior to a specified and detailed religious doctrine which is universally enforced. Hugo Grotius, John Milton and Roger Williams for example, played an important role in this regard and which was furthered by John Locke. This took insights on constitutionalism, politics and the law to another dimension, which is elaborated upon in the following section as well as in the Epilogue.

4. John Coffey on Samuel Rutherford’s political and legal theory

4.1 Introduction

John Coffey’s, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*²⁸⁶ has been described as the “first modern intellectual biography of the Scottish Covenanter’s great theorist Samuel Rutherford.”²⁸⁷ Coffey claims to have written the most informative biography of Rutherford, Coffey stating, “In short, no-one has yet provided a rounded, properly contextualised account of Rutherford’s life and thought”.²⁸⁸ Coffey adds, “Altogether, however the small number of academic articles on Rutherford offers only patchy coverage of his ideas. Like seventeenth-century Scottish Presbyterians in general, Rutherford has not received sustained attention from professional historians.”²⁸⁹

Critiquing Coffey’s biography on Rutherford’s political and legal thinking is of value in that it highlights the line of political and legal thinking reflected in the Independents, the Congregationalists, the Anabaptists, Antinomianism, Grotius, Locke, Williams²⁹⁰ and Milton, who furthered the accommodation of all religions and

²⁸⁶ Published in 1997.

²⁸⁷ Description by publishers.

²⁸⁸ John Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, (Cambridge: Cambridge University Press, 1997), 15.

²⁸⁹ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 17.

²⁹⁰ Coffey’s support of Roger Williams’ political (and dispensationalist) thinking is also confirmed in Coffey’s statement that: “This paper, therefore, aims to fill in an important gap in the principled pluralist case by showing that the position has deep roots in the evangelical protestant tradition. It does so by describing the political thought of Roger Williams, an English puritan who emigrated to America and became one of the most outspoken champions of religious liberty in the seventeenth century. Though feted by several generations of American academics, Williams has generally been a prophet without honour in his own constituency. Yet his argument for religious toleration and the non-

beliefs, the privatisation of religion and the dilution of government's role in maintaining the true religion in the Christian Republic. These developments were of serious concern to Rutherford. Although Coffey's support of the idea of 'principled pluralism', which means that Christianity should not be a State religion,²⁹¹ might be relevant to contemporary Western liberal and pluralist societies, it is not true for Europe and especially Scotland in Rutherford's time.²⁹² The reasons for this were explained in especially Chapter 1 (but also transpired throughout this thesis). Coffey's support of principled pluralism for Rutherford's time as well, results in a skewed analysis of Rutherford's constitutional thinking. Stephen Perks summarises Coffey's dilemma regarding what the biblically justified nature of the state and the church should be by stating that, "For some bizarre reason, what Coffey argues is that it is only the secular State that is not inherently evil; Christian States are evil, as are other non-secular States."²⁹³

Overall, Coffey's analysis of Rutherford provides important insights and observations. However, there are views by Coffey that need to be critically addressed, also bearing in mind a better orientation towards the constitutional and consequent

confessional state was profoundly biblical, and I shall argue, a far better guide for Christian political action than the Constantinianism of the magisterial Reformers", John Coffey, "How Evangelicals Shouldn't Think About Politics", [published in the *Evangelical Quarterly*, Vol. LXIX, No. 1, (1997)], in Perks, *A Defence of the Christian State*, 197-198. Also see *ibid.*, 200 for further confirmation of Coffey's support of the political theory of Williams, as well as Coffey's opposition to the political tradition of the magisterial Reformers and the Puritans. Coffey, in the said paper, also states, "Moreover he (Williams) does this without once compromising the universal truth claims of Christianity, because his political vision is an intensely biblical one, drawn from the pages of the New Testament and the example of the primitive Church", *ibid.*, 208. As Perks rightly points out throughout his criticism of Coffey, neither Coffey nor Williams provides "an intensely biblical" approach to political theory. Perks comments that it is valueless in using the thought of Roger Williams to demonstrate principled pluralism (the view that the state should not support religions and treat all religions equally), when the society to which Williams belonged and to which he addressed his arguments was less religiously diverse, Perks, *A Defence of the Christian State*, 33-34.

²⁹¹ Perks, *A Defence of the Christian State*, 9.

²⁹² In this regard, it is interesting to note what Greg Bahnsen has to say namely, (i) Pluralism is contrary to the Biblical demand that all the kings and judges of the earth 'serve Jehovah' specifically (Ps. 2:10-11); (ii) By subtracting the civil commandments from God's law without relevant and specific Biblical warrant, pluralists come under the condemnation of the law itself, and (iii) the logical impossibility of the state giving 'equal' effect to substantial moral issues such as, for example, abortion, Greg L. Bahnsen, *No Other Standard. Theonomy and Its Critics*, (Tyler, Texas: Institute for Christian Economics, 1991), 192. Biblically speaking, pluralism can also not be qualified (see Col. 1:13-18; Matt. 28:18; Col. 2:3; 1 Pet. 1:15; 1 Cor. 10:31; and 2 Tim. 3:16-17), *ibid.* 198. This idea however should by no means be linked to the idea that contemporary pluralist society has to become Christian by means of force nor would Rutherford have supported this.

²⁹³ Perks, *A Defence of the Christian State*, 115.

political and legal thinking of Rutherford.²⁹⁴ Rutherford has been depicted as being a controversialist,²⁹⁵ a supporter of persecution²⁹⁶, a militant,²⁹⁷ a zealot,²⁹⁸

²⁹⁴ Regarding Rutherford's political thought as a whole, note the acclaim Coffey gives to J. F. Maclear's article titled, "Samuel Rutherford: The Law and the King" (published in 1965) as the "best article on Rutherford's political thought as a whole" whilst failing to give an equivalent acclaim to other good articles on Rutherford's political thought. Coffey overlooks the informative contribution (although he refers briefly to it) by Richard Flinn's "Samuel Rutherford and Puritan Political Theory" (*Journal of Christian Reconstruction*, Vol. 5, ([1978-9], 49-74), and which is not to be subordinated (as implied by Coffey's judgment) to the said work by Maclear. Coffey fails to mention Richard Flinn's article when commenting on "previous Rutherford Scholarship" (See *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 15-17), but briefly deals with Flinn's article under the heading, "Rutherford and the American Christian Right" and more specifically labels the said article as a 'theonomist reading of *Lex, Rex*', see Coffey, *Politics, Religion, and the British Revolutions. The mind of Samuel Rutherford*, 13, fn. 66. Coffey's singling out of Maclear's article is questionable. Firstly, Maclear's work on Rutherford really only provides a brief background to Rutherford, the context of early seventeenth-century England and Scotland, as well as Rutherford's political thought. A proper Scriptural analysis also lacks in this work, Maclear placing the emphasis more on the Scottish traditions and history to which Rutherford was so loyal. Secondly, Flinn's article on Rutherford's political thought is informative as well as William M. Campbell's, M, "Lex, Rex and its Author", *Records of the Scottish Church History Society*, Vol. 7, (1941), 204-228. Also, Coffey simply states that "other writers tend to give us only a partial view of Rutherford's political ideas", *ibid.*, 16. In this regard, the good scholarly works by authors such as O. K. Webb, J. L. Marshall, J. P. Burgess and W. Campbell do not enjoy emphasis. Coffey then immediately switches over to an analysis from a 'historical' context, stating that the works by Webb and Marshall, although based on 'careful reading of Rutherford' 'tend to be very weak on historical context perhaps because they emerge from divinity departments', *ibid.*, 15. Coffey admits that he could not obtain C. E. Rea's thesis on Rutherford, which also presents an informed take on Rutherford's political thought, *ibid.*, 15.

²⁹⁵ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 3.

²⁹⁶ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 1. Coffey also, in no uncertain terms, labels Rutherford, "an intolerant advocate of religious persecution and divine-right Presbyterianism ...", *ibid.*, 62.

²⁹⁷ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 54, 149-150, 197, 219 and 248. At *ibid.*, 234, Coffey states that Rutherford and his fellow militants among the clergy had to persuade the nobility of the necessity and efficacy of action on behalf of the cause – "Just as Lenin had to persuade the 'vanguard' to take positive action instead of passively waiting for great historical forces to do their work, so these ministers had to convince potential supporters that God's providence left room for genuine human agency". At *ibid.*, 150, Coffey states that, "The fact that *Lex, Rex* was published 'by authority' in London suggests that the militant Scots had allied themselves with those Presbyterians in the English parliament who were equally concerned to drive a hard bargain. The ferocity and bitterness of *Lex, Rex* fits very well with this conception of its purpose", and " ... *Lex, Rex* had achieved its provocative purpose", *ibid.*, 151. Coffey also states that, "The 'infinite inhumane bitterness' against Charles I expressed in *Lex, Rex* may have contributed to the intransigence of both royalists and their opponents, an intransigence that led to the eventual collapse of the negotiations at Uxbridge in January 1645", *ibid.*, 151. Coffey ends his book by referring to Rutherford as being part of the "bellicosity of the Puritan drive towards godly rule", *ibid.*, 258. Compare this to Robert Paul's observation on the activities of the Scottish Divines during the Westminster Assembly in that, " ... it would be entirely wrong to accuse these divines of deliberately using their exegesis of Scripture, or the theology derived from it, for merely political ends. We would have to say of them ... that 'to suggest a fundamental hypocrisy – whether on the grounds advanced by seventeenth century royalists, or on those put forward by twentieth century realists – is to offer a solution too simple to be acceptable'; and for the same fundamental reason: the religious issue was too grave for any believer to play fast and loose with eternal destiny. These serious divines came to certain conclusions about the Church, about society, and about the way scripture should be interpreted, and they saw with peculiar clarity the evidence that supported those conclusions; but never in the debates do we find them consciously twisting the biblical material to fit their own convictions ...", Paul, *The Assembly of The Lord. Politics and Religion in the Westminster Assembly and the 'Grand Debate'*, 200.

authoritarian,²⁹⁹ and supporter of anti-toleration.³⁰⁰ *Lex, Rex* (and its author) has been associated with a “ferocity and bitterness”,³⁰¹ with a “provocative purpose”,³⁰² and with a “radical reputation”.³⁰³ *Lex, Rex* is referred to as an ‘inflammatory book’.³⁰⁴ Coffey’s analysis of the ‘mind’ of Samuel Rutherford has to be, on the one hand, acknowledged for its partly informative observations of the life and thought of Rutherford, yet on the other hand, needs to be approached with caution. Coffey, between the lines of facts, clearly reflects his own subjective abhorrence towards Biblical Presbyterianism (as well as a holistic understanding of the Bible as a whole). Coffey refers to Rutherford as sometimes “rejoicing in the cross, and sometimes trusting in the sword”, and that “those who claim to be inspired by him today reflect the same ambiguity”.³⁰⁵

²⁹⁸ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 34, 44 and 256.

²⁹⁹ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 53.

³⁰⁰ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 27, 255 and 257. Also see, *ibid.*, 202.

³⁰¹ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 150.

³⁰² Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 151.

³⁰³ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 174. Also see *ibid.*, 34-35, 46, 48, 87, 146-147, 157-158 and 179. It is clear on reading Coffey’s work that ‘radicalism’ is to be understood in a negative sense, a sense of ascribing, among others, a fundamentalist trait to Rutherford. Coffey also refers to Rutherford as a member of the ‘radical Presbyterians’, *ibid.*, 194.

³⁰⁴ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 152.

³⁰⁵ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 14. This needs to be understood against the background of his following statement, “The examples of Randall Terry, the Christian Reconstructionists and John Whitehead illustrate the many political ‘lessons’ that have been drawn from Rutherford’s *Lex, Rex*, or at least from cursory readings of it. The book has been used to justify civil disobedience, a state run according to Mosaic law and the rights and liberties of religious people. Whilst partly reflecting the political confusion among conservative American Evangelicals, these views also point to ambiguities in Rutherford himself. Sometimes he appeared to be a constitutional liberal, at others a vengeful theocrat. Sometimes he rejoiced in the cross, at others he trusted in the sword...”, *ibid.* It is then that Coffey concludes his paragraph by stating that, “...Those who claim to be inspired by him today reflect the same ambiguity”, *ibid.* In other words, Coffey, instead of merely observing the interest in America in the works of Rutherford (especially *Lex, Rex*), goes a step further by aligning ‘those in contemporary society who claim to be inspired by Rutherford’ to the *ambiguity* of Rutherford. This Coffey does without any convincing argument. In any event, would “wielding the sword whilst rejoicing in the cross” need to be interpreted negatively or necessarily carry the same support as it would in an overwhelmingly Christian paradigm as reflected for example, in seventeenth-century Scotland and England? Coffey fails to explain what he precisely means by Rutherford’s ambiguity in this regard. Coffey not only criticises modern-day supporters of Rutherford, but also states that such supporters, for example, Randall Terry, “have been described ... as ‘the leading figure’ of the 1980s ‘militant anti-abortion crusade’”, *ibid.*, 12-13. Coffey then continues by referring to Ronald Dworkin’s comment in *Life’s Dominion* that, “The war between anti-abortion groups and their opponents is America’s new version of the terrible seventeenth-century European wars of religion”, Coffey then stating that, “In the light of Rutherford’s influence on Schaeffer and Terry, this seems strangely appropriate”, *ibid.*, 13, fn. 64. Coffey’s equating of ‘anti-abortion’ groups with ‘terrible seventeenth-century European wars of religion’ requires much convincing.

According to Coffey, Rutherford ransacked the Old Testament for cases of “bloody revolutions, palace coups and armed resistance to royal authority”.³⁰⁶ Then there is Coffey’s comparison of Rutherford to the Ayatollah Khomeini, the Iranian cleric who made a speech, while holding the Koran, in which he accused the Shah of violating his oath to defend Islam and the Constitution.³⁰⁷ Coffey also refers to Rutherford being one of the ‘hardliners’ (including George Gillespie) within the ‘kirk’ who, inspired by the Old Testament concept of the covenanted nation, were to be guided by belief in the necessity of purging malignants, both in church and state.³⁰⁸

Coffey states that his study on Rutherford differs from most of the academic theses written on Rutherford in that it is truly historical.³⁰⁹ Although this may be true to a large degree, Coffey’s analysis of Rutherford however, reflects a historical analysis inundated with subjective, unsubstantiated as well as vague comments, and which has an underlying aversion to the tenets of the WCF. Coffey’s views make sense when compared with his admission that, “My father’s decision in 1975 to leave the Presbyterian ministry and become a Baptist has undoubtedly shaped the perspectives from which this book is written, and I can only hope that my Presbyterian friends do not find this Baptist life of Rutherford too unsympathetic.”³¹⁰ It is not denied that a historian retains a sense of subjectivity in his or her analysis and description of the thought of a specific person. However, Coffey’s subjectivity is brought to light in all of this and it is therefore important to have more clarity from the ideological point of view which is aligned with Scottish Presbyterianism and which is illustrated throughout this thesis, especially against the background of Rutherford’s constitutional thinking.

³⁰⁶ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 176. Coffey also states, “... at times Rutherford came close to justifying king-killing”, *ibid.*, 178. Also see *ibid.*, 178. J. P. Burgess’ observation is interesting in this regard, namely, “On the basis of the exigencies of the moment, John Goodwin argues for execution of the king. Rutherford, by contrast develops a casuistry on the basis of the natural law and concludes that resistance, not execution be justified”, Burgess, *The problem of Scripture and political affairs as reflected in the Puritan Revolution: Samuel Rutherford, Thomas Goodwin, John Goodwin, and Gerard Winstanley*, 106.

³⁰⁷ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 184.

³⁰⁸ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 219.

³⁰⁹ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 25.

³¹⁰ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, xi. This underlying influence is inextricably linked with his historical analysis of Rutherford’s ‘mind’.

4.2 A critical look at Coffey's approach

One can understand Coffey's antagonism towards Rutherford on a further reading of Perks analysis of the 'mind' of Coffey, for example, Perks states that Coffey simply assumes that the notion of a secular State (a religiously neutral state) is possible.³¹¹ Coffey uses 1 Peter 2:9 to assert that the New Testament brings the fusion of civil government and religion to an end.³¹² Perks states that Coffey's argument for principled pluralism is in opposition to Scripture, because Coffey argues that the 'Constantinian' position (as Coffey terms it) – which claims that the conversion of the nations is part of God's providential plan for mankind and therefore that Christians should work to create and maintain Christian States – is not biblical.³¹³ Perks points to Coffey's skewed ideas on the Reformers' views regarding the discontinuities between the Old and the New Testaments. Coffey argues that because the Reformers postulated that the magisterial office of Old Testament Israel had to be continued in the New Testament era, the Reformers did not differentiate properly between the Old and New Testaments.³¹⁴ This view by Coffey can also be coupled to his dispensationalist views reflected in his support of the thought of Roger Williams,³¹⁵ also referred to earlier on.

Coffey does not approach the religious concerns of the Scottish Divines adequately from an informative and contextual point of view. Coffey's dispensationalism comes to the fore in his views on Rutherford's references to Old and New Testament texts in *Lex, Rex*, Coffey stating that,

However, in *Lex, Rex* it was the historical books of the Old Testament that were most commonly referred to. This was, of course, because these books were crammed with historical references to kings and covenants, and provided a mine of political quotations

³¹¹ Perks, *A Defence of the Christian State*, 15.

³¹² Perks, *A Defence of the Christian State*, 61.

³¹³ Perks, *A Defence of the Christian State*, 34.

³¹⁴ Perks, *A Defence of the Christian State*, 51. Coffey's view in this regard leaves Perks puzzled, the latter stating that, "Of course, as a graduate student of the political thought of Samuel Rutherford we must assume that Coffey has some idea of the Reformers' teaching on this subject ...", *ibid.*, 51.

³¹⁵ See Perks, *A Defence of the Christian State*, 52. Williams', *The Bloody Tenent of Persecution* is according to Perks, a substantial influence on the political thought of Coffey, *ibid.*, 47. In confirmation of the dispensationalist approach by Williams, see Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 167, where Coffey observes that Williams opposed the idea of national covenants due to the fact that, according to Williams, the New Testament provided no authority for it. Also see Timothy L. Hall, "Roger Williams and the Foundations of Religious Liberty", *Boston University Law Review*, Vol. 71, 3(1991), 468 and 474.

for Rutherford ... References to the New Testament in Rutherford's political theory were overwhelmingly outnumbered by those to the Old Testament ... he believed that Israel was still to be a model for contemporary Christian nations.³¹⁶

It may be the case that *Lex, Rex* includes a significant referral to the Old Testament; however, this does not negate *Lex, Rex's* referral to the New Testament as well, nor does Coffey prove a substantial separation between the Old and New Testaments. For example, Richard Flinn comments that whereas Deuteronomy 17 is the most frequently quoted passage of Scripture in *Lex, Rex*, it is followed in only slightly less frequency by references to Romans 13:1-6. This proves beyond doubt that Rutherford believed that there was continuity throughout the history of the divine prescriptions for civil government and the civil magistrate. The doctrine of Romans 13 does not abrogate the Old Testament stipulations for government, but ratifies them and builds upon them. From these it can be deduced that (according to Rutherford and to many of the other Reformers in and around his time) the basic requirements and functions of the office of the civil magistrate in the Old Testament continues to the present.³¹⁷

Coffey's observation regarding the Westminster Assembly also invites criticism. Coffey states that Rutherford (and the other Scottish delegates) "vigorously defended the Presbyterian form of church government, exercising an influence out of all proportion to their numbers", also stating that, "... Rutherford's radicalism was essentially authoritarian. Like the revolutionary mullahs of Iran in the late 1970s he was prepared to use the anarchic energies of private religious meetings to usher in the order and discipline of a Presbyterian theocracy".³¹⁸ Here Coffey's equating the Mullahs of Iran to Rutherford's 'radicalism' is unfounded and fails to provide an informed view of the happenings within and surrounding the Westminster Assembly in seventeenth-century Britain, as especially elaborated upon in Chapter 1. Coffey's incoherent clustering of anything connoted to Protestantism to that which is oppressive, together with his ignorance of biblical authority pertaining to political and legal theory, as well as the role of magistracy, is also evident in his following observation as emphasised by Perks, "Whether in Calvin's Geneva, Knox's

³¹⁶ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 80-81.

³¹⁷ Flinn, "Samuel Rutherford and Puritan Political Theory", 72-73.

³¹⁸ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 52-53. Coffey also states, "Rutherford was one of the most regular attenders at the Commission being present at nearly all its sessions after his return from England. For him the Commission was as critical for consolidating and furthering the Presbyterian *revolution* ..., *ibid.*, 54 (author's emphasis).

Edinburgh, Cromwell's London and Dublin, Winthrop's Boston ... Calvinists in power have wielded that power oppressively."³¹⁹ To this, Perks replies,

This seems to amount to nothing more than a repetition of the argument that the abuse of power by Christians in the past necessitates that Christianity should never again be allowed to become the religion of State. But again, there is no correlative assessment of the abuse of power by secularists and what impact this should have on the constitution of the State. Coffey never explains why he thinks abuse of power by secularists should not invalidate the idea of a secular State while abuse of power by Christians necessarily invalidates the idea of the Christian State.³²⁰

John Coffey comments,

On the one hand, Rutherford's arguments for popular sovereignty, the rule of law, and the right of resistance to tyranny, remind us of Locke, and can lead to the impression that the author of *Lex, Rex* was something of a modern liberal. On the other hand, his desire for a covenanted nation purged of heresy, idolatry and unbelief, makes him appear thoroughly reactionary, utterly committed to the ideals of Christendom. Ultimately, it was Rutherford's 'reactionary' side that was to win out, for it was the Old Testament concept of a nation in covenant with God that lay closest to his heart. The quest for a godly nation was destined to undermine the advice of natural reason.³²¹

Note how Coffey distinguishes between a more 'secular language' ('popular sovereignty, the rule of law, and resistance to tyranny') on the one hand, and a more 'religious language' ('covenanted nation purged of heresy, idolatry and unbelief').³²² Similarly, Coffey views the 'religious' side of Rutherford as the 'reactionary side'

³¹⁹ Perks, *A Defence of the Christian State*, 49.

³²⁰ Perks, *A Defence of the Christian State*, 49-50.

³²¹ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 187. Similarly, Coffey states that, "The Protestant covenant was to take precedence over the peace and order of the commonwealth". Here the 'Protestant covenant' is juxtaposed alongside 'the peace and order of the commonwealth'. In this regard, Coffey reflects the view that Rutherford's "passionate conviction that the king was obliged to defend true religion and purge the land of idolatry" (this being the national covenant's purpose) was to be subordinated to 'constitutional arguments' and 'the peace and order of the commonwealth'. A thorough reading of *ibid.*, 168-169 as well as cognisance of Coffey's dispensationalist thought, provides clarity to the aforementioned observation.

³²² Similarly, Coffey refers to, "... the deep tension in Rutherford's political thought between 'secular' discourses that can ultimately be traced back to classical sources (natural-law contractualism and ancient constitutionalism) and religious discourses derived from the Old Testament (religious covenantalism and apocalypticism). Often this tension is hard to detect, because in early modern Europe – and in Rutherford's own education – the Greek and Roman classical heritage was thoroughly interwoven with the Hebrew biblical heritage. In the end, however, this particular tapestry was to unravel, and when it did, it was not the classical sources but the Old Testament that guided Rutherford's political thinking", Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 81.

that is viewed as synonymous to being ‘utterly committed to the ideals of Christendom’, which in turn is viewed as being synonymous to the ‘Old Testament concept of a nation in covenant with God’. In this regard, one needs to note Coffey’s distinction between ‘secular arguments’ and ‘religious’ arguments, “Rather than presenting an argument for the secular right to resist, *Lex, Rex* concentrated on the religious duty to resist. The cause of true religion was always preeminent in Rutherford’s mind, and, in comparison with it, other concerns paled into insignificance”.³²³ Here Coffey again seems to distinguish between ‘the cause of true religion’ and a ‘secular argument’. It is erroneous to place concepts such as popular sovereignty and the ‘rule of law’ into watertight compartments coloured in by only one subjective ideology. Coffey tries to place ‘religious’ insights into separate compartments from those of non-religious insights, but such an exercise remains futile, due to the inextricable link between belief and insights related to the said concepts.

Furthermore, Coffey again distinguishes between the ‘religious’ and the ‘secular’ by observing and commenting that, “In response to Maxwell’s claim that ‘the kingdom had peace and plenty in the prelates’ time’, he (Rutherford) retorted, ‘A belly-argument. We had plenty when we sacrificed to the queen of heaven.’ The Protestant covenant was to take precedence over the peace and order of the commonwealth”.³²⁴ Here Coffey again views ‘the covenant’ and the peace and order of the community as separate insights, the former religious and the other ‘non-religious’. This is also reflected in Coffey’s comment that Rutherford “was also drawing from it (Scripture) something that fallen natural reason could never tell him – the covenant obligations of a godly nation”.³²⁵ Yet again Coffey distinguishes between constitutional (secular)

³²³ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 181.

³²⁴ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 169.

³²⁵ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 155. Whether this is a properly nuanced observation by Coffey is questionable, taking into consideration the complexities pertaining to Rutherford’s interchangeable use of concepts such as ‘reason’, ‘natural law’ and ‘conscience’, see Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 16. This is said also against the understanding that to Rutherford, nature is imbued with God’s character, and thus with His law. Rutherford sought to identify natural law with the Scriptural doctrine of the covenant of works which God inscribed in man’s original, sinless constitution – for Rutherford the language of nature was a covenantal language, *ibid.*, 23. To imply a split between ‘Scripture’ on the one hand, and ‘reason’ on the other, in qualifying the covenant concept (even in a political sense) would be too superficial a deduction regarding Rutherford’s thinking on these issues. The following excerpt from Marshall’s study on Rutherford’s thought on the covenant, natural law and politics, also illustrates the inextricable relationship between ‘reason’, ‘nature’ and ‘covenant’, namely, “The social order is one sphere of

thinking on the one hand, and religious thinking on the other hand, in his comments on Rutherford and the covenant, also stating that: “John Morrill has persuasively suggested, it was this passion,³²⁶ rather than constitutionalist arguments that drove men to take up arms against the king”.³²⁷ Here Coffey views ‘constitutionalist’ arguments as separate from ‘religious’ insights. It is clear throughout this thesis but especially from the Epilogue that it was Rutherford’s constitutionalist thinking that drove men to resist the king. In the last paragraph of Coffey’s analysis of the ‘mind’ of Rutherford, Coffey states:

... what attracted Evangelicals to it (*Lex, Rex*) was not Rutherford’s passionate desire for a godly magistrate who would stamp out idolatry and advance the cause of true religion. Instead, eighteenth- and nineteenth-century writers warmed to Rutherford’s natural-law arguments for a mixed constitution and the liberties of subjects. *Lex, Rex*, was interpreted as an apology for Victorian liberalism, though Rutherford would have been appalled at the tolerance of popish idolatry, heresy and unbelief that characterised nineteenth-century Britain. His admirers have now abandoned the bellicosity³²⁸ of the Puritan drive towards Godly rule.³²⁹

Here Coffey subtly implies that ‘natural-law arguments’ are to be distinguished from the abhorrence towards ‘tolerance of popish idolatry, heresy and unbelief’ and the ‘bellicosity of the Puritan drive towards Godly rule’, also placing the latter (the religious passion for a Godly nation) in a negative light. It is clear from the above that

nature governed by God’s providential activity, and human agency is the preeminent means by which he achieves his ultimate designs in that sphere. As a rational creature, man is gifted with the power to will his end in conformity with the principles God has laid down, first in man’s natural constitution, and later in the pages of Scripture. As a rational creature, therefore, man possesses the covenant principle in a manner different from that of non-rational creatures. It is an instrument of his self-consciousness by which he sets about to order the whole of his natural life; it is the driving force behind all human social transactions, including government. Obedience or disobedience to the covenant principle inhering in his nature and expressed more fully in Scripture will determine the success or failure of his social enterprise”, *ibid.*, 31-32. Surely, the ‘covenant obligations of a godly nation’ was an extension of this natural covenant and of reason, resulting in an interrelated relationship between Scripture and reason. Marshall, after having referred to Rutherford’s view and support regarding the political covenant, and how this forms part of nature, refers to the fact that this understanding of the political covenant is, according to Rutherford, affirmed by the nature of the covenant relation between God and his people, *ibid.*, 64.

³²⁶ According to Coffey, Rutherford’s passionate conviction that the king was obliged to defend true religion and purge the land of idolatry, Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 168.

³²⁷ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 168.

³²⁸ “bellicosity” refers to ‘war-like’. Here Rutherford’s passion that the king is to defend religion is understood by Coffey as being more important to Rutherford than constitutional arguments. This is not correct. Rutherford’s political and legal thought are inextricably connected to constitutional arguments including the defence of religion as a constitutional idea. Coffey assumes that constitutional arguments are always exclusive of religion.

³²⁹ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 258.

Coffey views a natural law mode of communication as similar to the secular (the irreligious), and anything to do with strictly biblical reflection and the establishment of Christianity in politics and society (the religious) is to be opposed.³³⁰ Coffey needs to be reminded that a plethora of interpretations of nature, mostly anti-supernatural, have arisen since Rutherford's day. The observable world has been used to prove Hegelian pantheism and Darwinian evolution, with C. S. Lewis stating that, "Nature has all sorts of phenomenon in stock and can suit many different tastes."³³¹ Natural data are not interpreted without some all-embracing philosophy that tries to account for that data. In the words of David Little, "Christians who take the fallenness of human nature seriously will always treat natural law as something that must be seen as relating to and complementing the norms of Christian revelation, not as a substitute for them".³³² Natural law in itself is open to various pre-suppositional ideological points of authority.

The link between Rutherford's aspirations towards a godly nation where Presbyterian church government was to reign³³³ and a reasoned or natural law argument were not at all far apart, as Coffey implies. Rutherford taught that submission of a church to a Presbytery, of a Presbytery to a provincial synod, and of a provincial synod to a national assembly was qualified both from a positive law of God and from the law of

³³⁰ Even the cover description of Coffey's work on Rutherford's 'mind' emphasises: "The book demonstrates that while *Lex, Rex* provided a careful synthesis of natural-law theory and biblical politics, Rutherford's Old Testament vision of a purged and covenanted nation ultimately subverted his commitment to the politics of natural reason". Here we also find the depiction that there is a separation between 'biblical politics' and 'Old Testament vision' on the one hand, and the 'politics of natural reason' on the other. In this regard, Coffey ascribes a uniform meaning to reason, which cannot be the case. Reason itself overlaps with some or other foundational ideology.

³³¹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 265.

³³² Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 265.

³³³ Paul Smith observes, "The presbyterians comprised the largest group in the assembly, about 90 percent of the whole. They represented the mainstream of English puritanism, with roots extending back to Elizabethan times. They were the spiritual descendants of such men as Thomas Cartwright, William Fulke, Lawrence Chaderton, and John Preston. Presbyterians were in the strongest position to assume the reins of church government from the outlawed bishops. Presbyterianism was the government of Reformed churches abroad, and it was respectable in England as well. This was in marked contrast to independency, whose reputation was tarnished by exile, constant fissure, and rumours of dissention and scandal, Smith, *The Debates on Church Government at the Westminster Assembly of Divines, 1643-1646*, 147. Also see *ibid.*, 482-484 and 466-467. There were also important victories for the Presbyterians in the various debates taking place in the Westminster Assembly, something which could also have possibly lead to fuelling the expectations for a Presbyterial ecclesiological system, see for example, *ibid.*, 254, 258, 266, 309 and 413.

nature.³³⁴ This should also be understood against the discussion on the limits on liberty of conscience discussed earlier in this chapter. According to Rutherford, the need for churches to preserve themselves requires an overarching ecclesiastical authority, just as the need for families themselves requires an overarching civil authority. Here, Marshall points out that Rutherford maintains that grace does not destroy nature:

Suppose that God had appointed every family in the world to be independent within itself, subordinate to no civil law or magistrate outside its own little corporation. In one shire, province, or country there would be ten hundred or ten thousand independent kingdoms subject to no supreme civil authority, 'but immediately subordinate to God in the Law of nature.' When these ten thousand families turn on each other with the sword or otherwise wrong each other, the only remedy would be to complain to God and renounce civil communion with them. No external means of compelling them to 'doe duty, or execute mercy and Judgement one toward another' would be lawful ... It is a 'maxim of naturall policy, acknowledged by all, in all policies, civill, naturall, supernaturall' that 'God intending the conservation of societies both in Church and State hath subjected all Societies, and Multitudes to Lawes of externall policy.' A multitude of little congregations is just as much a multitude requiring external laws as any other social grouping. Therefore the government of churches as independent bodies, void of any 'coactive power of Church censures,' must lack divine institution and thus be a form of 'will worship'.³³⁵

As was elaborated earlier on in this chapter, Rutherford saw in Independency a dangerous rival to Presbyterianism. The Scottish Commissioners reported to the General Assembly that there was "nothing more pernicious, both to church and state, than the leaving of all men to autonomy in religion".³³⁶ As a result, Rutherford wrote *A Free Disputation Against Pretended Liberty of Conscience*.³³⁷ Rutherford's (and the other Scottish Divines') fear was reflected in Edmund Calamy's presentation to the Westminster Assembly in 1644 where he stated that,

Some errors are such, as *subvert the faith, and destroy the power of Godliness*: others are of a lesser nature, which may consist with the power of Godliness, and with an unity in the faith. But that which I now speak against, is that unbounded liberty that is pleaded for

³³⁴ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 235.

³³⁵ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 239-241.

³³⁶ Rendell, *Samuel Rutherford. A New Biography of the Man and His Ministry*, 69.

³³⁷ Rendell, *Samuel Rutherford. A New Biography of the Man and His Ministry*, 70.

in divers books lately written, which hold forth this prodigious Tenent. *That every man is to be suffered to have the liberty of his conscience, be it never so Heretical or Idolatrical.*³³⁸

Independency's support of the doctrine of 'the inner light' was staunchly rejected by Rutherford, Rutherford seeing in this a subjectivism which resulted in a threat to the community, especially taking into consideration the vacuum created by Charles I and Laud in which the individualism of the seventeenth century could express itself.³³⁹ This threat included the numerous sects that arose in Britain during Rutherford's time, which in turn lead to a higher demand for toleration, eventually leading to Roger Williams' (the founder of the Rhode Island Colony) strong influences supporting the accommodation of different sects in early American history.³⁴⁰

It is therefore submitted that a general weakness in Coffey's rendition of the 'mind' of Rutherford is that he looks at Rutherford through the spectacles of dispensationalism (which also is confirmed by his support of the thinking of the dispensationalist, Roger Williams). Coffey also refrains from providing the necessary sensitivity to the context in which Rutherford wrote and gives substantial emphasis on reason, assuming here a one-size-fits-all meaning of reason. Emanating from this is Coffey's separation between 'religion' and for example, 'politics'. It can be asked as to why there should be mention, when looking at Rutherford and the likes, as to an 'exclusive' political debate, instead of 'religious' political debate. In this regard, see John Coffey referring to Rutherford, Buchanan, Locke and others against the background of "talking exclusively about politics, not theology, and about the concept of rights, not religious duties".³⁴¹

However, why would one want to portray these writers as 'talking exclusively about politics', bearing in mind the inextricable connection between politics and religion in a Christian cosmological and epistemological paradigm? In any event, political and legal theory always has some or other ideological foundation to it. Can resistance

³³⁸ Edmund Calamy, *An Indictment against England because of her selfe-murdering divisions: together with an exhortation to an England-preserving unity and concord*, presented in a sermon preached before the Right Honourable House of Lords in the Abby church at Westminster; at the late solemnefast, December 25, 1644, cited in Coldwell and Winzer, "The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis, Part 1: Chronology", 20.

³³⁹ Rendell, *Samuel Rutherford. A New Biography of the Man and His Ministry*, 89.

³⁴⁰ Rendell, *Samuel Rutherford. A New Biography of the Man and His Ministry*, 90. Also see *ibid.*, 91.

³⁴¹ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 183.

theory, for example, not include opposition against idolatry, in addition to opposing a tyrannous paradigm that is threatening to one's physical health – why separate the spiritual dimension (idolatry) from a universal dimension (safety of one's body)? With this in mind, it is difficult to understand Coffey's view that, "rather than presenting an argument for the secular right to resist, *Lex, Rex* concentrated on the religious duty to resist. The cause of true religion was always pre-eminent in Rutherford's mind, and, in comparison with it, other concerns paled into insignificance".³⁴²

Also, regarding the said view by Coffey that, "The quest for a godly nation was destined to undermine the advice of natural reason ..." does not take cognisance of Rutherford's view (as observed by John Marshall) that, "To obey God in all things is part of man's rational nature. There is no inherent contradiction in obeying God in what may seem to be a violation of the law of nature, such as Abraham's sacrificing his son Isaac, because obeying God in all things is part of that very law of nature originally concreated in the human heart. Any seeming contradiction is the result of sin which refuses to recognize God as infinitely wise and just in all he commands."³⁴³ Since submission to the will of God is the height of rationality, the attempt to make absolute the will of a man is the height of irrationality.³⁴⁴

As stated earlier, Coffey refers to 'natural reason' as if this is a concept agreed upon in meaning by everyone and in the process bypasses the variations and complexities of such a concept. Here one need also refer to Rutherford's warning against the sinful nature of reasoning namely, "Carnal reason demands to know by what necessity God made a law forbidding the eating of an apple, when he knew full well that this would

³⁴² Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 181. During the Reformation, as in contemporary society, discussion on the role of government and politics in general does not entail the 'religious' versus the 'secular' but rather the 'religious' versus other 'beliefs' (whether humanist, liberal, etc.), and, more specifically, the Reformation had to deal with Biblical instead of non-Biblical answers to political and social theory. For some more clarity on why it is inaccurate to refer to 'the religious' and 'the secular' see Iain T. Benson, "Taking Pluralism and Liberalism Seriously: The Need to Re-understand 'Faith' 'Beliefs' 'Religion' and 'Diversity' in the Public Sphere", *Journal for the Study of Religion*, Vol. 23, Numbers 1 & 2, (2010), 17-41; and Iain T. Benson, "The Freedom of Conscience and Religion in Canada: Challenges and Opportunities", *Emory International Law Review*, Vol. 21, 1(2007), 111-166.

³⁴³ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 138 (Also see *ibid.*, 139 & 143, Marshall also observing that to Rutherford, God, on creating man, also created the natural law within man to love Him above all things).

³⁴⁴ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, 141.

result in damnation. Reason thinks God should never have created the tree of knowledge or forbidden eating from it”.³⁴⁵ Rutherford adds that weakness in faith, leading to the sinful use of reason, is found in Christians who argue for universal grace. Reason, says Rutherford, seems to say that everyone without exception should share in the grace of the gospel. Bare reason must be answered with Scriptural reason.³⁴⁶

The accuracy of Coffey’s interpretation on Scripture to qualify his views is also questionable. In this regard, Coffey’s reliance on Matthew 13:24-30, 36-43³⁴⁷ will receive more attention. Roger Williams erroneously used Matthew 13:30, 38 in order to postulate a biblically qualified reason in opposition to the political ideas of the Reformers pertaining to functions and responsibilities of the magistrate and the church.³⁴⁸ Commenting on Matthew 13:24-30 (and verses 36-43), Perks says that this text does not invalidate the relevance of the State; stating that this passage does not address the issue of law and order and on what basis the magistrate is to administer justice. In fact, it cannot be deduced from the words in this passage that non-believers should not be punished for the crimes that they commit.³⁴⁹

Regarding Matthew 13:24-30, 36-43, Bahnsen states that the civil magistrate was not authorised, nor were sanctions specified, in the law of Moses to judge the unbelief of one’s heart. Similarly, Jesus warned against any attempt to root the tares (sons of the evil one) out of the world in order to leave only the wheat standing – this is God’s prerogative alone, exercised at the end of the world, with the application of eternal condemnation and not of civil penalty. In this age the sons of the kingdom (wheat) will always live and witness in the presence of the thorny sons of the evil one (tares),

³⁴⁵ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 133.

³⁴⁶ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 135.

³⁴⁷ See Perks, *A Defence of the Christian State*, 90.

³⁴⁸ Perks, *A Defence of the Christian State*, 82. Matth. 13:24-30 was marshalled by many authors in the sixteenth and seventeenth century in defence of the tenet that Christ intended the godly and ungodly to live together unmolested until the day of judgement. The Baptists also incorporated this text into one of their confessions of faith and Roger Williams devoted a whole chapter of his *Bloudy tenent of persecution* to showing that this allegory revealed that men ought to exercise patience towards false believers and reprobates alongside whom they lived in society, even while they were to be expelled from the gathered congregations of the elect, Walsham, *Charitable hatred. Tolerance and intolerance in England, 1500-1700*, 239. Also see Murphy, *Conscience and Community. Revisiting Toleration and Religious Dissent in Early Modern England and America*, 104 (Murphy here also refers to the influence that scepticism may have had in this regard), as well as *ibid.*, 97.

³⁴⁹ Perks, *A Defence of the Christian State*, 103.

and God has not called the civil magistrate to bring it about otherwise.³⁵⁰ Rutherford agrees with this understanding.

Concerning Matthew 13, Rutherford states that the scope of this parable has nothing to do with the office of the magistrate, in punishing or not punishing heretics. Christ did not show that magistrates should punish none of the children of the wicked one, because of the danger of cutting off the children of the kingdom with them, “for the words may bear then (says Calvin), that all punishments and censures, both civil and ecclesiastical rebukes, and excommunications, should cease till the end of the world.” Rutherford also confirms that Bullinger said the same.³⁵¹ In the words of Rutherford:

... that the magistrate should punish no false prophets or seducers, but let them all grow till the day of judgment, for fear that he punish or put to death a faithfull teacher in lieu of a false seducer, as Luther following some of the fathers teaches, is so far from being in this text, that it is not a truth contained in all the Old or New Testament. Yes, it is openly false, for then should we not avoid and turn away from idolaters and hereticks contrary to 1 Corinthians 5: 11, Titus 3: 10 and Romans 16: 17; but live and converse with them to the end of the world, because we may take some to be hereticks who are no such thing, but sounder in the faith than ourselves: show me a warrant for such an untruth, that we are to do no duties till the day of judgment, for fear of sinful miscarriages in the manner of doing them.³⁵²

³⁵⁰ Bahnsen, *No Other Standard. Theonomy and Its Critics*, 187. Bahnsen gives an added erudite explanation as to why it is ridiculous for pluralists to suggest that they alone conform to the teaching of the discussed parable, while those who advocate civil enforcement of God’s law regarding crime somehow do not, see *ibid.*, 197. Part of this explanation reads as follows, “Surveying the text of this eschatological lesson turns up not the slightest intimation that it pertains to the nature or function of civil government. Nor does it bear upon such issues by logical implication. The type of punishment dealt with in the parable is not temporal at all, but rather the judgment of eternal damnation (the tares are ‘gathered up’ in ‘bundles to burn,’ Matt. 13:30). Moreover, the temporal judgments of the civil magistrate have nothing to do with discerning the hearts of men so as to divide the unregenerate (‘the sons of the Evil One,’ v. 38) from the regenerate (‘the sons of the kingdom’), but rather with punishing law-breakers while protecting law-keepers (regardless of the wheat/tare distinction)”, *ibid.*, 197.

³⁵¹ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 236 (original version).

³⁵² Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 237 (original version). Also see *ibid.*, 238. George Gillespie has a similar view namely, “... that if the Magistrate must spare those who are meant by tares in the Parable, then he must spare and let alone all scandalous offenders, murderers, adulterers, drunkards, thieves, & c. when any such are discovered in the visible Church ... if the tares be Antichristian Idolaters, and they must not be plucked up, but suffered to grow till the harvest, as he expoundeth, this contradicteth other Scriptures, which say that the sword must be drawn against Antichristian idolaters, and they thereby cut off, *Revel.* 13.10, and 17.16.”, George Gillespie, *Wholesome Severity reconciled with Christian Liberty* (or *The true Resolution of a present Controversy concerning Liberty of Conscience*), (Printed for Christopher Meredith, London, 1644), 14. Also, says Gillespie, “... Calvin, Beza, and our best Interpreters, take the scope and intent of that parable, not to be against the immoderate zeal of those who imagine to have the Church rid of all scandalous and wicked persons, as wheat without tares, corn without chaff ... The parable therefore intimates unto us

Rutherford refers to the reason given by the Libertines concerning their opposition against the killing of heretics; the reason being that the Libertines view such practice as a danger in that they could be taken away from being part of the elect and before they are converted. This argument is against divine providence. The magistrate's duty is to impose justice, while election and reprobation are secrets that belong to the Lord.³⁵³ The Lord has appointed a way how to purge heaven out of the church (1 Corinthians 5:1) and how evil-doers shall be cut off (Romans 13), although not in so strict and accurate a way as one may dream of, who would not have one thistle in our Lord's field.³⁵⁴

In some laws in the Old Testament, God was severer to things and to persons, for example, where He commands the cattle and women with children to be killed because God would both give a document of *moral justice* for our imitation and of *typical-ness of justice* (which is now ceased). However, concerning the application of moral justice, the Lord is severer under the Gospel than under the law (Old Testament), as is evident in Malachi 4:1–2, Hebrew 2:1–2, Luke 23:28–30, and no less jealous of his own glory now than at that time.³⁵⁵ Although the case of conscience could not be determined, the heretic who repents is to be pardoned by the magistrate, while continuous exercise of heresy is punishable by death. The blasphemer, who has perverted many souls and has presumptuously dishonoured the majesty of God, although he is not put to death, surely has to be punished by the magistrate.³⁵⁶

Rutherford refers to the Libertines, the latter mentioning an instance where Christ was rejected and denied lodging by the village of the Samaritans, and where John asked

(as *Bucerus* upon the place expoundeth it) that when the Magistrate hath done all his duty in exercising his coercive power, yet to the world's end there will be in the Church a mixture of good and bad. So that it is the universal and perfect purging of the Church, which is put off to the last judgment, not the punishment of particular persons. Neither do the servants in the parable ask whether they should pluck up this or that visible tare, but whether they should go and make the whole field rid of them; which field is the general visible Church sowed with the seed of the Gospel; and so much for that argument", *ibid.*, 15. Gillespie adds, "Another negative argument is this. Such a coercive power in matters of religion, maketh men hypocrites and seven times more the children of hell. Christ's Ordinances put upon a whole City, or a Nation, may more *civilize* and *moralize*, but never *christianize* them; saith Mr. [Roger] *Williams*, chapter 82. I answer, this argument doth utterly condemn *Josiah's* Reformation as sinful, for he caused all *Judah* to stand to the Covenant, as we heard before from 2 *Chron.* 43.32, yet *Judah* became thereby more hypocritical. *Treacherous Judah hath not turned unto me with her whole heart, but feignedly, saith the Lord*, speaking of those very days of *Josiah*, *Jer.* 3.6, 10", *ibid.*, 15.

³⁵³ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 238 (original version).

³⁵⁴ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 240 (original version).

³⁵⁵ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 244 (original version).

³⁵⁶ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 247 (original version).

Christ whether He would have them command fire to come down from heaven and consume the Samaritans, as Elias did. Christ replied by rebuking them, stating that the Son of man has not come to destroy men's lives, but to save them.³⁵⁷ This the Libertines refer to as justification that the lives of those who refuse the true and sound doctrine of the Gospel are to be spared. Rutherford, in response, refers to Celfus, who stated that this example is not meant to compare the Samaritans with heretics or the apostles with the ministers and the magistrate, but that the benign and meek nature of Christ, in matters of religion is clear, and that one should abhor cruelty in matters of religion.³⁵⁸

Rutherford continues in his response to the Libertines by firstly challenging the latter to explain from this that the disciples were applying their minds to matters of religion as to why they would have the Samaritans burnt. From the side of the Samaritans, it was an act of envy rather than opposing the doctrine of the gospel. This was because there was envy between the Jews and the Samaritans, and the Samaritans, having had a high esteem of Christ, were offended that so mighty a Prophet should visit their hateful enemies, the Jews.³⁵⁹ Rutherford also acknowledges that the Samaritans were utterly ignorant of the gospel and poses the question whether the first thing to be done to such as will not admit Christ or his messengers within their houses, is to call for the magistrate to destroy them by the sword, or for fire from heaven to destroy them. In this context, Rutherford makes it clear that it is not lawful to go with fire and sword, to force Indians, Samaritans or any heathen to embrace the Christian faith.³⁶⁰ Coffey also relies on the authority of Luke 9:54 (and further) as qualification for his dispensationalist loyalties. Roger Williams erroneously used Luke 9:54 (and further) in order to postulate a biblically qualified reason in opposition to the political ideas of the Reformers pertaining to functions and responsibilities of the magistrate and the church.³⁶¹

³⁵⁷ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 248-249 (original version). See reference to Luke 9:51-53, *ibid.*

³⁵⁸ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 249 (original version).

³⁵⁹ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 249 (original version).

³⁶⁰ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 249-250 (original version).

³⁶¹ Perks, *A Defence of the Christian State*, 82. Also see *ibid.*, 103-104, the author commenting on Luke 9:54-55, states that this passage does not justify the fact that the magistrate must not have regard for religion. Those upon whom the disciples proposed to call down fire had committed no crime, and therefore on what grounds can it be contended that they be punished by the magistrate? There was

Whether the punishing of seducers is inconsistent with the meekness of Christ, Rutherford again refers to the critics, who lean on Luke 9:54 (“And when His disciples James and John saw this, they said, ‘Lord, do You want us to command fire to come down from heaven and consume them, just as Elijah did?’”) to justify opposition to the punishing of idolaters by the magistrate’s sword. The Libertines viewed Christ as a screen and shield between false teachers and the sword, so also the Arminians. Rutherford quotes the following criticism pertaining to the latter text namely,

If Christ will not permit to his disciples a desire of punishing, out of zeale and love to Christ, to whom the Samaritans denied lodging, far less will he permit Christians to punish heretics for their conscience only. But Christ proves the former to come from a spirit not such as was in Elias: 1. That spirit is sharp and bitter. 2. tending to destroy lives, which I came to save. 3. not acceptable to me, in that you would destroy for religion, and this is against all cruelty for religion.³⁶²

In other words, the Libertines emphasise that it is wrong to punish idolaters, just as it is wrong and contrary to the will of Christ for the Apostles to want to destroy the Samaritans, as well as the fact that the approach of Elias (in calling fire from heaven to destroy as witnessed in 2 Kings 1) is to be condemned by Christ’s response to a similar act (the desire by the Apostles for the calling of fire from heaven to destroy as witnessed in Luke 9:54). Referring to Luke 9:54, Rutherford states that it was Theophilactus who said that this text is an example of blind anger and zeal, and adds that to consume a whole city, consisting of men, mothers, children and many innocent people, a need of an express law of God and the known will of God is required. Although there was a law justifying the destroying of a city that maintained idolaters and that tempted to follow strange gods, and kept out against all Israel, and so defied Israel and their God; yet the execution of such a temporary judicial law is not to be found without referring to what God commands by his mouth. In this specific

perhaps sin involved, but not crime. Even if they had committed a crime, the disciples were not magistrates and therefore it was not their duty to judge. For the disciples or Christ to act in such a way would have been to bypass and usurp the authority of the duly instituted courts of Israel, and therefore rebellion against the judicial order established by God. Judgment by means of fire from heaven would not in any case be the exercise of the magistrate’s authority and power, but a divine judgment; calling fire from heaven was not the magistrate’s job. What this passage refers to is the appropriateness of calling down divine judgment, not the office and calling of the magistrate or the means at his disposal to pursue that calling, and therefore the magistrate is irrelevant to this instance.

³⁶² Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 288 (original version).

instance, says Rutherford, the fiery disciples follow their own way in revenge by asking fire from heaven.³⁶³

Rutherford also adds that nowhere in this text (nor in the case of Elias), was the argument that which concerned idolatry or false worship, but the denying of an act of humanity to Christ in the form of not providing Christ with lodging. Elias did not desire fire to come down from heaven and burn cities, men, women and children; what he did desire was that fire destroy murderers that came to either kill him or bring him to a tyrant, who against all law, sought his life. Therefore, according to Rutherford, the two examples, Elias desiring the killing of people and the disciples wanting to kill the Samaritans, cannot be synonymous,³⁶⁴ and cannot be used to justify the toleration of idolatry and heresy.

In addition, Elias followed God's command in what he did, which is in contrast to the disciples who called for fire from a wild spirit, and it was not a proper function for the apostles, nor had they any extraordinary calling from God as Elias had. Elias came to restore the true religion after great apostasy, while Christ came to propagate the gospel.³⁶⁵ According to Rutherford, the criticism put forward by the Libertines can just as well use the meekness exhibited by Christ in this text as justification that therefore pastors ought not to rebuke sharply, and magistrates may not in a well ordered city, reprove and punish persons who refuse lodging to innocent strangers, which is against the law of nature.³⁶⁶ Rutherford refers to Mimius Celsus, who states, "But it is not our mind to compare and resemble by this text Samaritans to Heretics, and ministers of the Word to Magistrates, for that were to no purpose, but to condemn all cruelty flowing from desire of revenge, in the matter of Religion".³⁶⁷ Building on

³⁶³ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 288-289 (original version). In this regard, Gillespie states: "So our Lord Christ's rebuke, *Luke* 9.54, 55, striketh not against any just and necessary severity, but against a private vindictive spirit, and carnal blind zeal, It being the purpose of Christ, then, most of all other times, not to exercise violence, (as tyrants do in conquering new dominions) but to conquer and subdue souls by his doctrine and miracles, with a spirit of meekness, especially having to do with the *Samaritans*, or any other who had never yet known nor received the Gospel. Even those who say most for a coercive power to be put forth against Heretics and Schismatics, do not allow of the compelling of Infidels, Pagans, or Jews, by external punishments to receive the Gospel", Gillespie, *Wholesome Severity reconciled with Christian Liberty*, 23.

³⁶⁴ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 289 (original version).

³⁶⁵ Samuel Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 291 (original version).

³⁶⁶ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 289 (original version).

³⁶⁷ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 289-290 (original version).

this thought Rutherford states, "... for there can be no greater cruelty than for a Christian magistrate to suffer bloody wolves to prey upon the flock, and false teachers to hunt souls, and destroy them. It was justice, not cruelty; yes, mercy to the church of God, to take away the life of Servetus, who used such spiritual and diabolic cruelty to many thousand souls, whom he did pervert ..."³⁶⁸

Some additional arguments that the Libertines refer to in order to justify the toleration of false teachers,³⁶⁹ is met with further opposition by Rutherford.³⁷⁰ Rutherford refers to Christ who is meek to repenting sinners, but a severe judge and a revenger of ill-doers;³⁷¹ nor is the meekness of Christ inconsistent with his justice and righteousness, in commanding the nurse fathers of his house, the rulers of the earth, that which the moral and perpetual standing law of God requires, namely that they use the sword against ill-doers of all sorts and degrees,

... for they stand together in the person of Christ, who is a meek king, Zachariah 9: 9 and lowly and just, having salvation, and breaks not the bruised reed, nor quench the smoking flax, which is not meant of his forbearing the use of the sword against grievous wolves that spares not the flock, and wolves in the skin and cloathing of sheep, seducing heretics, for neither Calvin, Musculus, Gualther, Junius, Scultetus, Marlorat, nor any sound interpreter, Protestant, Lutheran or Papist, save Socinians and Anabaptists professed parties, render any such sense ...³⁷²

Rutherford also challenges the Libertines to prove that heretics are such tender and weak believers as weak reeds and smoking flax, "and that Christ does not only not use the sword against such tender ones, but takes wolves and seducing teachers in his bosom, and nourishes and tenderly cherishes the leaders of people of corrupt minds, destitute of the truth"³⁷³.

³⁶⁸ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 290 (original version).

³⁶⁹ Such as Isaiah 42:1-2; 2 Timothy 2:25 and 1 Corinthians 4:5, Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 291 (original version).

³⁷⁰ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 291 (original version).

³⁷¹ See Revelations 2:6, 9, 14, 20-22, 24; Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 293 (original version).

³⁷² Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 293 (original version).

³⁷³ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 293-294 (original version). Rutherford states that as Christ is meek to weak ones, so also, He is not so in various other instances, see Psalm 110:5-6 and Revelations 19:11, *ibid.*, 294. "Considering the parties he has to do with, he is meek toward the meek, but so as he destroys his enemies, and burns their cities with fire, who will not have him to reign over them, Matthew 22: 7, which yet I expound not to be the sword of the Christian ruler, as if he were an office-bearer in the church, but only bring it to prove how weak

To correct with the sword and with the rod as a father is consistent with covenant-mercy and meekness; as not to punish is one of divine wrath (Hosea 4:14); to judge before the day (1 Corinthians 4:5) is not to forbid all judging of heretics, for if the latter are not judged as heretics, asks Rutherford, how are we to be aware of them, as Christ commands us (Matthew 7:15), and shun them (Romans 16:17) and not bid them God speed, nor receive them into our houses (John 2:10) and avoid them (Titus 3:10); and far less must a judicial trial of Jezebel be forbidden to the church of Thiatira (Revelation 2:20).³⁷⁴ Rutherford also refers to 1 Peter 2:11-14, emphasising the subjection due to kings and the governors sent by them, and states that freedom to sin, and consequently freedom to exercise heresies, and the teaching and spreading of false doctrines, is no less a work of the flesh than adultery, murder and witchcraft.³⁷⁵ The conditions of the covenant include religious precepts emanating from the first Table, and not only from the second Table.

There is therefore no ground to state that the New Testament dispensation is so spiritual that God will have no remedying of seducing prophets but by the spiritual armour of the word. To argue that the New Testament is as spiritual to gain the sorcerer, thief, sodomite, drunkard, reveller as the idolater, by the spiritual armour of the Word (Act 19:19, 1 Corinthians 6:9-11) and therefore that the magistrate may not punish the thief, sodomite, drunkard and sorcerer, is contrary to Romans 13:1-6, 1 Peter 2:14, “Especially since the magistrate is not indifferent towards ill-doers, and well-doers, since he must punish the one as a nurse-father, praise and reward the other, 1 Peter 2: 14, gaining of souls is well-doing, Matthew 25: 21, 23. And seducing of souls is by the law of nature and nations the worst of injuries done to men”.³⁷⁶

It is apt here to look critically at Coffey’s criticism of Rutherford’s approach towards resistance to tyranny, which also has implications as to the importance of the ruler’s responsibilities towards the upkeep of both Tables of the law. Coffey refers to the problem Rutherford had with his ‘secular’ arguments justifying resistance, in that, according to Coffey, they seemed to conflict with the Scriptural doctrine of passive

these allegorick places are, either for or against the point at hand”, *ibid.* What Rutherford is also emphasising is that Christ’s meekness is not inconsistent with his justice, see *ibid.*, 293-294.

³⁷⁴ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 294 (original version).

³⁷⁵ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 234 (original version). Refer to confirmation of this in Galatians 5:16-21, stating, *inter alia*, that idolatry, witchcraft and heresies, are works of the flesh in sin.

³⁷⁶ Rutherford, *A Free Disputation Against Pretended Liberty of Conscience*, 311 (original version).

obedience.³⁷⁷ Does Scripture only provide for a doctrine of passive obedience? According to Coffey, the answer is yes. Looking at Rutherford's analysis of Romans 13, where Rutherford states that it must be interpreted by means of the distinction between the king *in abstracto*, the king 'as a king', and the king *in concreto*, the king 'as a man',³⁷⁸ Coffey states that such an exegesis of Romans 13; "however, hardly squared with the example set by Christ and the early Christian martyrs". Rutherford's doctrine of resistance is built upon Romans 13, being a description of an office, which places an obligation upon officials – "When there is a *man* holding the office who usurps the obligations and responsibilities of the office, replacing God's law with his own, then the *office* gives legitimate sanction to the citizens to resist the *man*."³⁷⁹

Rutherford states that Romans 13:1-2 are words resorting under a formal command of God and herein are words of action, as the community is not to resist God's ordinance actively as his ordinance, and that Romans 13:3 commands the community to do good and not bad works so as not to have the ruler be a terror to us – "we are to do no ill in order to be free of vengeance's sword; and we are to pay tribute, and give fear and

³⁷⁷ Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 175. Coffey throughout his work on Rutherford, links Rutherford to a 'revolutionary' and 'militant' character, probably as a consequence of an uninformative approach regarding Rutherford's context, Scriptural usage and overall theory on issues related directly or indirectly to his (Rutherford's) stance on resistance. Coffey for example, states that Rutherford's enthusiasm for writing *Lex, Rex*, "was no doubt inspired by his desire (and perhaps that of Argyll) to ensure that the achievements of the Covenanting revolution were not forfeited by moderates who were prepared to pay a high price for peace. *Lex, Rex* was intended to close the possibility of compromise ...", *ibid.*, 149.

³⁷⁸ John Coffey then jokingly states, "The magistrates of whom Paul spoke were a terror to evil-doers, not to good Protestant subjects!", Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, 175. In less than half a page, Coffey comes into opposition to the plethora of reformed scholarship by reformers besides Rutherford, such as Heinrich Bullinger, Johannes Althusius, John Knox, and Philippe Duplessis-Mornay, Coffey hereby omitting further explanation.

³⁷⁹ Flinn, "Rutherford and Puritan Political Theory", 70. Also see Rutherford, *Lex, Rex*, 110(2), Rutherford stating that the powers referred to in Romans 13 are not absolute. In fact, concerning the distinction between the office and the person of the king, Rutherford refers to Knox who was in agreement to this, Rutherford stating, "The congregation, in a letter to the nobility, (Knox, *Hist. Of Scotland*, 1.2.) says, 'There is great difference betwixt the authority, which is God's ordinance, and the persons of those who are placed in authority. The authority and God's ordinance can never do wrong, for it commandeth that vice and wicked men be punished, and virtue, with virtuous men and just, be maintained; but the corrupt person placed in this authority may offend, and most commonly do contrary to this authority. And is then the corruption of man to be followed, by reason that it is clothed with the name of authority?' And they give instance in Pharaoh and Saul, who were lawful kings and yet corrupt men. And certainly the man and the divine authority differ, as the subject and the accident, – as that which is under a law and can offend God, and that which is neither capable of law or sin", *ibid.*, 146(1).

honor to the ruler, Romans 13:7.” According to Rutherford there is no commandment whatsoever in this text concerning passive obedience.³⁸⁰

Rutherford adds that Romans 13 and Titus 3 “is nothing else but an exposition of the fifth commandment, but in the fifth commandment only active obedience is formally commanded. The subordination of inferiors to superiors is ordained and passive obedience is nowhere commanded.”³⁸¹ John Sanderson, commenting on the relationship between the Parliamentarians of the 1640s and resistance theory that is compatible with the Scriptures, says that the Parliamentarians had no doubt that the magistrate who exceeded his powers and became a tyrant could find no protection in those biblical texts upon which the Royalists placed much emphasis (Romans 13 and 1 Peter 2).³⁸² Sanderson adds that for the Parliamentarians, Peter and Paul made it clear that references were to the legitimate ruler exercising authority rather than to anyone who happened to be in a position of power and able to inflict his will upon others. More importantly, Sanderson states that to the Parliamentarians “tyranny is no ordinance of God and He that commands us to obey a king does nowhere subject us to a tyrant”.³⁸³

4.3 Conclusion

In conclusion, it can therefore be said that Coffey’s evaluation of the ‘mind’ of Rutherford takes place through an ideological lens that is foundationally different from the Puritan context and mind-set of seventeenth-century Scotland. Coffey’s criticism towards Rutherford also reflects his disagreement with many of the tenets of

³⁸⁰ Rutherford, *Lex, Rex*, 155(2).

³⁸¹ Rutherford, *Lex, Rex*, 155(2)-156(1).

³⁸² John Sanderson, *‘But the People’s Creatures’*. *The Philosophical Basis of the English Civil War*, (Manchester and New York: Manchester University Press, 1989), 21.

³⁸³ Sanderson, *‘But the People’s Creatures’*. *The Philosophical Basis of the English Civil War*, 22. On *ibid.*, 23, Sanderson states that for Rutherford Romans 13 also called for a distinction between ‘the power lawful’ and the ‘sinful person’ who for the time being abused it. According to Rutherford, in the context of Romans 13, resisting the ‘power’ was absolutely forbidden by the text, whereas he who resisted the man who was king, “commanding that which is against God, and killing the innocent, resisteth no ordinance of God, but an ordinance of sin and Satan.” It is interesting to take note of Sanderson’s comment, “What is probably the most forthright contemporary application of Romans 13 to British affairs came from the pen of Samuel Rutherford”, and in so far as the acts of the king are contrary to the requirements of his office, he could be resisted, for the community is only bound to the office of the king, which implies that the people are only bound to the obligations and functions of the king. This means that the people are only bound to the king in so far as he is a terror to evil, *ibid.*, 24. Jeremiah Burroughs, William Prynne and Stephen Marshall postulated a similar theory to Rutherford concerning resistance theory in the context of the distinction between the office of magistracy and the person of the magistracy, see *ibid.*, 22-23.

the WCF. Rutherford's interpretation of both the Old Testament and the New Testament regarding political and legal theory presents an accurate and coherent argument for the inextricable relationship between religion and politics, between religion and the law, as well as how the constitutional and republican idea finds relevance to religion in the Christian Commonwealth. Coffey's idea that religion should be separated from 'the secular' or from reason and that religion also should be separate from constitutional, political and legal aspects, ignores the fact that ideology and science (political or legal for example) are ultimately connected to some or other ideological or belief basis. Coffey chooses the line of thinking that is similar to the dispensationalist, rationalist and religiously liberal development that confronted Rutherford as well, and which Rutherford acutely defended. The quest for freedom during the sixteenth and seventeenth centuries entailed more to society than an unlimited approach towards religion – with freedom for religion came responsibilities under the authority of both the Old and New Testaments. This also had implications for resistance to tyranny. Another important finding arising from this critical analysis on Coffey is that Coffey fails to extract the constitutional relevance (as especially explained in Chapters 1 and 2 as well as the Epilogue) of Rutherford's thinking both for the time that Rutherford lived in, as well as for contemporary political and legal thought.

5. Conclusion

The acceptance of the modern idea of the State presupposes that politics and the law are held to exist solely for irreligious political purposes. The endorsement of this understanding remained impossible to Rutherford, as long as it was assumed that all temporal rulers had a duty to uphold godly as well as peaceable government (needless to say, within a Christian society). The sixteenth-century Reformers were entirely at one with their Catholic adversaries on this point, namely that they all insisted that one of the main aims of government must be to maintain 'true religion' and the Church of Christ.³⁸⁴ At the beginning of this chapter, reference is made to the following quote by Kingsley Rendell: "... he [Samuel Rutherford] insisted upon a national conformity, imposed if necessary by the power of the civil magistrate, a thesis he strongly

³⁸⁴ Quentin Skinner, *The Foundations of Modern Political Thought*. Vol. 2: *The Age of Reformation*, (Cambridge: Cambridge University Press, 1978), 352.

presented in his *Against Pretended Liberty of Conscience*. If liberty of conscience meant that every man could do whatever he thought right in his own eyes, then Rutherford would have none of it.”³⁸⁵ *Lex, Rex* also played a central role in expressing and explaining this understanding. This would be viewed by many as a limitation on freedom, which is not the case. One must distinguish here between an understanding of this in the context of seventeenth-century Britain and that of today, and between the context of the Christian Republic and that of an ideologically diverse and plural society. Freedom to Rutherford had a different connotation than today, making constitutional, republican and consequent political and legal thinking highly relevant to religion (unlike the position in contemporary Western societies).

To Rutherford the responsibilities of the civil ruler as prescribed in the Old Testament continued into the New Testament dispensation. In this regard, there is no substantial difference between Deuteronomy 17 and Romans 13, and *Lex, Rex* was inundated with references to these two sections in Scripture pertaining to the role of the civil ruler. This needs to be especially taken cognisance of when considering the relevance of the first Table of the Decalogue. The distance between both these biblical sections gained momentum towards the beginning of the seventeenth century, where there were a growing number of sects and denominations, eventually leading to a plurality of Christian central beliefs in Christian society. These, in turn, watered down the relevance of Roman 13 as it pertains to the role of the ruler in maintaining and protecting the true religion.

This distance was eventually strengthened by the eventual transformation of what were originally Christian States, into religiously plural states where the accommodation of other religions and of irreligious beliefs took place. In this regard, Romans 13’s interpretation, as limited to the second Table, grew in popularity and was viewed as substantially separated from the meaning of Deuteronomy 17. To Rutherford, Romans 13 was as applicable towards the whole of the Decalogue as Deuteronomy 17. Here it is important to note that to Rutherford this understanding was relevant to the Christian Republic and to no other society. Whether Romans 13 understood in this manner can still be applied to contemporary Western liberal and postmodern society is an altogether different question, but should not be confused

³⁸⁵ Rendell, *Samuel Rutherford. A New Biography of the Man & His Ministry*, 136.

with the proper understanding of the relevance of Romans 13 to the Christian Republic, such as, for example, in Scotland in the sixteenth and seventeenth centuries.

Religion understood as the source of supremely important goods or duties, implies that a government concerned for the welfare of its citizens should require them to accept such goods or to perform such duties. If, according to Steven Smith, government imposes, for example, compulsory education laws, mandatory social security withholding, seat belt requirements and substance abuse prohibitions, based on the fact that this is 'good' for society, "why then should government impose these mundane benefits on its citizens and at the same time neglect their incomparably greater interest in the salvation of their souls?" This insight against the background of Europe in pre-modernity and modernity as well as early American history is added meaning.³⁸⁶ In this regard, Harold Berman's insight proves especially relevant. "It is never enough ... to attempt ... to explain a legal rule (or concept or value or institution) solely by appeal to logic or policy or fairness; it must also be ... explained in part by appeal to the circumstances that brought it into being and by the course of events that have influenced it over time".³⁸⁷ The law in sixteenth- and seventeenth-century Europe as understood as an instrument working towards the protection and maintenance of the true religion should not seem strange at all when interpreted and explained through the ideological lens of the spirit of the times.

Rutherford's concern regarding the maintenance, protection and furtherance of the true religion within an already established Christian society runs like a golden thread through his constitutional and consequent political and legal thinking, and his views in this regard are contributory. This concern over keeping the true religion in society intact was inextricably connected to the Reformation's quest towards attaining the freedom to practise the true religion, which included the responsibility to maintain the believer's knowledge of the true religion, which, in turn, formed part of the ruler's obligations in the ordering of society and the salvation of man. Rutherford's support

³⁸⁶ Steven D. Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse", *University of DePaul Law Review*, Vol. 140, 1(1991), 155. Smith adds, "An agnostic, for example, is not likely to agree that distinctively spiritual or religious goods and duties are supremely important; he may regard such ostensible goods and duties as illusory or even contemptible. For present purposes, however, the critical point is that although the religious justification is not universally persuasive, that justification carried considerable weight with Americans of the founding generation", *ibid.*, 156. A similar understanding can be applied to Britain in Rutherford's time.

³⁸⁷ Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, (Cambridge Massachusetts: Harvard University Press, 1983), 16.

of the rule of law so clearly stated in *Lex, Rex* (which was in opposition to the tyrannous monarchy) relived in his *A Free Disputation Against Pretended Liberty of Conscience*, in which Rutherford desperately wanted the rule of law (and the sword of the magistrate) to control, this time round, the power of the militia in England (in 1649) in instances where the militia opposed the Laws of God and where the militia was protecting “blasphemers and false teachers”.³⁸⁸

Even though 1649 heralded the end of a national Presbyterian church of England, at the time Scotland shared Rutherford’s commitment to the universal suppression of unorthodox opinion and behaviour. The records of the Commission of the General Assembly at the time included the statement that “no libertie is to be allowed unto men in the breaches of the duties of the second Table which we owe unto our neighbours” and “why it should not also be thus in regard of the duties of the first Table which we owe unto God?”³⁸⁹

Although theologico-political federalists such as Bullinger and Althusius held the same, Rutherford provides ne with added earnestness and unique argumentation in this regard. This also explains the Scottish Presbyterian fervour in arguing for a form of church government in opposition to that of the Independents, the latter arguing for greater autonomy for churches (and individuals) to exercise and maintain true doctrine. In Rutherford, the concern regarding the proneness of error in a state of nature (and therefore on the individual’s conscience) formed part of the discussion on the ordering of society against the background of the covenant and the law. Sensitivity to the sinful nature of man and woman, and therefore the weakness of his or her conscience (understood as his faculty of knowledge and his consequent ability to discern God’s Will from falsities), as well as a biblical sense of the true meaning of liberty, served as an important reason for seeking constitutional, political and legal efforts toward the attainment of religious purity in addition to that of civil justice.

In *The Divine Right of Church-Government and Excommunication*, Rutherford states: “Christ Jesus *is a uniting Saviour*, one God, one Faith, one Lord Jesus, *one Religion should be*, and I beseech the God of Peace, *they may be Chains of Gold to tie these*

³⁸⁸ Gribben, “Samuel Rutherford and Liberty of Conscience”, 363.

³⁸⁹ Gribben, “Samuel Rutherford and Liberty of Conscience”, 363-364. See *ibid.*, 364 where Gribben substantiates the Scriptural support for the responsibility of the magistrate to ensure the external orthodoxy of the community.

two Nations and Churches together in uno tertio, that they may be concentered and united in one Lord Jesus.”³⁹⁰ According to Rutherford, God, through the working of the civil magistrate and the pastor (who were bound to the covenantal conditions), were obligated to maintain, protect and further the true religion. This does not negate Rutherford’s support of the view that the church had its own exclusive obligations regarding the propagation of the truth. Added to the abuses of the papacy and the monarchy was the growing number of sects in seventeenth-century Britain. Opposition to the tyranny of the king and the abuses by the Roman Catholic Church left a space that once was under the powerful control of the pope and the king, consequently giving rise to the flourishing of different religious and belief groups. This necessitated the search for solutions for the attainment of freedom pertaining to religious belief as well, which heralded ideas on constitutionalism and republicanism.

When compared to many of the other prominent Reformers, Rutherford was probably best situated in understanding the threat of the subjectivity of faith (and the weakness of man in this regard) as he lived in a period where the flourishing of sects was at a high, causing Rutherford to be most receptive to the dangers that this posed. Accompanying this development was the rise in scepticism in the political ability to achieve and retain the maintenance and protection of the true religion. Here, for example, Bodin, Grotius, Buchanan, Milton, the representatives of the Independents at the Westminster Assembly and the rising allurements towards Dispensationalism, Libertinism, and Arminianism³⁹¹ made the threat of such scepticism to the maintenance of the true religion even more threatening.

To Rutherford this was, against the background of the covenantal and consequently soteriological expectations, a serious matter. Rutherford understood the Christian Republic as a covenanted entity with a responsibility towards achieving the Divine purpose, and this could only be attained by securing that the believer remained loyal to the tenets of the true faith. The task of the Christian magistrate was to keep the community as a covenanted community, to encourage and enforce the fulfilment of

³⁹⁰ Samuel Rutherford, “The Epistle Dedicatory”, in *The Divine Right of Church-Government and Excommunication*.

³⁹¹ Rutherford’s *A Free Disputation Against Pretended Liberty of Conscience* includes many arguments in refutation of the scepticism postulated by among others, Libertine and Arminian deification of the conscience and scepticism towards the authority of Scripture and its representation of a uniform meaning. See for example, *ibid.*, 28, 32, 79 and 112 (original version).

the covenant conditions. This included the maintenance of the health of the condition of faith as well. Limitations on both tolerance and liberty of conscience need to be understood contextually, the Westminster Assembly having much reason to counter the threat of a repetition of the abuses preceding and going into seventeenth-century Britain. Reformers such as Calvin, Bullinger and Rutherford clearly understood the risks involved in moving towards a 'minimised' dogma spurred on by the spirit of an overdose of toleration and consequent relativism. Rutherford, in his support of the religious duties of the magistrate affirmed the Christian understanding on liberty, namely liberty from the condemnation of death, which the law works in Christ.

Liberalism's optimism in man, in opposition to the Scriptural view on the scepticism in man's infallibility, ran hand-in-hand with the view that freedom is found in man. This understanding of freedom was supported by the faith man placed in his unlimited self, hereby relaxing all limitations supposedly placed there by traditional religion. What is the result of this for religious rights and freedoms? The result is that today, religion in Western democracies has substantially been removed from the public sphere and is increasingly coming under attack by irreligious beliefs that are now dominating and influencing the minds of the religious and the associations to which they belong.

Rutherford lived during a time when there was increasing momentum (even from religious circles) towards the 'self' as the autonomous source of authority as well as a selective approach towards the Bible as ultimate authority. In the Christian Republic, conscience should be viewed as both the possession of the individual as well as of the community. In other words, conscience has a public dimension as well, and this is better understood against the background of the covenant. Here Rutherford's reconciliation of God's Sovereignty and human agency also comes into play – the covenant, church and magistracy are external means to protect society's existence in conformity to God's will, and therefore the issue was rather how liberty of conscience in the mind of the faithful could be protected from external elements countering God's will. Rutherford is indeed unique and contributory towards this essential aspect of political and legal thinking.

The historian John Coffey's biography on the 'mind' of Rutherford requires criticism due to its limitation pertaining to historical and religious context, Scriptural

interpretation, the relationship between reason and Scripture, the relationship between constitutionalism and Scripture, and the validity of the Old Testament. As stated earlier on in this chapter, critiquing Coffey's biography on Rutherford's legal and political thinking is of value in that it serves as criticism towards the line of political and legal thinking reflected in the Independents, the Congregationalists, the Anabaptists, Antinomianism, Grotius, Locke, Williams and Milton. It is especially when dealing with Rutherford's views on the political and legal aspects related to Rutherford's thinking that Coffey fails to present an accurate understanding of Rutherford's concern for the maintenance and protection of the true religion, as well as how this concern was inextricably connected to Rutherford's constitutional theory.

In Rutherford's *A Free Disputation Against Pretended Liberty of Conscience* lies a treasure of argumentation pertaining to the dangers of the Libertine and Anabaptist toleration of various religious expressions in the Christian community. Rutherford ably applies Scripture and logic in order to defend the idea that an unlimited accommodation of different religious expressions poses a risk to the spiritual well-being of the Christian community. Critics of Rutherford such as Coffey, fail to address the arguments posed by *A Free Disputation Against Pretended Liberty of Conscience* substantially, arguments that, from a Scriptural (and logical) point of view will be difficult to refute. Bodin's influence towards the separation of religion and politics and Grotius' promotion of a diluted religious doctrine, together with the growing importance of reason and the limitless accommodation supported by groups such as the Libertines and the Anabaptists during Rutherford's time would pave the way towards the accommodation of all forms of religious expression as fervently proclaimed by authors such as John Milton, John Locke and Roger Williams. These theorists assisted in influencing Western constitutional, political and legal thought, which eventually came to fruition in the substantial privatisation of religion and the establishment of a public space that is increasingly ignorant and antagonistic towards religion.

The enduring contribution by Rutherford pertaining to magistracy and the protection of religion, which is elaborated upon in the Epilogue, lies in the following: In Rutherford's thought there lies valuable insights, even for a contemporary liberal and postmodern Western society pertaining to the limits that should be placed on external

influences that might be enforced on the consciences of individuals within society, especially where irreligious beliefs and ideologies are enforced upon those who ardently subscribe to religious beliefs. This has implications for the law and the role of government. This is also of concern regarding contemporary modern pluralist societies where the religious and the associations they form part of are under continuous and ever-increasing pressure from external sources of influence, which are in many instances contrary to the values supported by the religious and the religious associations to which they belong. For Rutherford there is a self-contradiction within the idea of toleration. For him the Achilles heel in all arguments for toleration is that “even the most tolerant have limits to what they will tolerate”.³⁹² Tolerance in this regard can never be inclusive, but like the idea of neutrality, it always remains exclusive. In this regard, Rutherford represents one of the first explicit forms of thought emanating from sixteenth- and seventeenth-century Western political and legal Reformed theory pertaining to the toleration of beliefs in the public sphere and the limits thereof.

Rutherford’s thinking in this regard is most relevant to present-day concerns regarding the risks presented by liberalist approaches where, for example, irreligious ideologies (which represent some or other belief) proclaim a religiously neutral (and therefore accommodative) public sphere where religion is pushed into the private sphere. For example, one finds the contemporary presence in many Western pluralist and democratic societies of a dominating liberalism where the public sphere is representative of exclusivist liberal values, which in turn gives rise to the overpowering of such liberal values to the detriment of religious beliefs. These call into question whether constitutional models represented in such societies are truly accommodative towards religious beliefs and their accompanying liberties. In all of this, Rutherford takes the form of a credible critic against the myth of religious neutrality in the public sphere, a view that, centuries later, repeatedly emanates from liberal sectors.

³⁹² Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 210-211.

EPILOGUE

“Law is not only fact; it is also idea, or concept, and, in addition, it is a measure of value. It has, inevitably, an intellectual and a moral dimension. Unlike purely intellectual and moral standards, law is required to be practised, but unlike purely material conditions it consists of ideas and values.”¹

1. The law and ideological context

An understanding of a constitutional, political and legal system extracted from a specific period in history requires clarity on the context of such a period. This includes more clarity on the history, traditions and concerns related to a specific society within a given period. A more specific manner in accomplishing this, and which in this instance is related to sixteenth- and seventeenth-century Europe, is cognisance of the overlap between ‘reason’ and ‘revelation’. Reason does not connote a unified understanding separated from specific religious beliefs in a metaphysical and epistemological sense. This has implications for how constitutionalism and the law have to be viewed within the context of a selected community during a specific period in time and how the thinking of a theorist within such a context should be understood. The same applies to Samuel Rutherford.

As was discussed and argued in Chapter 3, John Coffey’s view that the quest for a “godly nation was destined to undermine the advice of natural reason” does not take cognisance of the interrelatedness of ‘reason as revelation’ which in turn has implications for how Rutherford’s thought on constitutionalism and the law should be understood. Coffey’s analysis of Rutherford in this regard does not take into consideration that the quest towards supposedly neutral prescriptive constitutional principles and of the law as accommodative of various divergent interests through the mediation of reason is laden with ideological presuppositionalism, which makes the quest towards neutrality, accommodation and a view on reason, detached from any presuppositionalist subjective beliefs, futile. In fact, the change that took place around the latter half of sixteenth-century and the early part of seventeenth-century Europe regarding the meaning and authority to be ascribed to reason itself was a concern for

¹ Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, (Cambridge, Massachusetts: Harvard University Press, 1983), 557.

Rutherford. Reason was elevated to a superior status from within the church, the Independents, the Congregationalists, and the Anabaptists, as well as from prominent political and legal theorists such as Grotius and Bodin, and in the process became understood as something universal and rational, and therefore acceptable. This would have substantial consequences for an understanding and application of the law and constitutionalism.

Rutherford was part of a tradition of thought that came to the fore within a Christian milieu spanning many centuries. This tradition, like many other traditions, connotes specific insights to concepts such as liberty, toleration, duty, rights, the good life (public interest), societal and individual preservation, the covenant and the law, as well as how these concepts should be understood in their overlap with one another and against the background of other central ideas that were given a specific religious meaning, such as the depravity of man, man's personal relationship with God and scepticism in man's ability to discover a religious truth that could not be refuted. A sensitive and appreciative approach towards context of a specific period in history where the reigning ideology was universal pertaining to a specified region, lays the basis for understanding the specific ideas postulated regarding the ordering of a society and the reasons, as well as the authority for such ordering. Therefore, before clarification on this is provided, a proper understanding of Rutherford's views on politics and the law remains incomplete and open to unnecessary criticism.

Starting in the sixteenth century, Protestant theologians had to recreate an entirely new view of history. Accompanying this was an added sense of urgency pertaining to formulations on the limitations of power, the authority, form and purpose of the law and the distribution of justice in order to address the challenges of the day. At the time in Britain, there was a need to oppose the abuses by the Roman Catholic Church and an abusive monarchy. The pressure the Puritans were under in the Elizabethan church and the Laudian regime posed a substantial threat, and the calling of the Long Parliament was the beginning of their release. In England too, false worship was viewed as the main corrupter of the commonwealth. *Lex, Rex* is inundated with references to many of the abuses by the Roman Catholic Church. What also served as a catalyst in the Reformed Scottish cause was the unacceptable interference by the

monarchy in the affairs of the Church and an equally unacceptable use of centrally appointed church officers in the coordination of the civil sphere.

Almost every Protestant society felt a heightening of religious intensity after its break with Rome. In Medieval and Renaissance Europe, political thought was fundamentally Christian, an exercise in applied theology unknown to the experiences of the liberal and pluralist societies of today. Questions regarding what form politics and the law should take were during this period inevitably to ask what form God wished them to take. Questions about politics and the law soon became questions about the proper understanding of Revelations. Against the background of the Christian Republic, where the societal understanding and loyalty regarding religion were largely uniform, the original understanding and purpose of political and legal thought were not opposed to religious authority and explanations. The endeavour for liberty was something good to religion (and liberty was ultimately religious by nature) and religion was something good to liberty, but within a context where religion in the form of Scripture as an important source of authority provided the moral and cultural underpinnings for a liberated society, also understood against the background of a salvatory purpose. In the words of S. A. Burrell: “Are we, in all conscience, more certain that the promises of secular redemption held forth by later revolutionary visions are, in fact, any closer to reality or any more appealing than the promise that men should ‘live gain in the joy of Zion, with the assurance of election and the hope of salvation’?”²

The concepts of ‘tolerance’ and ‘scepticism’ (as elaborated upon in previous chapters) played a major role in determining the path of political and legal theory, and these concepts were approached in a specific manner by Rutherford (and many other theorists during the sixteenth and seventeenth-centuries). To Rutherford, tolerance pertaining to religious matters had its limits, irrespective of the fact that what the German, Swiss, French, Dutch, English and Scottish Reformations stood for was to be liberated from the enforcement of religious doctrine and specific forms of worship by the Roman Catholic Church and, in many instances, by the monarchy. Furthermore, challenged by the flourishing of various religious sects and denominations, as well as by the dilution of accurate religious doctrine accompanied by the overwhelming

² S. A. Burrell, “The Covenant Idea as a Revolutionary Symbol: Scotland, 1596-1637”, *Church History*, Vol. 27, 4(1958), 349.

temptations of the superiority of reason (accompanied by the elixir of pragmatism), Rutherford set out to vindicate the importance of the upholding of a largely uniform doctrine for a society that was fundamentally Christian in all walks of life. Such vindication was also necessary for a society that had formally committed itself towards the idea of the Covenant and the consequent fulfilling of the covenant conditions. This was inextricably connected to the soteriological purpose of society understood against the background of Creation (and therefore government, amongst others) as medium, which serves God's purpose for His glorification and the salvation of man; and which in turn had enormous implications for an understanding of the role of a constitutional model and for the law. To Rutherford the ordering of society by way of a constitutional model was part of something larger. Therefore, a higher meaning was connected to the law, a meaning beyond those of exclusivist anthropocentric and pragmatic applications of the law such as for example, utilitarianism, positivism, communism, socialism or liberalism.

Harold Berman comments that law has come to be understood not as being a pointer to the collective fulfilment of a higher aspiration and destiny but as an end in itself. The higher aspiration of the law was in fact that the law is an end in itself. Referring to the American position, Berman states, "We have come to believe in the Constitution for its own sake – to believe in the 'free exercise', clause and the 'establishment' clause for their own sake: one finds legal neutrality in matters of religion to be *convenient*, and one knows of no other principle that would be *acceptable* in 'a pluralistic'; that is, a first amendment society. No other justification is thought to be needed."³ Berman refers to this as a form of secular religion or idolatry.⁴ From this is deduced that the law in contemporary Western society has been relegated to an end in itself, unconnected to 'a higher aspiration and destiny' as postulated by especially Reformers such as John Calvin, Heinrich Bullinger, Peter Martyr Vermigli, Theodore Beza, Johannes Althusius and Samuel Rutherford. This state of affairs has its roots in the early Enlightenment, more specifically, in authors such as Jean Bodin and Hugo Grotius. It was soon afterwards furthered by John Locke and Thomas Hobbes. Within religious circles one finds, for example, the Congregationalist and Anabaptist modes of thought, which eventually led to a

³ Harold J. Berman, "The Interaction of Law and Religion", *Capital University Law Review*, Vol. 8, 3(1979), 354.

⁴ Berman, "The Interaction of Law and Religion", 354.

negation of religious doctrine and the idea of the Covenant. With every smaller community within the larger community, having the independent and sole authority to decide what doctrinal route to follow, a public sphere started developing that was diluted in a religious sense and with this came a sense of the law being less and less religiously inclined. The seventeenth-century Presbyterian ecclesiastical cause understood the implications of such thinking, and Rutherford was at the forefront of such a concern.

Adding to the exclusion of religion from the public sphere was Bodin and Grotius, who played influential roles in bringing to the law a positivistic, pragmatic and merely regulatory, as well as accommodative characteristic and function. In this sense, the law eventually lost its Divine attributes, became detached from its religious roots, and became open to a spectrum of rights and wrongs, each competing for a place in the public domain. The law would eventually become inextricably connected to relativism and detached from a 'higher', divinely inspired moral source of authority and justice. In this regard, constitutionalism's purpose lost its religious meaning. The eventual product for Western civilisation was that of liberal individualism to which many idealistic expectations were attached, and which have failed in many respects regarding the provision of solutions in accordance with such expectations.

Law as 'aspiration and destiny' was especially the case in sixteenth- and seventeenth-century Reformed thought with special emphasis on the theologico-political federalist tradition. Rutherford was a prolific theorist stemming from this tradition. Not only does one find in Rutherford an encompassing and interrelated understanding of the law connected to a higher aspiration and destiny, but also insights of enduring relevance to constitutional, political and legal theory. Rutherford understood something more than the mere attainment of order to be the ultimate aim of governance and the law. Order was not the end goal; rather, order served a purpose towards another end-goal understood within the context of a messianic eschatology. There is scholarship (be it by implication or explicitly), which places the emphasis on Rutherford's prioritisation of the view that the magistrate is to act ultimately towards the safety and preservation of society and nothing beyond this. However, embedded beneath this is the soteriological purpose of magistracy, constitutionalism and of the

law. The attainment of order as a primary aim neglects the relevance of God's ultimate will for society.

It is stated that, "Presuppositionally, a person's view of the appropriate relationship between church and state begins with one's ecclesiology (i.e., what is the origin and purpose of the church?) and with one's philosophy of the state (i.e., what is the purpose of civil government and the scope of its authority?) ... A search then, for neutral principles of law detached from all religious systems ... is vanity."⁵ To Rutherford there was no inherent contradiction in obeying God's commands as revealed in Scripture – submission to the will of God is as rational as can be. In addition to this, believing in the sinful nature of man's reason and compensating for this by means of the elevation of the authority of Scripture is in itself a reasoned act. This is nothing different to a humanist's sense of rationality emanating from the belief that human reason is all that plays a role in the determination of right and wrong and how society is to be ordered. Every legal system is directed towards certain purposes; every legal system is of necessity a 'purposeful enterprise',⁶ and this links the law and a legal system to a specific ideological point of departure.

Looking back into history one also finds that justice had 'a messianic purpose', which was an attribute in line with the revolution caused by the Reformation. This messianic purpose had as end the salvation of man. For the Catholic, Lutheran and Puritan revolutions, this eschatology was expressed in biblical terms.⁷ With Augustine came a fundamental change from the Roman constitution by way of the introduction of the Christian tradition. In the latter tradition, the law and the justice upon which such law rests were not primarily a matter of will (whether of the people or of the ruler), "they can only be realised and understood, if the sanctity of the divine person and the dignity of his human counterpart and creation are served by it. The substance of human justice is seen as in a mirror in the divine justice that is a mystery only partially revealed."⁸ The belief in an end-time (the end of the temporal world) had an influence on the great revolutions in Western history, where each of these revolutions

⁵ Carl H. Esbeck, "Five Views of Church-State Relations in Contemporary American Thought", *Brigham Young University Law Review*, 2(1986), 374-375.

⁶ W. Friedmann, *Legal Theory*, 5th Edition, (London: Stevens & Sons, 1967), 21.

⁷ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 25. In the case of the French, American and Russian revolutions the eschatology was non-religious, *ibid.*, 25.

⁸ Carl J. Friedrich, *Transcendent Justice. The Religious Dimension of Constitutionalism*, (Durham, NC: Duke University Press, 1964), 10.

(such as the sixteenth- and seventeenth-century Reformations) translated the experience of death and regeneration into a different concept of the nation and of the church.⁹ The law and its purpose could not escape being understood in a certain manner as part of such a revolution. An eschatological connotation was applicable both for the revolutions emanating from religious causes as well as for the revolutions emanating from other ideological non-religious causes (yet still ideological), such as, for example, the Enlightenment and Communism.

For many centuries, beginning with Augustine, the church was not supportive towards revolutionary millenarian movements that tried to transform, among others, the social and political realities of the temporal world into a heavenly kingdom of the spirit. During these centuries, the rebirth of the Christian believer as well as the regeneration of mankind was understood to refer only to the eternal soul, which experienced such rebirth only by “dying to this world, above all, through the monastic life.”¹⁰ However, there arose an understanding towards preparing man in this world for the world hereafter. This gave rise to certain expectations from constitutionalism, politics and the law and it was especially in the sixteenth-century Reformations that this understanding was emphasised and eventually gained momentum in the seventeenth century. At the time of the Westminster Assembly, towards the end of the first half of the seventeenth century, it was popularly accepted by the participants in the Westminster Assembly and especially by the Scottish Divines, that man needed to be prepared in this life for the coming Kingdom, and that constitutionalism, politics and the law needed to be coloured accordingly. Chapter 1 especially elaborates on this understanding of the metaphysical order in which Rutherford found himself, together with the threats facing the Scots at the time. This provides more understanding and sensitivity to Rutherford’s views on politics and the law. In furtherance of this explanation, this thesis elaborates upon the ideas of divine imminence, the depravity of man and the bounds of toleration. The context in which Rutherford was immersed

⁹ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 27.

¹⁰ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 27. According to Carl Friedrich, Augustine’s ‘pessimistic’ conception of government and the political order is the “logical as well as the spiritual consequence of his insistence upon the utter transcendence of true justice. Such true justice is attainable by the faithful only with the aid of divine grace, and can never be found in any earthly commonwealth, whether Christian or non-Christian”, Friedrich, *Transcendent Justice. The Religious Dimension of Constitutionalism*, 11.

is brought to the fore in this manner and sets the stage for a more nuanced understanding of his constitutional, political and legal thought.

2. The law, the covenant and the legacy of republicanism

In Chapter 1, the republican principles emanating from the many centuries preceding the seventeenth century are investigated. This period spans the time from Ancient Hebraic, Greek and Roman thinking and continues up to sixteenth-century Reformed and Roman Catholic sources, and in the process highlights ‘covenantal’ thinking and the ‘superiority as well as the importance of the law’ as essential components of republicanism (which is elaborated upon in Chapter 2). Parallels between this historical legacy and Rutherford’s thought are also made evident. In this regard, it is confirmed that the law plays a superior role to that of political power in the ordering of society; the law also being understood as forming part of those prescriptive principles of the republican mechanism, which was geared towards the ordering of society and to consequent ‘higher’ goals.

In Chapter 2, the two central components of republicanism, namely that of the covenant and the importance of the law, are elaborated upon, which includes Rutherford’s views in this regard (and which includes emphasis on the inextricable connection between the covenant and the law). The focus here is placed upon the challenges facing Rutherford regarding late sixteenth- and early seventeenth-century developments pertaining to foundational insights regarding politics and the law. These challenges heralded an understanding of, amongst others, politics and the law, which was substantially different to that postulated by Reformers such as Bullinger, Calvin, Vermigli, Beza, Althusius, Knox and Rutherford himself. In Rutherford, one finds the furtherance of the school of thought related to theologico-political federalism, namely the idea of the covenant as a foundational facet of the Christian Republic, and of the republican idea of an active and representative citizenry based upon specific divinely prescribed norms.

There is a foundational facet to republicanism, which, upon further investigation, provides a better insight into Rutherford’s constitutional law thinking. These are the idea of the covenant, the superiority of the law and the inextricable relationship between the two. This is elaborated upon in Chapter 2. To Rutherford the covenant

formed the backbone of the law and consequently of the ordering of society. The covenant's authority was found in both the Scriptures and the law of nature and served as a mechanism towards the ordering of society and the attainment of salvation (although grace preceded the salvation of man). The covenant conditions were reflected in the Decalogue and held both the ruler and the people responsible and accountable towards God and towards one another. The covenant served as a means provided by God towards the ordering of society and the attainment of His purposes with Creation. The same applies to the Divine law as condition of the covenant. Rutherford applies the idea of the covenant to both the individual believer and the Christian Republic. The law of God which was placed in man before the Fall formed part of the Covenant of Works, where man was required to follow God's precepts or else suffer the consequences. After the Fall, the Covenant of Grace set in, and man, although having the law in him, was unable to follow the conditions of the covenant in full. This introduced secondary means towards assisting man in following the prescriptive conditions of the Covenant, which in turn heralded the importance of politics and the law, as well as the quest towards a constitutional model. Works was not the key to salvation but faith instilled in man by God, was protected and maintained by means of the various secondary mediums established by God such as the preaching of the Word and the external governance of man by means of God's law as reflected in the Decalogue.

The law to Rutherford (as it was to classical philosophers such as Cicero and prolific authors spanning the period from Augustine to the sixteenth- and seventeenth-century Reformations) was something more than Machiavelli's and Bodin's (and later on Hobbes') command of the ruler. The law, unlike the views expressed by steadily growing liberal Christian thinking towards the early part of the seventeenth century, such as is, for example, reflected in Grotius, was inextricably connected to the idea of the Covenant. *Lex, Rex*, by reversing the traditional *rex lex* to *lex rex*, was among the pioneering early modern works to give the Rule of Law principle a firm theoretical foundation and to emphasise the binding nature of the law by means of the idea of the Covenant. This was similar to the views of, for example, Althusius and, as emphasised in Chapter 1, formed part of the rich legacy of constitutional, political and legal theory spanning centuries since especially Cicero's emphasis on the importance of the law and justice and its universal and covenantal attributes. Rutherford begins

Lex, Rex with, “I reduce all that I am to speak of the power of kings, to the author or efficient, – the matter or subject, – the form or power, – the end and fruit of their government, – and to some cases of resistance.”¹¹ Rutherford is here working with the four *aitia* (often referred to as the four causes) of Aristotle, namely the efficient cause, the material cause, the formal cause and the final cause.¹² *Lex, Rex* therefore includes the following questions: What is the purpose of government? Who or what brings government into being? What is it that makes government a government, or what is the essence of government? What does government comprise? What are the due limitations of civil government?¹³ These questions, whether understood as questions related to political justice or purely normative foundational questions, necessitate some or other view on the relevance, origin, substance, and purpose of the law,¹⁴ and in the end, the answer to these questions confirms the importance of the law and in all of this we find overlap with constitutionalism.

Looking at these Aristotelian causes and relevant questions flowing from this in the context of *Lex, Rex* (also bearing in mind the title of Rutherford’s work namely *Lex, Rex* – “The Law and the Prince”) in the context of the nature and relevance of the

¹¹ Samuel Rutherford, *Lex, Rex*. (or *The Law and the Prince*), (Printed for John Field, London, 1644, Reprint, Harrisonburg, Virginia: Sprinkle Publications, 1982), 1(1).

¹² David Field, “‘Put not your Trust in Princes’. Samuel Rutherford, the four causes and the limitation of civil government”, 83-151, in *Tales of Two Cities. Christianity and Politics*, Stephen Clark (ed.), (Leicester, England: Inter-Varsity Press, 2005), 89-90.

¹³ Field, “‘Put not your Trust in Princes’. Samuel Rutherford, the four causes and the limitation of civil government”, 90. David Field summarises Rutherford’s understanding of these four causes in the following: “Civil government is brought into being by God and the people. It exists for the well-being, and especially the protection of the people, whose highest good is found in the practice of true religion. It is made of the stuff of ordinary, sinful human beings; neither separate from nor superior to those they rule. And the essence of civil government is its embodiment of the law of God, which it is to declare legislatively, apply judicially, and enforce executively”, Field, “‘Put not your Trust in Princes’. Samuel Rutherford, the four causes and the limitation of civil government”, 134.

¹⁴ Rutherford however was not the first Reformer who applied these Aristotelean insights. The fifteenth-century Italian Reformer, Peter Martyr Vermigli (also made considerable use of, among others, Aristotle’s four-fold causality, namely that of the material, formal, efficient, and final causes, Mariano di Gangi, *Peter Martyr Vermigli 1499-1562. Renaissance Man, Reformation Master*, (Lanham, Maryland: University Press of America, 1993), 19. Similar to Aristotle, Vermigli describes civil government causally in the following manner: (i) its efficient cause is God; (ii) its final cause is the preservation of the law and peace, the banishing of vices, and the increase of virtues; (iii) its formal cause is the order of divine providence for the good of humanity; and (iv) its material cause is the person who is chosen to serve as magistrate, *ibid.*, 103. The influence of Aristotle’s thought in this regard comes as no surprise in the light of Vermigli’s emphasis on the importance of Aristotle’s *Ethics*, *Politics*, and *Rhetoric* for theologians in developing and defending orthodox Christian doctrine, Stephen J. Grabill, *Rediscovering the Natural Law in Reformed Theological Ethics*, (Grand Rapids, Michigan: William B. Eerdmans Publishing Company, 2006), 102. Vermigli was of the view that the civil magistrate should assist in the rightful administration of the true religion, Di Gangi, *Peter Martyr Vermigli 1499-1562. Renaissance Man, Reformation Master*, 104. *Lex, Rex* refers to Vermigli on a few occasions indicating that Rutherford was probably also aware of Vermigli’s Aristotelean insights.

law,¹⁵ one finds Rutherford's questions necessitating some or other view on the law and its substance, parameters, origin, purpose and importance. In addition, Rutherford's understanding of the normative dimension in the context of political power and the consequent importance of the law is witnessed in the following:

A law-power is for good – A power to crucify Christ is for ill. A law-power is a terror to ill works, and a praise to good. Pilate's power to crucify Christ was the contrary. A law-power is to execute wrath on ill-doing, a power to crucify Christ not. A law-power conciliateth honour, fear and veneration to the person of the judge, a power to crucify Christ conciliateth no such thing but a disgrace to Pilate. Good acts flow not from bad powers.¹⁶

To Rutherford the law precedes and is superior and authoritative to political power. The law represents all that is good and all that is against ill doing. The order and power needed to be subservient to the Divine will hereby place the law above that of the king and to majority rule, and serve as a binding medium understood in the context of the covenant. Political power had to come from the law and not the other way round and the law as part of the idea of the covenant sets conditions that the ruler and society are bound to. Here one is reminded of the republican principles discussed in Chapter 1, which include the idea related to the elevation of the law over that of political power, which in turn is of relevance to a constitutional model.

To Rutherford, even the authority qualifying the need for government has a normative aspect, stating that, "government by rulers has its ground in a secondary law of nature which lawyers call, *secundario jus naturale* or *jus gentium secundarium*, a secondary law of nature which is granted by Plato".¹⁷ "A republic appoints rulers to govern which is a *moral action* because to set no rulers over the people is a violation of the fifth commandment."¹⁸ The people owe obedience and subjection to the powers of government by virtue of the moral law.¹⁹ The function of the moral law is to *bind* men to duty and to do so by legislative authority. The moral law does not merely provide guiding principles, but unchanging absolutes, which oblige a person to walk

¹⁵ Author's emphasis.

¹⁶ Rutherford, *Lex, Rex*, 152(1).

¹⁷ Rutherford, *Lex, Rex*, 3(1). And this power of government granted by the law of nature was not properly a monarchical power, an understanding also supported by Tannerus, Sotus, Molina and Victoria, *ibid.*, 3(1).

¹⁸ Author's emphasis.

¹⁹ Rutherford, *Lex, Rex*, 4(2).

accordingly.²⁰ This also implies subjection to the Divine law as a strict framework for the powers of government and for the Christian Republic as a whole. This idea of the superiority of the law is what forms the basis of any constitutional model. When Rutherford speaks of government as “a lawful power”,²¹ this implies an authority qualified by the Divine law that is aligned with the law of nature.²² By implication, if the power is by God, Divine substance (law) is connected to the office of kingship. This Divine substance entails the preservation of both Tables of the law by the king,²³ which in turn serves the preservation of the community²⁴ and the attainment of God’s purpose with man and the rest of Creation.

As was observed in Chapter 2, the law according to Rutherford is what makes government what it is because government embodies the rule of God’s law. However, Rutherford’s view on the law exceeds the understanding of the law as formal cause of government. Stated differently, there is more to the law for Rutherford than it being the essence of government. In this regard, the idea of the Covenant introduces a foundational normative understanding. Law to Rutherford is fundamentally relational in character, binding the soul to God in a deeply personal way, unlike the impersonal approach where God is substituted for reason.²⁵ This needs to be understood against the background of the covenant and the natural law. The idea of the covenant has a normative attribute to it.

According to Rutherford, the law could not be understood without a proper insight into the covenant. This also presented a similar line of thinking to that of the theologico-political federalist tradition. Remnants of this understanding are found in the plethora of social contractarian theories spanning the centuries following on the Reformation and which form part of constitutional theories. One cannot get to grasp Rutherford’s understanding of the law in full if one refrains from including the

²⁰ Chris Coldwell and Matthew Winzer, “The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis, Part 2: Analysis”, *The Confessional Presbyterian*, Vol. 5, (2009), 59-60.

²¹ Rutherford, *Lex, Rex*, 76(2).

²² “Nature’s light is the same as the law of nature which is the same as the Divine law, Rutherford, *Lex, Rex*, 1(1).

²³ Rutherford, *Lex, Rex*, 142(1).

²⁴ Rutherford, *Lex, Rex*, 114(1).

²⁵ John L. Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, (A thesis submitted to the Faculty of Westminster Theological Seminary in partial fulfilment of the requirements for the Degree Doctor of Philosophy, 1995), 18.

covenantal perspective as reflected in Scripture. The Covenant to Rutherford was not only qualified by Scripture but formed part of the natural law. As was described and explained in previous Chapters (especially Chapter 2), federal theology and its implications for the law and politics played a central part in Rutherford's thinking. Rutherford's blending of theology and the law in the context of the idea of the Covenant certainly places him in the higher ranks regarding covenantal thinking spanning the period from Augustine and ending towards the latter half of the seventeenth century. In this regard, Rutherford competes with the substantial contributions made by Althusius on political and legal covenantal theory, especially pertaining to clarity on an encompassing idea of the law and the role of civil government in religious matters (also bearing in mind the church's role in this regard) and consequently, matters pertaining to the protection of the conscience. It is surprising to see how sparse theory is in sources of Dogmatics (Systematic Theology) on not only political and legal covenantal theory but also on the overlap between theology and the individual with such political and legal covenantal theory. This thesis clarifies Rutherford's thought in this regard.

In Chapter 2, it was also observed that the covenantal idea provided the Christian community with a practical and understandable mechanism, which also provided a sense of responsibility and accountability towards God as part of the mechanism in the unfolding of His soteriological plan for man. The covenant demanded more accuracy regarding the normative dimension related to the ordering of society (which included the ordering of religion), and the maintenance and protection of the covenantal conditions enjoyed urgency. This understanding was strongly expressed by especially the rest of the seventeenth-century Scottish Commissioners who participated in the Westminster Assembly. To Rutherford, the covenant gives to the believer a sort of action of law, to plead with God in respect of his fidelity to stand to that covenant that binds him because of his fidelity. The covenant is so mutual that if the people break the covenant, God is unbound from His part of the covenant. It was by means of the covenant that God's promise of redemption became personal and understandable. The individual's prioritisation of being obedient to the precepts of God and inclusion in God's purpose of salvation is included in the larger social and political paradigm, in which the obedience and salvation of society and the normative format to accomplish this were also emphasised by Rutherford and his fellow Scots.

The idea of the covenant was ingrained in especially sixteenth- and seventeenth-century Scottish thinking, and among Scotland's covenantal theologians, Rutherford is probably ranked near to the very top.²⁶ A framework for the law according to Rutherford could therefore not be separated from this. Covenant theology with its roots in Ulrich Zwingli (1484-1531) and Heinrich Bullinger (1504-1575) was continued and elaborated upon by Rutherford, who contributed substantially towards understanding the covenant also in a constitutional, political and legal manner. The teachings of the Westminster Confession of Faith (WCF) were aligned with the thinking of Rutherford in this regard, Rutherford also having played a role in its formulation.

The covenant of grace according to Rutherford, involves two parties, promises and a condition,²⁷ namely that of faith;²⁸ and although faith can only be given by God alone, the preaching of the Gospel acts as a means of giving faith. This, however, does not mean that good works are not necessary for salvation or that they are not required by those in covenant.²⁹ To Rutherford, although 'holiness and sanctification' are not conditions of the covenant, they are conditions of the Covenanters;³⁰ and though good works form a strong part in the process of salvation, they are not technically said to be a condition of the covenant.³¹ The condition of the Covenant of Grace was faith that could only be provided for by God; however, human agency (including politics and the external application of the law) as a secondary cause within God's absolute providence had a role to play in the awarding, maintenance and protection of such faith. Nature has not been denigrated to such an incapacitated level that it could not be used mediately in the accomplishment of grace. As stated earlier, law to Rutherford is fundamentally relational in character, binding the soul to God in a deeply personal way, unlike the impersonal approach where God is substituted for reason. This understanding extended to the collectivity of souls brings into play the public role to be played by the law in the context of the covenant.

²⁶ D. Patrick Ramsey, "Samuel Rutherford's Contribution to Covenant Theology in Scotland", *The Confessional Presbyterian*, Vol. 5, (2009), 115.

²⁷ Ramsey, "Samuel Rutherford's Contribution to Covenant Theology in Scotland", 119

²⁸ Ramsey, "Samuel Rutherford's Contribution to Covenant Theology in Scotland", 122-123.

²⁹ Ramsey, "Samuel Rutherford's Contribution to Covenant Theology in Scotland", 122.

³⁰ Rutherford's *The Trial and Triumph of Faith* cited in, Ramsey, "Samuel Rutherford's Contribution to Covenant Theology in Scotland", 122.

³¹ Ramsey, "Samuel Rutherford's Contribution to Covenant Theology in Scotland", 125.

When man was created, God made him a covenantal being; that is, He created man in the self-conscious awareness that he was subject to the image of the Law of God. This law is the natural law, which He tended to identify with the Covenant of Works. The connection between God's providence and the world he made is the principle of covenant, understood as the driving principle built into the very fabric of creation, ordering all created things to the ends for which God made them. However, sin disrupted the harmonious arrangement of nature but did not totally distort the covenant principle in man. Man's rational nature enables him to will his end in obedience or disobedience to the covenant principle lodged within him, but always under God's directing providence. God's sovereignty does not render the contribution of human actions a mere formality; there is real, though secondary, efficacy to human deeds. Therefore, the means created through human agency become instruments in the hand of God for the improvement of the human condition and for the accomplishment of grace in the elect, as God wills. Sin introduced the need to compulsion to ensure that men do by law what they are reluctant to do now by nature – "the covenant politic and civil, because of sin, now requires a system of mutual accountability, involving 'an oath betwixt the king and his people'." Therefore, on the one hand, nature still had the ability to order society by means of the law but on the other hand, the proper ordering of society by nature required certain prescriptive principles to keep it functioning properly, these principles being those belonging to republicanism and forming the basis of Rutherford's constitutional model.

Also in Chapter 2 it was observed that the social order is one sphere of nature governed by God's providential activity and where human agency is the preeminent means by which God accomplishes His ultimate designs in that sphere. Man is gifted with the power to will his end in conformity with the principles God has laid down, first in man's rational capacities, and later in Scripture. The corruptible character of nature was accompanied by a non-corruptible aspect that, by grace, lent itself to acting towards the fulfilment of God's will. According to Rutherford, it was precisely this that allowed for magistracy, the church and the law to act positively and externally towards the maintenance, protection and furtherance of a Christian society, and consequently as a portal to grace. The proper external ordering of both life and religion according to the Divine Law was therefore possible and of necessity, something which was underestimated by the Antinomians (and overestimated by the

Arminians). Patrick Ramsey states: “Following a long distinguished line of great theologians, Samuel Rutherford upheld and defended ... covenant theology in particular. He defended biblical truth against Arminianism and Romanism on the one hand and Antinomianism on the other as he boldly proclaimed the absolute sovereignty of God and the responsibility of man.”³² This understanding gave to the law an important role to play externally and positively as a ‘portal to grace’. In this regard, there was overlap between nature and grace.

Rutherford’s thought in this regard was similar to that of Bullinger. Bullinger concentrated on the covenant as *bilateral*, while others such as Calvin supported a *unilateral* (testamentary) idea of the covenant.³³ For many of the prominent theologians of the sixteenth century the problem with Bullinger’s covenant idea was the tension produced by an affirmation of conditional covenant within the framework of *sola gratia*.³⁴ This ‘leniency’ of Bullinger towards understanding the covenant as *bilateral* and *conditional*, is not to be understood as a sacrifice of his support of God’s grace (or predestination for that matter).³⁵ Whether this covenantal structure would have been possible without the intervention of God is certainly clear to Bullinger and others. Nothing would have been possible without the intervention of God, and a prerequisite to the materialisation of the bilateral conditional covenant between God and man was God’s *unilateral institution* of this very covenantal structure, which in turn is nothing other than a clear expression of God’s free grace.³⁶

Reformers never differed about the fact that behind human faith there stood the elective love of God. Although there were some differences concerning the covenant, these differences were never of such a nature that some Reformers connected election and covenant with each other, while others did not. The differences pertained to ‘how’ the connection between election and covenant had to be laid out in order to accomplish the expression of the complete message of Scripture. Bullinger would opt

³² Ramsey, “Samuel Rutherford’s Contribution to Covenant Theology in Scotland”, 126.

³³ This is according to the observation of Trinterud as observed by Weir, see David A. Weir, *The Origins of the Federal Theology in Sixteenth-Century Reformation Thought*, (Oxford: Clarendon Press, 1990), 26.

³⁴ Baker, *Heinrich Bullinger and the Covenant* cited in Shaun A. de Freitas, *Samuel Rutherford on Law and Covenant: The Impact of Theologico-political Federalism on Constitutional Theory*, LLM thesis, University of the Free State, 2003), 22.

³⁵ De Freitas, *Samuel Rutherford on Law and Covenant: The Impact of Theologico-political Federalism on Constitutional Theory*, 22.

³⁶ De Freitas, *Samuel Rutherford on Law and Covenant: The Impact of Theologico-political Federalism on Constitutional Theory*, 23.

for a bilateral conditional structure and Calvin for a unilateral unconditional one.³⁷ These differences between Bullinger and Calvin are certainly misleading, for the simple reason that Bullinger as well as Calvin knew that it was God who let faith work through the Spirit in the heart. Bullinger was more afraid than Calvin was simply to come to logical conclusions. For Bullinger, the covenant was the manner in which God functions with His people in history, with his promise and claim.³⁸ One could say that Bullinger's thought contained more of a historical dimension than that of Calvin. Calvin viewed the covenant in such a manner that it was directed at election, while in Bullinger election was of less importance.³⁹

Bullinger does not exclude the doctrine of election anywhere. Whatever God determined before Creation is not an issue for Bullinger. What is of importance is the way in which God communicates and functions with man within revelation, irrespective of the fact that all depends, in the final instance, on the grace and sovereignty of God. This covenantal approach has its origin in God's involvement with man as witnessed in Scripture.⁴⁰ This covenantal relationship between God and man certainly had an impact on society; more specifically, politics and the law. Government, for example, must not only rule according to the will of God, but the parameters of such rule are defined within the biblically expressed bilateral conditional relationship between God and man, which, in turn, is embedded within the absolute will and sovereignty of God. A more concentrated awareness and degree of accountability, responsibility and duty are hereby cultivated on the part of society, including government.⁴¹ The constitutional value in this is self-evident.

Rutherford was the last prolific theorist of the sixteenth- and seventeenth-century Reformers whose political and legal thinking was akin to the tradition of theologico-political federalism. Accompanying this tradition were certain foundational perspectives pertaining to a normative cosmology and epistemology based on

³⁷ De Freitas, *Samuel Rutherford on Law and Covenant: The Impact of Theologico-political Federalism on Constitutional Theory*, 23.

³⁸ D. Willie Jonker, *Uit Vrye Guns Alleen. Oor Uitverkiesing en Verbond* cited in De Freitas, *Samuel Rutherford on Law and Covenant: The Impact of Theologico-political Federalism on Constitutional Theory*, 23-24.

³⁹ Jonker cited in De Freitas, *Samuel Rutherford on Law and Covenant: The Impact of Theologico-political Federalism on Constitutional Theory*, 24.

⁴⁰ De Freitas, *Samuel Rutherford on Law and Covenant: The Impact of Theologico-political Federalism on Constitutional Theory*, 24.

⁴¹ De Freitas, *Samuel Rutherford on Law and Covenant: The Impact of Theologico-political Federalism on Constitutional Theory*, 24.

covenant theology revitalised by Zwingli. Preceding Rutherford's political and legal postulations within this tradition were the informative and popular works by Althusius and DuPlessis-Mornay, namely *Politica Methodice Digesta, Atque Exemplis Sacris et Profanis Illustrata* and *Vindiciae Contra Tyrannos* (A Defence of Liberty Against Tyrants or Of the lawful power of the Prince over the People, and of the People over the Prince) respectively.

As was confirmed in Chapter 2, *Lex, Rex* reflects many similarities to these works by Althusius and DuPlessis-Mornay. However, by looking at the titles of these important works, one finds that Rutherford, in the title '*Lex, Rex*' gave the most explicit and encompassing reminder in the tradition of theologico-political federalism of the importance of 'the law' (and that, which binds political power). Rutherford, by placing '*Lex*' in the title of his work on politics and the law, and by having the word '*Lex*' precede that of reference to the 'King', the emphasis is placed on the law. The reference to the law in this regard goes deeper than the precepts contained in the Decalogue. Cicero refers to the law as the 'bond of society'⁴² and Rutherford's covenantal perspectives, in line with the tradition of theologico-political federalism, elaborate and extend upon this Ciceronian understanding of the binding nature of the law. It is therefore not only questions 22-27 in *Lex, Rex* that deal with the law,⁴³ but throughout *Lex, Rex* (and in other works by Rutherford such as his *A Free Disputation Against the Pretended Liberty of Conscience*) one finds the prominence and pre-eminence of the law understood from a more encompassing and foundational point of view. The natural law as requiring governmental rule and the Covenant and the consequent relational aspect pertaining to the ordering of society, as well as the prescriptive constitutional principles embedded in republicanism form the basis of Rutherford's understanding pertaining to the underlying norms required for the ordering of society.

Regarding the application of the Divine law to society, Rutherford's understanding of human agency and the mediating structures applied by God to maintain and protect society as well as the balancing of such agency with God's absolute sovereignty had

⁴² Friedrich, *Transcendent Justice. The Religious Dimension of Constitutionalism*, 9.

⁴³ Coffey states that the "heart of *Lex, Rex* is found in the answers to Questions XXII to XXVII, where Rutherford discusses the relationship between the king and the law, placing *rex* firmly under *lex*", John Coffey, *Politics, Religion and the British Revolutions. The mind of Samuel Rutherford*, (Cambridge: Cambridge University Press, 1997), 152.

implications for the application of the law by the magistrate. It was important for the establishment and specification of political structures that were guided by republican principles, as well as for the external application of the law (which included the magistrate's important role in the protection and maintenance of the true religion), also bearing in mind that only God could work in the 'hearts of people'. In this was also to be understood that man, due to his sinful nature, required external means for spiritual and physical protection, whilst simultaneously rejecting the sceptical attitude that because of man's depravity reliance upon the external means as reflected in political structures and a specific Divine content to the law, should be excluded. In addition, this understanding of human agency from a political and legal point of view was based on the assumption that a society was already substantially Christian and that national covenanting in this regard was a moral law and therefore perpetually binding. Scotland, especially in the years preceding Rutherford and during Rutherford's time, formally participated in establishing national covenants regarding the protection of the Decalogue.

Sin in man was for Rutherford not a reason for viewing Scripture as complex and open to various interpretations on basic tenets. Sin did not prevent the individual from determining the specifics of the law and what role the law played in the protection, maintenance and furtherance of the true religion. The same applied to Rutherford's quest for a constitutional model. The idea that faith leads to good works in the individual believer, according to Rutherford, also applied to faith and good works in a collective sense. In all of this, the salvation of the individual had a collective constitutional, political and legal angle to it as well. Where a group or society of believers was present, there also was the need to practise the Divine law. In this regard, Rutherford manages to maintain the inextricable relationship between politics, law and theology. The law and the covenant (as elaborated upon in Chapter 2), together with the heightened status of the people, served as mediatory structures or as secondary means towards the fulfilment of God's precepts and end purpose for man. The purpose of the church was understood as proclaiming the good news of salvation, and aiding the believing community in its pursuit of sanctification. However, it is not only the ecclesiastical framework that has a role to play in this 'pursuit of sanctification', but also the political and legal framework.

It is in the concept of Republicanism that the normative dimensions of the regulation of order in society is more clearly identified and understood, where the covenant and the law play central roles. In this, one also finds that the normative attributes of republicanism in totality, namely the covenant, the law, the participation and representation of the people, the division of powers and resistance to political tyranny play an important role in the mediatory or secondary process towards the accomplishment of grace and the glorification of God. According to the WCF, civil government is not only from God, it is also for God – Magistrates are ordained by God to be “under Him, over the people, for His own glory and the public good”.⁴⁴

As touched upon earlier, the idea of the covenant is also to be understood from both an individual and collective point of view. If Scripture is clear concerning the relevance of the law to the individual believer, and if it is the law that reveals what the magistrate may do, then this is where the covenant is similar from an individual as well as a societal or political perspective. In the covenant of grace, the faith of the individual, as God-given condition for salvation provides the fruit of eagerness and thankfulness in following God’s precepts, and where this is multiplied extensively, one finds a society consisting of individual believers who are eager in following God’s laws. This understanding is inextricably connected to that of covenant liberty originating in the individual’s heart (with its reliance absolutely on God’s grace) and extending into society as a whole in the form of Godly activity towards the accomplishment of obligations.

The covenant, with its view of the law as a condition, provides the law with greater meaning, a more informed content and emphasis. The covenant also acts as a practical tool to instil the law within the political community. Godly man and the community experience the highest sense of liberty when able to live according to the precepts dictated to him or her by nature. Therefore, in a covenanted society, where the materialisation of the pre-condition of such a society had already taken place, namely that the “heart of the community (or most of it anyway) has already been converted”, liberty obtains its highest enjoyment by the members of the community. Consequently, the dichotomy that may be perceived as existing between liberty (properly exercised in accordance with the Divine Will) and authority (properly

⁴⁴ Coldwell and Winzer, “The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis, Part 2: Analysis”, 73.

exercised in accordance with the Divine Will) is avoided. It is now for the magistrate to manage the faithful who have formed a society externally. This responsibility is covenantally based – in other words, to rule over the faithful according to God’s precepts (although not every single member is of the faith). This also takes place within a constitutional framework, which especially comes to the fore in republicanism.

The covenant also had to be understood from a natural law background. Regarding Rutherford’s view on natural law against the background of providence, the language of nature was covenantal. When God created man, he created him a covenantal being; that is, He created in him the self-conscious awareness that he was subject to God in all things. The law of “the image of God, the natural knowledge of God, his holiness, justice, mercy and of right and wrong, and a natural holiness and innate conformity of the heart to the eternal law of God in man’s soul” is the natural law, which Rutherford tended to identify with the covenant of works. This covenant structure co-created in human nature has not been thoroughly effaced by sin. Man still “comes under the Covenant natural, common to all creatures.” Therefore, there are covenant principles that he recognises and follows. Among them is the deeply imbedded recognition that there is a “mutual obligation to live in society and this obligation involves the need for government” and a constitutional framework. This ‘covenant natural’ inevitably leads to a ‘covenant politic or civil’. Here one finds the overlap between two ideas related to the natural law, namely the Aristotelian (and later Aquinian) idea of man as a social being and the relational idea of which covenantal thinking was central.

The concepts of duty and obligation arise because of God’s requirements upon man, which in turn was placed within the framework of covenant transaction.⁴⁵ In this regard, law is an essential component of both the covenant of works and the covenant of grace. According to the WCF, God gave Adam a law as a covenant of works, by which God bound Adam and all his posterity to personal, entire, exact and perpetual obedience; promised life upon the fulfilling of the law; threatened death upon the breach of the law; and endued Adam and all of his posterity with the power and

⁴⁵ Coldwell and Winzer, “The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis, Part 2: Analysis”, 57.

ability to obey the law.⁴⁶ The WCF continues to teach that Jesus Christ, in the covenant of grace, while delivering man from the law as a means of justification and an instrument of condemnation, does not in any way dissolve, but strengthens this obligation to the law. The moral law (which is synonymous to the Decalogue⁴⁷) binds all, whether justified or not, to the obedience thereof. In regeneration there is “a new heart and a new spirit created in believers, whilst in sanctification believers are “more and more quickened and strengthened in all saving graces, to the practice of true holiness.”⁴⁸

Reformed theology transmitted the idea that God governs human society by means of law and a legal framework.⁴⁹ This understanding is inextricably connected to the view that while justification is by faith alone, it is never alone among the graces of God. It is preceded by regeneration whereby a human person is enabled to believe, and followed by a process of sanctification in which the believer grows in grace, understood as manifested in such good works as are enjoined in the moral law.⁵⁰ Although the Reformed understood that believers in Christ were freed from the curses of the law, their failure to obey the moral law could result in temporal manifestations of divine displeasure. The purpose of the church was understood as proclaiming the good news of salvation, and aiding the believing community in its pursuit of sanctification.⁵¹ However, and as stated earlier, it is not only the ecclesiastical framework that has a role to play in this ‘pursuit of sanctification’ but also the constitutional, political and legal framework. A proper understanding of *Lex, Rex* will be absent if this central element is not accommodated. This was nothing new to early Reformed theology. Harold Berman, referring to Lutheran theology, states that:

⁴⁶ Coldwell and Winzer, “The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis, Part 2: Analysis”, 57.

⁴⁷ See Coldwell and Winzer, “The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis, Part 2: Analysis”, 64. Then there were the ceremonial and judicial laws, but these laws were only relevant for the Old Testament. The ceremonial law prescribes ritual observance, and judicial law provides judgement in civil cases. Both the ceremonial and the judicial law were situational, as opposed to the moral law which is universal and eternal, *ibid.*, 66-67. For more on the ceremonial and judicial laws see *ibid.*, 65 and 68.

⁴⁸ Coldwell and Winzer, “The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis, Part 2: Analysis”, 57. The moral law (as opposed to the judicial and the ceremonial law) is universal and perpetual, *ibid.*, 59.

⁴⁹ Peter J. Herz, *Covenant to Constitutionalism: Rule of Law as a Theological Ideal in Reformed Scotland*, (A dissertation submitted in partial fulfilment of the requirements for the Doctor of Philosophy degree, Department of Political Science in the Graduate School, Southern Illinois University at Carbondale, 2001), 56.

⁵⁰ Herz, *Covenant to Constitutionalism: Rule of Law as a Theological Ideal in Reformed Scotland*, 104.

⁵¹ Herz, *Covenant to Constitutionalism: Rule of Law as a Theological Ideal in Reformed Scotland*, 104.

Politics and the law were not paths to grace and faith, but grace and faith remained paths to right politics and right law. The Christian was supposed to be law-abiding, and the law of a Christian prince was supposed to achieve both order and justice. Law was supposed to induce people to avoid evil, to cooperate, and to serve the community. The Christian was not to think that by doing good he could earn credits in heaven; nevertheless, he was to use his will and reason –with full consciousness of their defective nature – to do as much good as God has made possible.⁵²

In Rutherford, one finds an elaboration on this idea as explained in this section (and especially in Chapters 1, 2 and 3). His political and legal theory explains the manner in which the attainment of this “as much good as God has made possible” should take place through insights pertaining to republicanism (and consequently to constitutionalism), where especially the law and the covenant play a central role and contribute towards a constitutional model within the frame of biblical authority. The law and the covenant were instruments provided by God and used by man towards the ordering of society and the attainment of a ‘higher’ destiny. In this regard, Rutherford serves as one of the most prolific Reformed theorists stemming from the sixteenth and seventeenth centuries and, as is explained later on, his political and legal thought contains enduring forms of relevance regarding constitutionalism. Religion in the context of politics and the law also played an important role in Rutherford’s thinking and formed an inextricable part of the good that God had made possible for society and its governance.

3. The law and religious truth

In Chapter 3, this thesis investigates the task of the law pertaining to the ruler’s role in the maintenance, protection and furtherance of religion against the background of freedom of conscience. Liberty, for both the individual and the community, had as much to do with religion as with the material and physical welfare of the individual and the community. At the time, Scotland was also largely uniform in its theological thinking and experienced threats from religious influences beyond its borders. Reading Rutherford’s *Lex, Rex* together with his *A Free Disputation against Pretended Liberty of Conscience* provides an informed understanding of the relevance

⁵² Harold J. Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, (Cambridge, Massachusetts & London, U. K.: The Belknap Press of Harvard University Press, 2003), 44.

of religion for political theory and the law and *vice versa* for sixteenth and seventeenth-century Europe. Rutherford set out to achieve the balance that was required between the extreme poles of absolute restriction and unlimited liberty of religion. The end of government understood as the attainment of the ‘safety and preservation of the community’, had as much to do with religion as it did with other matters. Theories on constitutionalism, politics and the law were necessary in order to assist the weakened (sinful) nature of man in matters religious and irreligious.

Bearing in mind the importance of the law from both a republican and covenantal perspective, the role of the law was substantially religious, in the sense of the law serving a soteriological purpose, which includes serving the maintenance, protection and furtherance of the purity of religion as well. Threats towards religious purity in especially the context of the first Table of the Decalogue necessitated republican and covenantal thinking. Here Rutherford also contributes to a better understanding and emphasis of the law. Due to man’s depraved nature, external means in the form of political structures and the law were required to protect and maintain the true religion externally, also required by the conditions of the covenant. This was only applicable to the Christian Republic where the people were already part of a Christian ethos and where all sectors of society, including the law and politics, were subservient to the authority of Scripture.

The law as reflected in the Decalogue, with special emphasis on the first Table, was ultimately religious and civil governance had its role to play in the protection thereof. This religious aspect of the law is no more of concern in contemporary liberal and postmodern Western societies where religion has become largely privatised. However, what can be learnt from Rutherford’s concern in this regard is that any enforcement of any ideology by a government on its people constitutes a violation of the consciences of those members in a society that ascribe to a different ideology or belief. Rutherford was one of the most ardent defenders of the protection of the conscience in the seventeenth century, having to oppose the threats presented by the abuses of the Roman Catholic Church and the monarchy at the time. More than this, Rutherford endeavoured the protection and promotion of the purity of religion in a society that lent itself out so such aims due to its liberation from the said abuses. This need was made even more urgent due to the growing number of sects and

denominations that were forming after having been freed from the abuses on the conscience by the Roman Catholic Church. To aver as John Coffey does that Rutherford's aspirations towards a "godly nation" was in opposition to "reason" presents a skewed picture of the nature and function of the law in the eyes of Rutherford and misrepresents the authority of both the Old and New Testaments. Law itself was understood in seventeenth-century Scotland (and many places elsewhere) as "godly" by nature and purpose, which includes the responsibility of the magistrate to maintain and protect the first Table's precepts. Aspirations towards a godly nation that upheld purity of religion are not necessarily opposed to reason.

Sensitivity and insight as to the weakened (sinful) nature of man, having arisen from the Fall, served as an important reason for seeking constitutional, political and legal efforts at not only the attainment of civil justice but also the attainment of religious purity. The community's covenant with God (in accordance with the Decalogue) was to be understood as an extension of the individual covenant, based on a specific belief in accordance with the true religion, and with the end goal of seeking God's blessing and consequent salvation. Because of the Fall, humankind's faculty for reasoning was corrupted and incapable of purely rational judgements. Divine revelation and redemption were the sole means by which man's defective reasoning was restored. Rutherford makes it clear that the sword cannot compel minds and convert souls to Christ, an idea that was already supported by the Patristic Fathers. However, the magistrate provides the external means to protect the true religion in the Christian Republic.

Rutherford's contribution towards theory on constitutionalism, politics and the law with specific focus on the protection of the conscience was the first elaborate theory by a Reformer during the sixteenth and seventeenth centuries. As was explained in Chapter 3, Rutherford was concerned about the threat posed by external expressions to the individual's belief in the true doctrine. In this regard, the magistrate had an important role to play in limiting outward expressions that were contrary to the true religion, such as blasphemy. This understanding was shared by many Puritans who did not endorse Rutherford's ecclesiastical stance. Even those who supported a broader toleration of those orthodox Calvinists outside the Presbyterian fold referred

to the Old Testament judicial laws as authoritative.⁵³ In this regard and for example, Cromwell's Rump Parliament established the death penalty for among others, blasphemy, and John Owen was prepared to argue that some of the judicial laws were eternally binding.⁵⁴ Scholarship on Rutherford's political and legal thought has emphasised Rutherford's qualification of sanctions to be applied by the magistrate to those who outwardly and substantially express themselves contrary to the dictates of the true religion. The same applies to Rutherford's clear opposition to the enforcement of religious doctrine onto the conscience of the individual.

Rutherford's thought in this regard can easily be interpreted as being in support of the enforcement of the true religion on society in the light of his theory on the role of the magistrate in the maintenance and protection of the true religion, as well as Rutherford's staunch support of a Presbyterian ecclesiology. The efforts by the Independents and the popularity enjoyed by Rutherford's contemporary, John Milton, who supported the protection of the conscience of the individual to the degree that not even the magistrate (nor the church) may subscribe externally to any detailed religious doctrine, also introduced some distance between the lines of thinking of Independency and Presbyterianism regarding the protection of the conscience. In other words, support for the protection of all consciences by the governing bodies as postulated by, for example, the Independents and Milton made Rutherford's approach seem more like a violation towards the liberty of conscience of the individual. However, this is certainly not the case; Rutherford did not go that far at all. He based his views on the protection of the conscience as well as of the protection of the true religion on the understanding that God had already transformed the mind and heart of seventeenth-century Scottish (and English) society. Without an understanding of the context in which Rutherford found himself (as explained especially Chapter 1); without a sensitivity towards the dangers of scepticism to religion; without an understanding of the covenant and the importance in this instance of the first Table of the Decalogue; and without the understanding of the WCF;⁵⁵ Rutherford's approach

⁵³ Crawford Gribben, "Samuel Rutherford and Liberty of Conscience", *Westminster Theological Journal*, Vol. 71, (2009), 372.

⁵⁴ Gribben, "Samuel Rutherford and Liberty of Conscience", 372.

⁵⁵ In the words of Gribben, "As radical spirits pointed increasingly to apparent errors in the Bible as evidence for their adherence to the spirit over the letter, conservatives like Rutherford found themselves having to defend the revelation that had been described by the Westminster Confession as "being immediately inspired by God, ... kept pure in all ages ... therefore authentic" (WCF 1.8)", Gribben, "Samuel Rutherford and Liberty of Conscience", 366.

towards the protection and maintenance of the conscience cannot properly be understood.

Bodin's views pertaining to anti-religious sentiment and the sovereignty of the ruler towards the end of the sixteenth century did not do much to alleviate threats pertaining to the enforcement of the conscience as exercised by the Roman Catholic Church, albeit in another form. Also, Grotius' (who to a certain extent supported the views of Bodin) weakening of informed doctrine and his support of an elevated status to the authority of reason worked towards fuelling the threat towards the protection of a conscience in line with an informed and nationally accepted religious doctrine. The approach taken by the Independents relating to the autonomy of congregations also contributed towards the disintegration of a uniform religious doctrine. Rutherford was one of the first political and legal theorists towards the end of the Renaissance who elaborated on the idea of the weakness of the conscience or the conscience's ability to be affected by external influences in accordance with Scripture. No theorist within the Patristic, Medieval and early Renaissance period came forth with such a focused and religious tract on the conscience and the role of the magistrate in the Christian Republic. Even amongst the prominent Reformers such as Calvin, Beza, Bullinger and Vermigli there was no elaborate theory on the conscience in a specifically political and legal context. In fact, Rutherford's approach in this regard can be viewed as aiming towards the protection of the religious rights of many within Scotland and England from both the external enforcement of a foreign religion by the Roman Catholic Church as well as the influences posed by the ever-increasing sects in seventeenth-century Britain.

Scepticism had its fair share to play in opposing this idea of the protection of religious truth that dealt with the preparation of the life hereafter, which in turn had consequences for the role to be played by the law. There is an angle to scepticism arguing that since one cannot be certain regarding one's claims about truth one cannot force one's own truths onto others. Scepticism became a serious matter for the Scottish Divines and those English Puritans concerned of the disintegration of a uniform religious society. This scepticism also fuelled support of an unlimited nature to be ascribed to the conscience, something that was of great concern to Rutherford. Rutherford believed that a logical consequence of scepticism in religion is the notion

that the magistrate must be independent or neutral towards all beliefs and religious sects. This scepticism was similar to the Anabaptist and Antinomian scepticism in Biblical truth that was so strongly represented in seventeenth-century Britain, and authors at the time such as George Buchanan, John Milton and Roger Williams played an influential role in this regard. For example, according to Williams, the individuals themselves contract to form a church ‘covenant’, and these individuals draw themselves from the world to maintain themselves unsullied by its surrounding sinfulness. Williams believed that the legal status of any church should be identical to that of a trading company or business corporation, where the character of its membership and the content of its creed are of no different concern to the civil magistrate than those of any other corporation. This results in a view of the church congregation being devoted to religious purposes whilst the state should be solely devoted to secular and civic functions.⁵⁶

Here one finds that at the root of the liberal individualist project was the Congregationalist matter related to the purity of religion and the universality of religious truth, something that Rutherford vehemently opposed. The introduction by the early Reformation to the idea of equality between persons, and the freedom to be enjoyed by the believer, presented in the form of the idea of the “priesthood of all believers” was, according to Rutherford, to be maintained within the parameters of the Divine and moral law. This necessitated obedience to religious purity, and the law therefore had as much to do with the maintenance of the true religion as with civil matters. The Independents and Anabaptists saw otherwise, viewing the “priesthood of all believers” as qualification for every believer and church congregation to believe in a religious doctrine true to that specific individual and church congregation. This gradually drained the government of its religious responsibilities, eventually resulting in the privatisation of religion and a view of the law as aspiring towards mere regulation of contrasting interests and of consequently becoming an end in itself, loosened from higher aspiration and destiny.

Included in early Enlightenment thinking was the growing support for natural law as denoting something independent of any Scriptural authority, thereby allowing for

⁵⁶ E. L. Hebden Taylor, *The Christian Philosophy of Law, Politics, and the State*, (Nutley: The Craig Press, 1966), 514-515. For more on Williams’ thought in this regard see Timothy L. Hall, “Roger Williams and the Foundations of Religious Liberty”, *Boston University Law Review*, Vol. 71, 3(1991).

man's reason to determine the truth and in the process giving religious doctrine an overwhelmingly human attribute, and making such doctrine relativist and open to various interpretations. According to this understanding, the law loses its authority in the external regulation and protection of especially the first Table of the Decalogue and merely becomes a mechanism for the physical preservation of society, bringing with it a so-called 'tolerant' characteristic regarding all kinds of religions and beliefs. That happened in the centuries following on the seventeenth century, where influential authors such as Locke and Hobbes furthered the idea of scepticism in religious truth and eventually lead to the privatisation of religion and the proclamation of a religiously neutral public sphere. To Locke, toleration becomes the chief mark of the true church, "the new cardinal virtue".⁵⁷

Bodin made a radical break with the past in that he, in recognising that the main problem of political authority in the post-Reformation world lay in that men claimed to be doing God's will but could not agree on what God's will was largely assisted in separating politics from religion. Bodin also sought to justify submission to the 'sovereign power' in the state, on grounds of practical necessity, as revealed through the detailed study of the actual functioning of states. In medieval times, law was understood to stem from the very core of society, expressing the juridical reality of social roots in accord with a historical and ontological plan, whilst for Bodin, law originated exclusively from the state. In this regard, the state becomes a monad, which finds within itself the reason for its existence, its liberty, and its ability to organise the social body.⁵⁸ Bodin's thoughts in this regard were similar to those of the sixteenth-century Florentine political theorist Niccolò Machiavelli. Even many of the sixteenth-century Spanish Catholics, for example Suárez, supported the idea that once the power of the community was transferred to the ruler through consent, it bound the community indefinitely (except for instances of tyranny). Rutherford wrote within these tensions.

For politics and the law, Rutherford's understanding of the depravity of man necessitated a sceptical approach towards unlimited toleration pertaining to religious

⁵⁷ Jerome C. Foss, "Francisco Suárez and the Religious Basis for Toleration", *Perspectives on Political Science*, Vol. 42, 2(2013), 97.

⁵⁸ Alain de Benoist, "The First Federalist: Johannes Althusius", (Originally published in *Krisis* 22 (March 1999), Translated by Julia Kostova), 44, http://www.alaindebenoist.com/pdf/the_first_federalist_althusius.pdf (accessed 10 December 2013).

expression. It also threatened the institution of a unified church and weakened religious orthodoxy, which was considered essential to ties of obligation and contract. God's use of external means such as magistracy and the proper content to be ascribed to the law opposes such scepticism. Rutherford, by explaining that government is something good and natural, was responding to Antinomianism, saying that it had failed to see that external commandments (involving things that are tangible and visible) are not sinful – “they [external agents] are agents by which God effects spiritual ends in the life of his church”. The outward and material are not opposed to the inward and spiritual, and therefore there needs to be no rejection of the goodness of creaturely actions. Rutherford's understanding of the form and role of constitutionalism, politics and the law was substantially related to the need of the Christian Republic to maintain and protect the true religion. The same can be said of the ecclesiastical form proposed by Presbyterianism at the time.

Both scepticism in the capacity of political structures to hold religious truth as, for example, intimated by Suárez and Grotius, and the fears resultant from a perception that absolute monarchy was the only structure to preserve society as, for example, staunchly postulated by Bodin, played a major role in giving rise to understanding the law as not necessarily being coterminous with especially the first Table of the Decalogue, as well as diminishing the idea of the Biblical covenant, in the process placing more emphasis on social contractarian theory. This eventually not only led to the privatisation of religion and a relativistic and consensual political and legal paradigm, but also led to the separation of the bond of religion and the law. Rutherford reacted to this by re-explaining the importance of the covenant, which naturally brought with it the promotion of the Divine Law. In this regard, Rutherford remained loyal to the legacy of the theologico-political federalists such as Bullinger, Althusius and DuPlessis-Mornay. The covenant conditions attached as much worth to the law in the form of the first Table as it did to the law of the second Table of the Decalogue. The fifteenth- and sixteenth-century Reformations that had taken place in the various regions in Europe primarily addressed doctrinal matters. As discussed in Chapter 1, abuses directed towards doctrine by the powers that were, were in the eyes of the Scots (and for many in England) a serious threat to liberty.

John Coffey's bibliography on Rutherford, which places special emphasis on Rutherford's political thought, expresses an uninformed take on Rutherford in this regard. This is especially present in Coffey's opposition towards the relevance of the Old Testament teachings pertaining to political and legal thinking, with special emphasis on the question whether the true religion in society should be protected, maintained and furthered by the civil governing authorities. To Rutherford the purpose of the law is also to protect and maintain religious truth and not just to maintain peace. Whether a biography by a Baptist historian such as Coffey on the thinking of a Presbyterian such as Rutherford can ever exclude subjectivity is unlikely and, needless to say, everyone is entitled to their own points of view on such (sometimes contentious) religious issues. However, this thesis (Chapter 3) criticises Coffey's analysis of Rutherford's mind with special focus on his political and legal thinking. This is done through the lens of a metaphysical point of departure that is aligned with the WCF, and which argues for a more nuanced approach pertaining to the context of the period in which Rutherford wrote. Coffey's Anabaptist approach is akin to the views taken by the Independents in Rutherford's time and which enjoyed support in later years by Locke who had a major influence towards the materialisation of liberal individualism, the consequent exclusion of religion from the public sphere, and populist rule in the Western world. Locke, like Bodin, referred to the importance of the Divine and natural law. However, where Bodin's thinking steered away from a substantial reliance on Divine and natural law, leading to ideas on state absolutism, Locke's political and legal theory, although providing the Divine and natural law with much emphasis and importance, included attractions towards majoritarian wants based purely on humanist interests.⁵⁹

From a Scriptural point of view (which is founded upon the validity of both the Old and New Testaments), Rutherford's political and legal thinking is informed and coherent. Also, what Coffey neglects to do, is present an encompassing and inclusive framework of the law and its constitutional dimension regarding Rutherford's thought; this whilst making it clear in his biography on Rutherford that the emphasis of his biography is on Rutherford's political thought. Coffey's evaluation of the 'mind' of Rutherford takes place through an ideological lens that is foundationally different from the Puritan context and mind-set of seventeenth-century Scotland.

⁵⁹ See Friedmann, *Legal Theory*, 122-125.

Coffey's criticism towards Rutherford also reflects Coffey's disagreement with many of the tenets of the WCF. Rutherford's interpretation of both the Old and New Testaments regarding political and legal theory presents an accurate and coherent argument for the inextricable relationship between religion and politics, and between religion and the law, as well as how the republican idea finds relevance to religion in the Christian Commonwealth. Coffey also supports the separation of reason and revelation on issues related to the law such as the law's role in the maintenance and protection of the true religion and he criticises Rutherford through this lens. As explained earlier, the separation between reason and revelation is open to criticism. Coffey does also not present the enduring relevance of Rutherford's more foundational view on the law and constitutionalism.

An understanding of Rutherford's views on the law is not complete without the religious dimension of it all. The end of government understood as the attainment of the 'safety and preservation of the community' had as much to do with religion as it do with other matters. Theories on constitutionalism, politics and the law were necessary in order to assist the weakened nature of man in matters religious and irreligious and the need for a constitutional model had as much to do with religion as with civil or irreligious matters.

4. Rutherford's enduring contribution to constitutional, political and legal theory

Now that more clarity has been provided on Rutherford's constitutional, political and legal thought by means of republicanism and two of its foundational principles, namely that of the law and the idea of the Covenant, together with arguments for the protection of the true religion, the enduring contribution of Rutherford's constitutional, legal and political thinking to contemporary society is elaborated upon. A more contemporary description of this would be to refer to the importance of social contractarianism, the centrality of natural or moral law, the relevance of representative, participatory and direct democracy, the separation, yet interplay between the executive, the legislative and the judiciary, as well as federal politics and activism against oppression and corruption. In this regard, an investigation into republican attributes, as observed in especially Chapters 1 and 2, reflects fundamental

prescriptions, which form part of a constitutionalist model geared towards liberty and the proper functioning of society. The idea of the covenant, the Rule of Law idea, an active and representative citizenry, the separation of ruling powers, and resistance towards political oppression, represent constitutional prescriptions, which are required for the proper ordering and functioning of society. This presents insights related to an understanding of a constitutional model emanating from the thinking of Rutherford. The understanding ascribed to constitutional law in this instance is that branch of public law that focuses on the organisation and frame of government, the organs and powers of sovereignty, the distribution of political powers and authority, the fundamental principles directed towards the ordering of the relations between government and subject, as well as generally plans the method according to which public affairs of the state are administered.⁶⁰

As was indicated in Chapter 1, these republican principles have a long history of support and development over many centuries, spanning from ancient Hebrew, Greek and Roman times to seventeenth-century Europe and even beyond. It was especially during the Reformations of the sixteenth and seventeenth centuries that these principles were urgently necessitated to oppose the abuses of the Roman Catholic Church and absolutist monarchical power, and it is evident from this thesis that Rutherford contributed towards countering such abuses. Republicanism itself represents an encompassing constitutional normative norm, which works towards that which ought to be applied for the ordering of society. This republican norm also finds relevance to the ordering of societies in general, irrespective of a specific period in time. Contemporary constitutional thought is reliant on the very principles that have been so ardently expounded upon by previous centuries of thought, including the works of theorists such as Rutherford.

Part of the discussion on constitutionalism includes the status of the law, what the relationship between the law and political power should be, as well as the substance of the law to be applied to both government and society. Harold Berman comments that, “The crisis of the Western legal tradition is a crisis in law itself. Legal philosophers have always debated, and presumably always will debate, whether law is

⁶⁰ “The Law Dictionary. Featuring Black’s Law Dictionary Free Online Legal Dictionary 2nd Edition, <http://the.lawdictionary.org/constitutional-law/> (accessed 25 November 2013).

founded in reason and morality or whether it is only the will of the political ruler.”⁶¹ Revolutions are reactions to, among others, previous normative dimensions that can no longer be accepted by the people. The new normative dimensions introduced are in many instances based on the understanding that political power should be superior to the law, which in turn results in a substantially positivistic understanding of the law qualified by the foundational norm prescribing the absolute authority of power (with the law being subservient and in the service of such power), or based on the understanding that the law is representative of foundational moral norms superior to political power. Regarding this latter possibility, persecution (physical and religious) emanating from the ruling power results in the law being called upon to either limit or to totally bring to an end such persecution. The law therefore becomes inextricably connected to a constitutional model for society. To Rutherford, the republican idea of understanding the law as being superior to political power required emphasis in a time of religious and physical persecution. Even though it was an understanding postulated by many before him, *Lex, Rex* provides an informative argument (which is unique in various aspects) for the importance of republican principles (which includes the Rule of Law idea) and that these principles present an effective constitutional model for the ordering of society.

Law to Rutherford enjoys priority in the ordering of society, which entails the furtherance and maintenance of moral norms such as justice, the common good, equality in political decision-making, self-preservation and duty towards the collective as well as to one another, the sanctioning of immoral acts, self-defence (resistance towards political tyranny), physical as well as spiritual freedom and peace in society. Rutherford brings this to light at a time when religious and monarchical absolutism was at the forefront of political rule, a time when political power exceeded the bounds of the moral law. Ancient Hebrew texts, Roman authors such as Seneca and Cicero (who are referred to in *Lex, Rex*), together with the interpretations of their views and those of the Church Fathers, the Medievalists and the Spanish Catholics of the sixteenth century, as well as Reformed theorists of the sixteenth century contributed towards the development of Rutherford’s views on the law as superior to political power and based on fundamental moral norms, which also provided a moral

⁶¹ Berman, *Law and Revolution. The Foundations of the Western Legal Tradition*, 39.

context for law and politics transcending the narrow enclaves of legalism, moral relativism and harsh individualism.

These important and foundational norms are of such fundamental importance that if substantially abused or violated by the ruler, the people would be justified in actively resisting the ruler (as was touched upon in Chapter 1). The abuses committed by the monarchy reached a high during the first half of seventeenth-century Britain. In Chapter 2, the Bodinian influence in this regard was emphasised. King James I derived many of his ideas from Bodin, who argued that as in nature God ruled the universe as an absolute monarch; therefore, in human society sovereignty should be exercised in each political territory by an absolute monarch. To King James, just as for Bodin, the ordering of society was to take place by the sovereign governing power with the law to be understood as secondary to that of political power. What Rutherford emphasised was that although political power forms an important part in the ordering of society, the law was to be prioritised.

Law in this regard was to be understood as those basic foundational, moral or divine norms (as also reflected in the concept of Republicanism) that were superior to the positive law and the whims of the person of the ruler and to absolutist individualist needs. In addition and for example, the ancient pagan philosophers such as Cicero and then the Christian philosophers such as Augustine and Aquinas placed much emphasis in a transcendent universal and immutable moral law as well as a sense of justice and equity, which was of a Divine source, and which in Christian terms is reflected in the Decalogue. In universal language, this can be interpreted as love for God or a transcendent divinity and love for one another. It may well be argued that political thinkers such as Grotius, Bodin and Locke, whose enlightened and liberal thinking was not in agreement with that of Rutherford's, also accommodated a transcendent universal and immutable moral law and sense of justice. However, such accommodation was mainly formal, whilst the relativistic and positivistic component of the law was not only further fuelled, but the law itself disintegrated into a type of post-modernistic setting of various and conflicting interpretations and interests amongst which there were, in many instances, forms of gross inequality.

In Chapter 2 it was pointed out that Rutherford revitalised the Ciceronian emphasis on the importance of the law understood as that which is 'right reason and consistent

with nature’, and ‘eternal and unalterable’ whose author was God, ‘the universal master’. Where this law was absent, according to Cicero, there would be a tyranny. Rutherford’s views on the law were similar to Cicero’s views in that the state as a corporate institution grounded on moral considerations, reflects a natural law paradigm for subjecting the positive law of the state to normative considerations of a transcendent nature.⁶² The lawful exercise of political power by the people necessitates political offices subject to law, and the state as a corporate body is subject to divine, moral and natural law, which transcends the human will and which demands that the authority proceeding from the people should be exercised by warrant of the law.⁶³ Lactantius (towards the latter half of the third century) was one of the first prolific theorists within the Christian mould to suggest that this natural law was synonymous with the Divine law, something also dealt with by Augustine. The idea of the rational law transcended by a higher moral law of judgement was expressed by Aquinas centuries later. In *Lex, Rex* one finds the furtherance of this idea of the law as reflective of immutable and universal norms, *Lex, Rex* also including a natural law justification for the limitation of political power and the ordering of society, which was also supported by the legacy of Stoicism, Roman Law, Medieval and Renaissance thinking. The centrality and superiority of the moral law in Rutherford’s thought confirm the importance of the law in the quest for an effective constitutional model and is as relevant to the constitutional project for today as well as in the past. In modern-day constitutions of democratic and plural Western societies, one finds many parallels to this moral or natural law. This is reflected in fundamental human rights and constitutional prescriptions.

During the period of ancient Greek philosophy, one finds that democratisation had the effect of thrusting power upon people who were not accustomed to it and who therefore required guidance. This eventually placed the emphasis on *nomos* (rather than on *physis*) – on manmade institutions rather than on physical principles of nature.⁶⁴ However, this led to the view that man was the centre of attraction and this anthropocentric attribute, coupled with relativism, gave rise to the Sophists whose

⁶² A. W. G. Raath, “Moral duty, natural rights and the Ciceronian impact on the political views of Luther and Calvin”, *Journal for Christian Scholarship*, Vol. 49, 2(2013), 23.

⁶³ Raath, “Moral duty, natural rights and the Ciceronian impact on the political views of Luther and Calvin”, 23.

⁶⁴ D. H. van Zyl, *Justice and Equity in Greek and Roman Legal Thought*, (Pretoria: Academica, 1991), 17-18.

thinking was rejected by Socrates. Socrates was of the view that a universal definition of justice could be attained, which is the same for all persons, hereby in essence making him a supporter of natural law theory.⁶⁵ In a similar manner, Plato realised that the majority of rulers would not be able to live up to the strict standards set by him and therefore proposed that they should be assisted by a legal code which regulated the conduct of all citizens. In this regard, the emphasis moves away from the state and settles on the laws and legal precepts required for good government. “The laws are characterised by high moral and ethical standards and demand to be unconditionally obeyed ... in the *Nomoi*, Plato introduces a divine creator of laws and justice who aimed to terminate chaos and injustice in the world and to replace it with a spirit of order and reasonableness.”⁶⁶ Aristotle and Cicero were no different.⁶⁷ According to Cicero, the state itself and its law was always subject to the law of God, or the moral or natural law – that higher rule of right that transcends human choice and human institution.⁶⁸ Rutherford’s thought in this regard was similar. Although natural law has been used to support almost any ideology at different times, it has been inspired by two ideas, namely that of a universal order governing all men and of the inalienable rights of the individual.⁶⁹ In this regard, Rutherford’s legal and political thinking has substantially contributed towards, needless to say, also adding to the importance of not only inalienable rights, but also their corresponding duties.

One finds a similar pattern in, for example, the early Reformation in the sixteenth century. Opposition against the physical and religious abuses by the Roman Catholic Church and the monarchy brought with it a form of democratisation, which in turn resulted in people progressively gaining in a heightened experience of individual liberty, power, autonomy and self-worth. This development necessitated a search for a constitutional model for the proper ordering of society and political power. Like sponges uncontrollably expanding and scattering in different directions after the string which had tightly held them together had been severed, the sudden loosening of the firm grasp that the Roman Catholic Church had on Europe lead to the uncontrollable

⁶⁵ Van Zyl, *Justice and Equity in Greek and Roman Legal Thought*, 18-20.

⁶⁶ Van Zyl, *Justice and Equity in Greek and Roman Legal Thought*, 24.

⁶⁷ See Van Zyl, *Justice and Equity in Greek and Roman Legal Thought*, 28-33, 77 and 85. Cicero supports the acceptance of justice as the ultimate aim of man, in his capacity as a member of the human race and supreme law of God, *ibid.*, 85.

⁶⁸ George H. Sabine, *A History of Political Theory*, (3rd Edition, London: George G. Harrap & Co. Ltd., 1963), 166.

⁶⁹ Friedmann, *Legal Theory*, 96.

expansion of diverse interests and beliefs. At the same time there were the temptations related to the exercise of governmental power where the boundaries of such power were attracting serious concerns and questions. The growing popularity of science during the early Enlightenment assisted in driving a wedge between religion and rationality that were fused with one another for many preceding centuries. The wedge that was driven between religion and rationality also resulted in the separation of natural law from its religious mooring, which in turn took the natural or moral law away from its Universalist religious character. These were the challenges that Rutherford faced at the time and which lead to his search for the particulars of a constitutional frame to limit the tide of unlimited freedom.

From this emanates the important idea that the State rests on no basis of mere law (understood in an exclusively positivistic, empiricist, material individualist, popular democratic, secular socialist, utilitarian, pragmatic, communist or absolutist rational and individualist sense), but on transcendent moral standards and natural law's foundations. The law has immutable and universal prescriptions embodied in republicanism and the natural law and these allow for the proper ordering of societies. These immutable and universal principles and norms are similar to many of the principles, values and rights found in the Constitutions of democratic and pluralist societies today, for example, the rule of law, federalism, the separation of powers, cooperative government, political accountability, democracy, the protection of rights related to, for example, life, human dignity, safety and security of the body, freedom, equality, conscience, religious beliefs and irreligious beliefs, expression and a universal adult suffrage.

Neither the State nor the people are the first source of the moral law. Moral law exists before and beyond the State and the people. The law in this regard has a divine, moral or natural law aspect to it, making it universal and immutable. This insight permeates the thought of Rutherford, and this is especially clarified in *Lex, Rex*. For Rutherford the idea of the Rule of Law took the form of a primary notion undergirding systems of rights and jural integrity, making this understanding of the Rule of Law much more than a convenient label for measuring the political performance of civil authorities. The idea of the Rule of Law according to Rutherford demands respect for truth,

submission to the demands of justice and an acceptance of the ‘weight’ of the moral duty of benevolence towards one another and towards the collective.⁷⁰

Inextricably connected to the law and constitutionalism were ideas and insights related to the republican quest for the common good in a society committed to justice; the individual as a social being; the frailty of mankind that necessitates the need for republican principles; self-defence and preservation of society; the mutual relationship between rights and duties; every individual’s duty towards a common good which transcends mere self-interest, the duty of individual and collective political participation by the citizenry; the covenantal principle of responsibility and accountability; the ruler’s accountability primarily before the moral law; the king’s justification of his actions towards the people over which he rules; the office of the ruling power and its universalist and immutable normative substance; the covenantal (contractarian) emphasis on equality between individuals and between society as a collective and the ruling power(s); the relational and mutual aspect of political (and social) activity; the covenant and social contractarian theory as an accessible political device; the recognition emanating from the idea of justice that the natural law that places the ruler in power in the service of the people should transcend the mere expression of the ruler; freedom of worship; love and benevolence in a political and social context; the calling of the community towards the attainment of the common good; communal solidarity; the moral duty of subjection to the law and the powers of government; active resistance towards tyrannous political oppression and ideas related to the protection of the conscience (and its relevance to jurisprudence on religious rights and freedoms generally).

W. Friedmann comments that, “the study of matter and of phenomena outside the realm of pure ideas is an inevitable, and indeed a dominant, aspect of modern science”.⁷¹ ‘Empiricism’ is the philosophical counterpart of the rise of modern science. Its first major exponent was Locke, who argued against Plato, Descartes and the scholastics that there were no innate ideas or principles. Locke considered that ideas were derived from experience, and that the operations of the human mind,

⁷⁰ For this understanding of the Rule of Law see A. W. G Raath, “Bolstering the Rule of Law: Reason, Moral Duty and Finnis’ Views on Practical Rationality”, *Journal for Christian Scholarship*, Vol. 45, 3(2009), 136.

⁷¹ Friedmann, *Legal Theory*, 253.

which Locke called ‘perceptions’ presupposed experience.⁷² This empiricism has exercised a substantial influence on modern philosophy, especially in the rejection of metaphysics as the pre-eminent preoccupation of philosophy. This is common in both ‘pragmatism’ and ‘logical positivism’.⁷³ This also heralded a substantial break between religion and the law, and introduced a relativist and popularist angle to the law and the attainment of the common good. However, the development towards this already had its origins in and around Rutherford’s time, where Bodin’s political and legal theory included this anti-metaphysical idea when thinking in terms of the philosophy of law and its constitutional implications. As stated earlier, Rutherford’s understanding of the law substantially included a defence of innate, universal and immutable moral norms, an understanding that was in opposition to the said empiricist and pragmatic insights pertaining to the foundations of the law. In this regard, the natural and moral law contributions by Rutherford regarding underlying and superior norms applicable to societies require the necessary appreciation. It is not that Grotius and Bodin did not refer to the authority of a ‘higher or moral law’, but this merely enjoyed authority in a formal sense. The implications of their thinking actually resulted in either state absolutism or legal relativism. In centuries that followed, this state absolutism and legal relativism were taken further and popularised through Hobbes (political absolutism) and Locke (legal relativism and popularism).

Regarding the idea of the Covenant, contemporary political and legal philosophy has much to gain from an awareness of the idea of the centrality of the relational (contractarian) aspect in the ordering of society, where not only rights and corresponding duties are established. These rights and duties are also inextricably connected to a normative dimension that transcends political power in the sense of acting as a ‘higher’ authority for such political power. In this regard, the focus from a political point of view was not primarily on the form of the ruling power, but on the relational aspect of such a power with the people and with higher norms. In this regard, political structures are always important, but ultimately, no matter how finely tuned the structures, they come to life (or fail) only by means of relationships that inform and shape them.⁷⁴ In the writings of the theologico-political federalists, one

⁷² Friedmann, *Legal Theory*, 254.

⁷³ Friedmann, *Legal Theory*, 254.

⁷⁴ Daniel J. Elazar, “The Political Theory of Covenant: Biblical Origins and Modern Developments”, *Publius*, Vol. 10, 4(1980), 10.

finds a reflection of the 'classical' paradigm which, according to Suzanna Sherry, had as a central theme the idea of 'connection' rather than 'autonomy', where relationships among individuals were viewed as more important than the "discrete, abstract individuals themselves".⁷⁵ This is a central idea related to the quest towards a constitutional model.

The Enlightenment introduced a secular dimension to the covenant, which became more and more subservient towards reason and power as authority and which lead to many abuses in the centuries proceeding the seventeenth century. Grotius and Bodin formed part of this development towards a more secular understanding of covenantal thinking. The State, according to Grotius, originates in a contract, by means of which every individual surrenders his sovereignty to the ruler, and in this manner, the people become bound to an almost blind obedience to the ruler.⁷⁶ This has risks of its own. The relational aspect amongst individuals and groups in society and between the people and government, as reflected in Rutherford's thought, presents a substantially different understanding by which every individual does not surrender his or her sovereignty to the ruler, but allows the ruler to rule, on condition that such rulership is in accordance with the moral or natural law conditions of the covenant.

Grotius also contributed towards placing natural law on a secular basis,⁷⁷ expounding the theory of a purely secular natural law based upon Stoicism and freed all ecclesiastical authority from natural law thinking. The decisive achievement of Grotius was to separate natural law from its Christian basis as it had been understood in the Middle Ages, and that such a natural law derived from pure human reason bound the sovereign only through his conscience. No institutional guarantee can be derived from it and therefore such a natural law provides no protection against the omnipotence of the state and its ruler.⁷⁸ The philosophical detachment of law from its religious foundation was carried through in its most decided form by Bodin, who readily recognised that freeing the sovereign from the laws did not mean freeing him from natural law. The sovereign was quite definitely subject to these, as indeed it was

⁷⁵ Suzanna Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication", *Virginia Law Review*, Vol. 72, 3(1986), 547.

⁷⁶ R. W. M. Dias and G. B. J. Hughes, *Jurisprudence*, (London: Butterworth and Company Ltd), 55.

⁷⁷ E. W. Patterson, *Jurisprudence. Men and Ideas of the Law*, 1st Edition, (Brooklyn: The Foundation Press, 1953), 344-345.

⁷⁸ C. J. Friedrich, *The Philosophy of Law in Historical Perspective*, 2nd Edition, (Chicago and London: University of Chicago Press), 65-66.

to the eternal law of God. However, the decision as to what was to be considered such higher law, Bodin attributed to the sovereign, therefore a really tangible limitation.⁷⁹

In contrast, Rutherford maintained a contractarian relationship between the ruler and society based on fundamental natural and moral law norms that are superior and authoritative towards the positive law and its limitless bounds based solely on the whims of the ruler and of the majority. The covenant provided a link between society and a transcendental universal and eternal normative authority in which the Rule of Law idea finds fertile ground. Rutherford's idea of the covenant comprises an agreement with a higher moral authority, in contrast to social contractarianism, based on the secular phenomenon of mutual pledges, which excludes commitment towards a higher moral law,⁸⁰ and is left to the arbitrary views of majoritarian decision-making or absolutist governance. This agreement involves a moral commitment beyond that demanded for mere and exclusivist mutual advantage.⁸¹

Although there is a democratic element involved in this line of thinking, where the involvement of the people in covenants is viewed as crucial to the formation of the community, it was not simply democratic in the sense of some public acclamation (majoritarian vote). Leadership of the community was invested in those able to claim legitimacy based on some normatively loaded authoritative source that stands external to the members of the community.⁸² This normatively loaded authoritative source was understood as residing in the 'office of the ruler,' which is to be distinguished from the 'person of the ruler'. Political oppression could therefore not result from the office of the ruler, but from the person of the ruler, because the office of the ruler was synonymous with justice and equity, with the moral or natural law. The idea of the Covenant presents a different political model to that emanating from classic Greek thought in that it prioritises relationships rather than forms of government, placing the emphasis on relationships between the rulers and those ruled, and between God and

⁷⁹ Friedrich, *The Philosophy of Law in Historical Perspective*, 57-58.

⁸⁰ Daniel J. Elazar, *Covenant and Polity in Biblical Israel. Biblical Foundations and Jewish Expressions*, Vol. 1 of the Covenant Tradition in Politics, (New Brunswick and London: Transaction Publishers, 1995), 31.

⁸¹ Daniel J. Elazar, "Covenant as the Basis of the Jewish Political Tradition", 21-51 in Daniel J. Elazar (ed.), *Kinship and Consent. The Jewish Political Tradition and Its Contemporary Uses*, (Washington D. C.: University Press of America, Inc., 1983), 22

⁸² Elazar, "Covenant as the Basis of the Jewish Political Tradition", 40. In the words of Elazar, "While all power must be subject to checks by the people, ultimately the nature of the community is determined by something higher than the people; there is a vision that stands above the simple counting of heads", *ibid.*, 40.

man.⁸³ By means of the covenant, certain mutual obligations that are inextricably connected to the moral or natural law are established and a commitment to undertake joint action to achieve defined ends under conditions of mutual respect and in such a manner in order to protect the fundamental integrity of all the parties concerned.⁸⁴

Covenantal foundings also emphasise the deliberate coming together of humans as equals to establish bodies politic in such a way that all reaffirm their fundamental equality and retain their basic rights – “polities whose origins are covenantal reflect the exercise of constitutional choice and broad-based participation in constitutional design and polities founded by covenant are essentially federal in character ... each polity is a matrix compounded of equal confederates who come together freely and retain their respective integrities.”⁸⁵ This idea of the Covenant introduces a specific political equality, because no one has a divine or natural right to rule any other. It may be that the persons entering a covenant may be unequal; covenant establishes a type of equality because it pairs persons in the same, rather than different, superior-inferior roles and “all humans are regarded as equal before God with equal rights to access to the goods of God’s creation.”⁸⁶

Rutherford held to the Jewish political tradition which is republican, in the sense that the political body is held to be a public thing (a *res publica*), and not anyone’s private preserve. In this regard, the state is not viewed as a reified entity – only the varieties of political relationships create polity.⁸⁷ The inviolability of the oath, which is of prominence in covenantal thinking, also presents a medium by which the ruler can formally commit towards ruling in accordance with justice and if this is not done a penalty would be applied. The taking of the oath involves an unconditional commitment for the ruler to rule in accordance with the ‘higher law’.

Rutherford’s thought contains valuable insights, even for a contemporary liberal and postmodern Western society pertaining to the limits that should be placed on external influences that may be enforced on the consciences of individuals within society,

⁸³ Daniel J. Elazar, “Introduction”, 1-17, in Daniel J. Elazar (ed.), *Kinship and Consent. The Jewish Political Tradition and Its Contemporary Uses*, (Washington, D. C.: University Press of America, Inc., 1983), 4. Also see *ibid.*, 5.

⁸⁴ Elazar, “Introduction”, 9.

⁸⁵ Elazar, “The Political Theory of Covenant: Biblical Origins and Modern Developments”, 13.

⁸⁶ John Kincaid, “Influential Models of Political Association in the Western Tradition”, *Publius*, 4(1980), 43

⁸⁷ Elazar, “Introduction”, 6.

especially where irreligious beliefs and ideologies are enforced upon those who ardently subscribe to religious beliefs. Proper cognisance of the threat that religion was confronted with in Scotland during the sixteenth and seventeenth centuries brings forth the understanding of the need for Scots such as Rutherford to present arguments for the protection of the religious rights of Scots individually and of the Scots as a collective. Rutherford, although in a religious sense, was also one of the most prolific theorists of the sixteenth and seventeenth centuries regarding the emphasis on the frailty of man's conscience in the sense of such conscience being easily influenced by external influences. In this regard, it is especially Rutherford's, *Lex, Rex* and *A Free Disputation Against the Pretended Liberty of Conscience* that represent one of the most informed and acute arguments and explanations pertaining to the protection of religious rights and freedoms.

This has implications for the law and the role of the civil ruler. This is of grave concern regarding contemporary liberalist and pluralist societies where the religious, the associations they form part of and the education they receive are under continuous pressure from external sources of influence (in many instances contrary to the beliefs supported by the religious and the religious associations they belong to as well as the approach to education they might have). As stated earlier, Rutherford's emphasis on, and unveiling of, issues pertaining to the conscience in the context of political and legal theory, as well as his thoughts in opposition towards the enforcement of a foreign religion (as was practised by the Roman Catholic Church and the monarchy at the time) should be understood as one of the most prominent postulations in defence of religious rights and freedoms stemming from the sixteenth and seventeenth centuries. Rutherford's thoughts in this regard makes its mark as a prolific contribution in the development of the protection of religious (and belief) rights and freedoms generally (even Rutherford's concern pertaining to the threat posed by the various sects can be viewed in the same light). Rutherford, for example, states:

... and Suárez saith ... 'If the people once give their power to the king, they cannot resume it without cause; and laying down the grounds of Suárez and other Jesuits, that our religion is heresy, they do soundly collect this consequence, 'That no king can be lord of the consciences of their subjects, to compel them to an heretical religion.' We teach that the king of Spain hath no power over the consciences of protestant subjects to

force them to idolatry, and that their souls are not his subjects, but only their persons, and in the Lord.⁸⁸

To Rutherford there is a self-contradiction within the idea of toleration. For Rutherford the Achilles heel in all arguments for toleration is that “even the most tolerant have limits to what they will tolerate”. There could be no question in Rutherford’s mind as to the legitimacy of a government refusing to grant toleration to all religions, for it is of the essence of any social group to practise restrictions.⁸⁹ Rutherford presents a credible point in this regard as pertains to the dominance of a Christian ethos in sixteenth- and seventeenth-century Europe. There was no neutral path to be followed, whether the views of the Independents, the Erastians, the Catholics or that of the Presbyterians gained the upper hand. Tolerance in this regard can never be inclusive, but like the idea of neutrality, it always remains exclusive. In addition, the State’s application of tolerance can never be objective. Rutherford’s concern directed towards the risks inherent in ascribing to the accommodation of different beliefs was most legitimate and qualified, Rutherford having had insight as to the futile attempt at having a public sphere cleared of any form of ideology and belief. Stanley Fish also postulates there can be no justification apart from the act of power performed by those who determine the boundaries and that any regime of tolerance will therefore be founded by an intolerant gesture of exclusion.⁹⁰ Compare this with Harold Berman’s comment that:

The cult of self has already begun to have the effect both of gradually removing from public education and public discourse all references to traditional religion and of gradually substituting its own jargon and ritual and its own morality and belief system. Thus, there is a danger that this new secular religion will, indeed place all other religions in subordination to itself, inflicting on others the very mischief of which it complains.⁹¹

Rutherford represents one of the first explicit forms of critical thought emanating from sixteenth- and seventeenth-century Western political and legal Reformed theory pertaining to the toleration of beliefs in the public sphere and the limits thereof. Even beyond his particularist discussion on the limits of tolerance regarding various

⁸⁸ Rutherford, *Lex, Rex*, 208(1).

⁸⁹ Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford’s Lex, Rex*, 210-211.

⁹⁰ Stanley Fish, “Mission Impossible: Settling the Just Bounds between Church and State”, *Columbia Law Review*, Vol. 97, 8(1997), 2261.

⁹¹ Berman, “The Interaction of Law and Religion”, 355.

religious denominations at the time, Rutherford's concerns in this regard are most relevant to present-day concerns regarding the risks presented by liberalist approaches where, for example, irreligious ideologies (which represent some or other belief) proclaim a religiously neutral (and therefore accommodative) public sphere where religion is substantially relegated to the private sphere. One finds the contemporary presence in many Western pluralist and democratic societies, a public sphere that represents exclusivist liberal values which in turn gives rise to the dominance of such liberal ideologies and values. In all of this, Rutherford takes the form of a credible critic against the myth of religious neutrality in the public sphere, a view, which centuries later, repeatedly emanates from liberal sources. Rutherford's concern for the maintenance and protection of the true faith can therefore be linked with modern-day concerns pertaining to the protection and maintenance of minority religions and religion in general which stand under the domineering influence of irreligious beliefs in many liberal and pluralist societies.

In Rutherford, one also finds substantial parallels to Communitarianism, which has gained much ground in contemporary jurisprudential theory, in opposition to liberalism, which has proved to have weaknesses. Communitarianism, although open to many strands of thought, is in essence in opposition to liberalism's emphasis on substantial individualism, which substantially supports the centrality of the individual in politics and the law. Rutherford was concerned about the understanding that the individual is self-reliant and absolute in deciding upon right and wrong. There is a frailty inherent in each person, whether one would call 'sin' in a religious sense or in a secular sense understand the individual to have 'weaknesses' that require external guidance. Rutherford's concern about the frailty of man had especially a religious connotation and in seventeenth-century England there were major debates between different groups each subscribing to and defending their views on particular forms of ecclesiastical structures, which in one way or the other, was connected to how one understands the nature of man to be. Is the individual easily influenced by external religiously foreign influences and, if so, how can politics, the law and ecclesiastical models assist in countering this weakness?

What is interesting is how, to a large degree, the development towards the privatisation of religion, was in fact a development that started within the community

of the faithful, and against which Rutherford was strongly opposed. Where the Independent's, Congregationalist's and Anabaptist's approach was to have each church community (or congregation) decide for itself as pertains to Christian doctrine and form of worship, to Rutherford, this form of ecclesiastical authority could not entirely be trusted, due to man's sinful or weak nature. These views by the Independents, Congregationalists and Anabaptists were similar to that of prominent theologians at the time (such as Milton, Williams and Goodwin) as well as prominent Enlightenment philosophers such as Grotius, Locke and Hobbes, who substantially contributed towards supporting the understanding of the autonomy of the individual and the superiority of reason. This tendency had already shown signs of life some centuries earlier in the nominalism of William of Ockham (1290-1350), which succeeded in emancipating the modern mind from the authority of the church and from the pope.⁹² With Bodin's emphasis on authority as ultimately resorting in government and positivism (and not in the 'higher law') and with Grotius' emphasis on reason and the weakening of the vertical aspect of the Covenant (as well as his support of Bodinian thinking), the momentum began towards a purely anthropocentric framework for the law. This was at approximately the time when *Lex, Rex* was formulated.

Shortly preceding the publication of *Lex, Rex*, one finds fundamental political and legal developments in the Lockean paradoxical view of an absolutely unencumbered individual and a tendency towards majoritarian rule, as well as the Hobbesian emphasis on the sovereign ruler; two influential pillars of Western political and legal thinking the seeds of which were planted by Grotian and Bodinian lines of thought in particular. Both Locke and Hobbes continued in the sceptical approach pertaining to the universality of religious truth taken by Grotius and Bodin and up to this point there was agreement between Locke and Hobbes. The difference came where Locke understood all men to be equally free to pursue their equally authorised or unauthorised visions, which necessitated that the "best government is the least

⁹² D.F.M. Strauss, "The mixed legacy underlying Rawls' *Theory of Justice*", *Journal for Juridical Science*, Vol. 31, 1(2006), 67. Also see D. F. M. Strauss, "A history of attempts to delimit (state) law", *Journal for Juridical Science*, Vol. 37, 2(2012), 44, Strauss commenting that, "Nominalism denies any universality outside the human mind and, therefore, undermined the meaning of both *law* and *morality*, for ultimately it does not leave room for supra-individual (normative) standards of conduct". This eventually leads to a positivist take on the law, and this was further extended upon by Marsilius, *ibid.*, 44-45.

government". According to Hobbes, "if society is to endure and perpetual conflict kept at bay, a cure must be found for this disease of equality and freedom, and that cure can only be 'a common Power to keep them all in awe'".⁹³ Locke established a body of innate, indefeasible, individual rights that limit the competence of the community and stand as bars to prevent interference with the liberty and property of private persons. Locke simply assumed, like liberals after him,⁹⁴ that the preservation of the common good and the protection of private rights come to mean the same thing.⁹⁵

Both these mainstreams of political and legal thought are accompanied by risks. For example, Locke's view supporting a more absolute and unlimited claim to individual rights protection and popularist rule (majoritarian), hereby presenting a risky platform pertaining to the maintenance of a stable and universal content to the law as well as a communitarian view regarding society. Hobbes, needless to say, supported absolute sovereign power, which in turn had risky implications attached to absolute political power accompanying it. The implications of Locke's thinking are clear when looking at present-day Western societies, where the proliferation of interpretations of rights has escalated to a very high degree, resulting in the liberalist accommodative project being necessitated to choose interpretations that are popular and/or pragmatic to the exclusion of less popular and pragmatic interpretations. This has implications for, amongst others, the protection of religious (and belief) rights and freedoms. In Rutherford one finds an understanding that, even though the importance of the equality of all men should be supported, it was of fundamental importance that man's faculties may not be given free reign. Man's make-up came with its weaknesses and

⁹³ Fish, "Mission Impossible: Settling the Just Bounds Between Church and State, 2272-2273.

⁹⁴ For example, Immanuel Kant's aspirations towards an ideal of an "aristocracy of all" and John Stuart Mill's vision of a society of "sovereign individuals". These are variations of the modern theme of the harmonization of a substantial human equality with a sweeping individual freedom. However, in the words of Peter Berkowitz, "It is not hard to understand the aspiration to an aristocracy of all. But can a person's human desire for distinction be satisfied in a society in which everybody is recognized as an aristocrat or sovereign? What are the practical effects on our hearts and minds of the conviction that each person is supreme? And what are the implications for moral psychology, or how the moral life is actually lived, of a form of moral reasoning that authorizes all individuals to conceive of themselves as laying down universal laws?", Peter Berkowitz, "John Rawls and The Liberal Faith, *The Wilson Quarterly*, Vol. 26, 2(2002), 68-69. Berkowitz also refers to the Protestant movement who also forms part of this ideal by proclaiming the "priesthood of believers", see *ibid.*, 68-69. However, the Protestant view in this regard is not the same as the humanist idea as reflected in Kant and Mill. The authority of the moral law was in pre-modern Protestant thought a given constant and not as relativist and human rationalist as that of Lockean, Kantian and Millian thinking.

⁹⁵ Andries Raath, unpublished notes for the module, Philosophy of Law, Faculty of Law, University of the Free State, (2012), 159.

consequently it was required from the law to seek the ordering of society and to give to the law in general a content that does not evolve into relativism and absolutist majority opinion. In addition to the Lockean emphasis on the individual with its consequent attributes of relativism, the route followed by Hobbes could be clearly understood as supportive towards the reigning of absolutist governments, thereby coming in contrast with Rutherford's emphasis on the Divine or moral law as superior to political power. The credibility of Hobbes's proposals took many falls into the abyss, where an over-emphasis of positivism leads to serious violations against natural law norms. As stated before, the roots of these new schools of thought originated during the time of Rutherford.

Separated from the normative dimension of the Covenant (and its corresponding relationship with the Divine Law), society became to be understood as a collection of individual interests where the majority of specific interests gained the upper hand by means of consensus within the social compact. This provided the law with relativist and humanist content. In Locke, one also finds much emphasis on reason, an understanding that especially Grotius helped to cultivate. Locke consequently understood the individual to be the sole criterion of the correctness of his or her religion.⁹⁶ This atomistic idea of society in a religious sense developed into an atomistic societal idea beyond that of only religion, in which the individual's interests in general gained in importance and where government's responsibility to protect such interests became prominent. In all of this a strong and vibrant sense of collective commitment towards the public good was lost, which explains the rise of criticism against liberalism by the Communitarians. Hobbes was also a prolific theorist in this regard. In order to keep all divergent interests at bay, political power became prominent, which in turn led to neglecting the superiority of the moral law over such power. As a result, and to build onto what Bodin began, Hobbes called for a *Leviathanic* government to take hold of society and its contrasting needs. According to Hobbes, the contract between the people and ruler was to be replaced by a covenant between each individual with every other individual, which was then transferred to the ruler resulting in the whole personality of the people becoming merged in the

⁹⁶ See Taylor, *The Christian Philosophy of Law, Politics and the State*, 204.

person of the sovereign ruler. According to this, individuals have no rights against the ruler who was the absolute sovereign in ruling over the people.⁹⁷

Bodin's initiation of the idea of the sovereign ruler (which had already been embarked upon by Machiavelli many years before), which was taken further by Hobbes, also provided a threat to the communitarian emphasis on the public good, where the 'higher law' was replaced with absolutist political power (and giving to the law an ultimately positivist character). Even though Bodin improved on the views of Machiavelli pertaining to absolutist political power by referring to Divine and Natural Law, Bodin's views on the absolute sovereignty of the ruler gained the upper hand in his thought. As stated before, history is inundated with examples of the negative consequences that Bodin's political absolutism and Locke's unlimited individualism in this regard can have.

Rutherford wrote at a time during which there was a growing development that placed the emphasis on the unencumbered individual and where serious questions were asked as to the limits of political power, as well as what the foundations of the law (also in a constitutional sense) should entail. The growing development of emphasis on the individual as well as of the amount of power to be placed in the ruler was matters Rutherford was confronted with and consequently took upon himself to address. This he did by touching on communitarian views. The covenant, understood as involving a moral commitment beyond that demanded mutual advantage even involved the development of community among the partners to it.⁹⁸ Communitarianism is therefore a recent development but was already touched upon in the thoughts of, for example, Rutherford and Althusius.

According to Rutherford, there was a larger sense of communal identity, where the self (although viewed as less unencumbered than what liberalism understands it to be) was inextricably connected to a sense of duty towards others and towards the collective, all under a more specific normative content (more specifically in this regard, the Divine, natural or moral Law), which was not susceptible to the risks contained in allowing the individual to have unfettered jurisdiction in determining right and wrong. All of this was based on the federal idea of the covenant and

⁹⁷ Otto von Gierke, *The Development of Political Theory*, (New York: Howard Fertig: 1966), 96.

⁹⁸ Elazar, "Covenant as the Basis of the Jewish Political Tradition", 22.

contractarian theory and on the understanding that an organic nature should be ascribed to society, where all the various parts of the whole play a role towards the interests of the whole and every entity within the whole. In the Christian Republic, individual and collective interests were more similar and subjected to a larger spectrum of universal and eternal ethical norms that remained applicable to everyone and to which everyone accepted adherence.

The law according to Rutherford gave rise to views of a just society by means of its working towards a specified purpose, which went deeper than the mere ordering of society (which was accompanied by substantial pragmatic baggage through the centuries). Individualism, on the other hand, is of the view that what makes the just society just is not the end at which it aims but precisely its refusal to choose among competing purposes and ends in advance. In this regard, the just society aims at providing a framework within which its citizens can pursue their own values and ends, consistent with a similar liberty for others.⁹⁹ The law for liberal societies has become primarily aimed at the regulation of different (and, in many instances, substantially contrasting) interests. In this regard, the law has become none other than a practical tool for administering interests with so-called neutrality, equality and tolerance as beacons for direction. In principle there is nothing wrong with this idea, however what has happened is that these concepts have ended up with some or other subjective popularist understanding. Consequently, the law in contemporary Western society, as exercised and applied by the authorities, has no deeper meaning beyond that of mere ordering and regulation. In this ordering and regulation the public sphere has become filled with a specific ideology (even though irreligious) which, contrary to calls for neutrality, equality and tolerance, dominates all the other entities in society which may have their own normative and linguistic loyalties, such as religious associations. In addition, the atomistic understanding of society created by radical individualism might lead to societies that support majoritarian interests that are to the detriment of minority interests in many instances.

Although Rutherford wrote in the context of early modern Europe, where States were largely extent uniform in culture and religion and where the law was therefore

⁹⁹ Robert Reiner, "Justice", 719-777, in *Introduction to Jurisprudence and Legal Theory. Commentary and Materials*, James Penner, David Schiff and Richard Nobles (eds.), (Oxford: Oxford University Press, 2005), 765.

understood in a uniform context, his contribution towards highlighting the weaknesses of individualism in contemporary Western pluralist societies lies in a few aspects. Rutherford reminds us of a more encompassing and enduring understanding of the law in which the law is understood as including universal and eternal prescriptions, which may not be amended by mere majoritarian or popularist consensus. In addition, the atomistic model of society neglects the duty aspect of individuals towards the benefit of the collective, and where exclusivist rights protection runs the risk of being ignorant of corresponding duties to be exercised, not only amongst individuals, and individuals and societal entities, but also by individuals or societal entities towards government and the public interest.

Rutherford's covenantal thought also blends in with a communitarian sense of society, where the covenant conditions are applicable to individual and society; these conditions acting as limiting authority pertaining to the whims that may arise from free-reigning individual decisions based on egocentric and material individual wants. Rutherford's communitarian views were also in contrast to socialism where the authority of the law was subservient to the masses and the governing authorities, based on social contractarian thought, which had no connotation to a 'higher set of norms which were universal and eternal' by nature. The normative aspect of communitarianism's critique against individualistic liberalism is that such liberalism fails to acknowledge any value in community and relationships *per se*, for example, loyalty to family, community, nation and self-sacrifice.¹⁰⁰ Rutherford places much value in the community, its relationships and its interests under the authority of eternal and universal moral laws. It is especially the idea of the covenant, which assists in developing this understanding further, where the collective and the ruler covenant with God aiming towards justice, self-preservation, self-defence and peace in society in accordance with the Divine Law. Rutherford accomplishes this without negating the interests of the individual who is also committed to and bound by the moral law. Placing the emphasis on the community instead of the individual also has its own risks by means of the violation of individual rights in the interests of the community. However, the moral or natural law acts as mediator in balancing the interests of the community with those of the individual.

¹⁰⁰ Reiner, "Justice", 774.

Two divergent streams of sceptical thought existing towards the end of the Renaissance in Europe require some mentioning, each of these influencing an understanding of the law in their own unique manner. One of these two streams was in opposition to the scepticism that Rutherford had regarding the individual's capacity towards the determination of doctrinal truth, which resulted in influencing an understanding of the role of the law and the relationship between the private and the public sphere. These streams of thought are found in, on the one hand, scepticism in man to act as sole source towards what religious doctrine should be and, on the other hand, scepticism in finding a universal and immutable religious doctrine – the former in opposition to the idea that foundational religious truth (and therefore religious doctrine) might differ from person to person and from congregation to congregation in support of the idea that the whole of Scripture can be understood, to a substantial degree, in one informed sense of religious truth and, in the latter, opposition towards having an informed religious truth (and therefore religious doctrine) applicable to the whole of society. The latter scepticism ended up having a major influence on the foundational meaning of the law and on how the relationship and overlap between the private and public spheres should be understood regarding the status of religion. Scepticism in a universal and immutable religious truth around the beginning of the seventeenth century is reflected in, for example, the anthropocentric loyalty of Grotius (and later Locke), while Rutherford's scepticism in man (instead of scepticism in a universal and immutable religious truth) points towards something beyond and higher than man alone, giving it a theocentric understanding.

This anthropocentric scepticism had already been witnessed within the church itself where the Independents, Anabaptists and Congregationalists believed that each person and community of believers could determine religious truth in their own manner. One can call the Grotian line of thinking in this regard the anthropocentric sceptical school of thought, and Rutherford's scepticism in man, the theocentric sceptical school of thought. This is further explained in that views revolving around the idea that the individual alone determines the substance and jurisdiction of religion is always in opposition to the possibility of having a universal and immutable doctrine of faith applied to society, whilst views that the individual is not the primary source in the determination of religious truth is in opposition to having religious truth determined

by the individual and his or her church congregation, eventually resulting in the privatisation of religion and the state becoming a mere regulator of interests.

This has implications for the relationship and degree of overlap between the private and public sphere regarding the jurisdiction of religion and, generally speaking, what norms and conceptual understandings in debate should apply to society, as well as to what extent associational freedoms are awarded to smaller groups of collectivities within society sharing, for example, the same religious interests, such as churches. A list of norms backed by the understanding that such norms may not emanate from a sceptical anthropocentric point of view will differ from a list of norms backed by scepticism in the infallibility of a person. Regarding a sceptical anthropocentric view, there lies a greater risk in negating a universal and immutable divine or transcendental morality as authority in the determination of right and wrong, hereby opening the doors towards the potentiality of having the proclamation of what the law should be lying exclusively at the feet of the individual and the collective. From this emanates the law understood as relativistic, pragmatic and popularist, aimed at the unlimited wants of the individual or of majoritarian needs (which also runs the risk of being detrimental to minority interests) as seen in, for example, utilitarianism, dominant liberalism and popular democracy. Harold Berman states: “The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity.”¹⁰¹ In Rutherford’s thinking on the law one finds opposition to this development within the law; opposition to the law as relativistic and exclusivist subjective prescriptions loaded with pragmatic and utilitarian purposes.

Anthropocentric scepticism also runs the risk of giving rise to absolutist political power due to a proliferation of wants and needs that can only be tamed by mere political power that comes with mere pragmatic purposes such as the need for substantial accommodation. The law in this regard loses a sense of commitment towards transcendental moral norms such as the Augustinian benevolent views of giving each one his or her due and doing to one’s neighbour, as one would like one’s neighbour to do to one. This also leads to an unfair and unqualified scepticism in anything that is religious and not in line with liberal interpretations of the good life, of

¹⁰¹ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 39.

human rights and duties and of the public interest. The negative implications of this for religious associational groups in today's society are clear.

In this section, it was argued that Rutherford's constitutional, political and legal insights are of enduring value to all societies, irrespective of time and place. Although Rutherford wrote to a seventeenth-century religious audience, there is, on careful analysis, a constitutional model for contemporary society as well. This constitutional model attains further credibility and effectiveness when compared to the new developments in political and legal theory that took place in Rutherford's time. In this regard, certain essentials of the thinking of Bodin and Grotius, together with the furtherance of their ideas in influential theorists such as Locke and Hobbes were investigated. *Lex, Rex* is familiar with the thought of Bodin and Grotius and aims at steering away from the implications that might arise from these Bodinian and Grotian lines of thinking. Rutherford does this by placing renewed emphasis on republican principles and, in this regard, with special emphasis on the principles of contractarianism, federalism and the superiority of the Divine or moral law, as well as the inextricable connection between these, which, in turn, forms the backbone of an effective constitutional model.

5. Conclusion

Bearing the above in mind, this thesis contributes towards identifying and describing what the law meant to Rutherford on mainly the following matters, namely (i) the law and republicanism; (ii) the rule of law idea and the nature of the law in the context of the covenant; and (iii) the role of the law in religious matters. These form a central part of Rutherford's constitutional model, which, as was explained above, also is of enduring value to constitutional thinking and application in general. Rutherford's thought in this regard also needs to be understood in the context of seventeenth-century Britain. These insights of Rutherford regarding the law are inextricably connected to the meta-legal dimension. Any theorist writing on the law (or politics) cannot avoid the presuppositional foundation of the law, which is related to some or other belief whether religious or irreligious.¹⁰² W. Friedmann comments, "all legal

¹⁰² Although many political and legal theorists shy away from laying the emphasis on the meta-legal aspect, and approach which is especially common among irreligious theorists.

theory must contain elements of philosophy – of man’s reflections on his position in the universe – and gain its colour and specific content from political theory – the ideas entertained on the best form of society.”¹⁰³ Similarly, John Salmond places the emphasis on the law having to postulate one or more first causes, adding that before there can be any talk of legal sources, there must already be some law in existence which establishes them and gives them their authority.¹⁰⁴ These are important foundational observations on the law and assist in truly understanding the political and legal mind of Rutherford in the context of seventeenth-century Europe.

To Rutherford (as was the case not only with other prominent Reformed theorists at the time, but also with political and legal theorists spanning a period of over a millennium immediately preceding *Lex, Rex*) the law has a ‘Divine’ aspect, which is axiomatic to all views on the law’s source, what the law’s should be, it’s purpose(s) and how the structures should look like in order to apply the law effectively. A philosophical view on reality is always the interpretive matrix for a foundational understanding of the law in a given society during a specific period in time. From the period of the early Church Fathers until the end of seventeenth-century Europe, God and His Revelations (both written and unwritten) played a substantial role in political and legal theory in the West. During this period and reason was also viewed as subservient to, and interwoven with God’s Word in many instances. To Rutherford and other prominent Reformed political and legal theorists of the sixteenth and seventeenth centuries such as John Calvin, Heinrich Bullinger, Theodore Beza, Pierre Viret, Johannes Althusius, Philippe DuPlessis-Mornay, Francis Hotman, Lambert Danaeu and Peter Martyr Vermigli, the rigid divide between religion and the law, and between religion and politics, as is accepted in Western liberal society today, did not exist. In fact, Viret, Calvin, Vermigli and Hottman were from legal backgrounds; yet their writings were inextricably connected to theology. On the other hand, Rutherford, Beza and Bullinger were primarily theologians; yet their writings included substantial contributions towards political and legal thinking.

The WCF gives us a clear and informative understanding of the law and its foundational structure as understood by Rutherford, his fellow Scottish Divines, many

¹⁰³ Friedmann, *Legal Theory*, 3.

¹⁰⁴ John Salmond, *Jurisprudence*, 10th Edition, by Glanville L. Williams, (London: Sweet and Maxwell Ltd., 1947), 155-156.

of the delegates present at the Westminster Assembly towards the middle of the seventeenth century and other magisterial Reformed theorists such as Calvin, Bullinger, Vermigli and Beza. According to the WCF, the good and the right are bound to what God is, what God does, and what God speaks. In the words of Rutherford, “things are just and good, because God willeth them.”¹⁰⁵ In the words of John Ward:

His law is a glass into which is shed the image or species of his righteousness, imitable and practicable, as well by Rulers in their Spheres, as other people in theirs. If ye look into that glass, ye may see how to dress your selves, and how ye ought to be, and do in place and exercise of power ... *The law of God is your rule; for the Theory of all policy, and for the practise too, even for making of laws, the beam and standard by which all laws must be weighed and tried. There is a Law above laws, said the most learned among Kings, Free and supreme, by which all Municipal laws must be governed except they have dependence on this law, they are unjust and unlawful* ... It is your guide for the administration of government ...¹⁰⁶

Rutherford was clear on the source for the law being God, as reflected in the whole of Scripture, and the covenant was applied as a central tool for the mediating of the origin and application of the law. It was the moral law as found in the Old Testament, which according to Rutherford continued into the New Testament, making both the first and second Tables still applicable to the Christian community.¹⁰⁷ There is no difference in substance between Deuteronomy 17 and Romans 13 (two texts numerous referred to in *Lex, Rex*). In this regard, Rutherford stood in stark opposition to the Bodinian line of thinking, which viewed the law as emanating from the sovereignty of the ruler idea, as well as the dispensationalist influence, which lead to a negation of viewing, especially the first Table of the Decalogue, as still applicable in the public sphere of the Christian community. The sixteenth-century Grotian emphasis on reason, which led to a diluted loyalty to a focused and informed

¹⁰⁵ Coldwell and Winzer, “The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis, Part 2: Analysis”, 57.

¹⁰⁶ John Ward, *God Judging among the gods*, opened in a sermon before the Honourable House of Commons assembled in Parliament, upon the solemn day of monthly fast, March 26, 1645 cited in Chris Coldwell and Matthew Winzer, “The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis, Part 1: Chronology”, *The Confessional Presbyterian*, Vol. 5, (2009), 26. The moral law (the Decalogue) is according to the Larger Catechism, a transcript of God’s holiness, which informs all men “of the holy nature and will of God”, Coldwell and Winzer, “The Westminster Assembly and the Judicial Law: A Chronological Compilation and Analysis”, Part 2, 65.

¹⁰⁷ Sherman Isbell, “The Divine Law of Political Israel Expired: General Equity”, 1-13, <http://www.westminsterconfession.org/a-godly-society/the-divine-law-of-political-israel-expired-general-equity.php> (accessed 24 November 2012).

doctrinal stance, also presented a challenge to Rutherford. This loyalty to reason (although not completely separated from religion) not only resulted in a diluted sense of the content of the law in general and as especially pertains to the protection and maintenance of the true religion, but also negated the covenantal idea, which is based on more specific conditions. All this formed part of the coming of age of the Enlightenment's anti-religious project. The consequent separation of religion and the law, together with the popularity of positivist and social contract theory, and the understanding of the law became more exclusively anthropocentric, eventually ending in a fully-fledged anthropocentric meta-jural framework, as experienced in especially Western liberal society in the twenty-first century.

As the Enlightenment ideology grew stronger, the idea of the Covenant became more and more irreligious. The law became separated from religion (resulting eventually in religion becoming something only belonging to the private sphere) and the relationship between God and the law became of lesser and lesser relevance and importance. During the seventeenth century, the emphasis on reason as, for example, postulated by Grotius and the popularity of positivism as, for example, propagated by Bodin, gained momentum, eventually resulting in the law understood according to many interpretations, interpretations in Western society that would later become completely separated from theology. This exclusively anthropocentric understanding of the law is embedded in current Western society to such an extent that, to speak of the law in a theocentric manner, will probably be scoffed at from many sectors in contemporary liberalist society, forgetting the challenges that accompany an exclusively anthropocentric understanding of the law and the abstract nature related to the meta-jural qualifications of such an understanding. Some insight to this is presented in Stephen Carter's reminder of the transcendental nature lying beyond the irreligious when he states that:

It is relatively easy for well-educated liberals to scoff at the idea that God's will is relevant to moral decisions in the liberal state, but the citizen who is religiously devout might ask why John Rawls' will, or Bruce Ackerman's will, or David Richards' will, or, for that matter, the will of the Supreme Court of the United States is more relevant to

moral decisions than God's. And so far, at least, I do not think that liberal theory has presented an adequate answer.¹⁰⁸

Explaining and justifying the law to an audience diverse in presuppositional points of departures naturally is problematic; there is no privileged set of variables that can be applied to explain the dimensions of law and the central issues of the origin, functions and effects of the law.¹⁰⁹ In other words, aims towards justifying the law according to mono-causal models pertaining to the law¹¹⁰ to a diverse audience are doomed to failure. In the words of Roger Cotterrell, "Law is the product of other social facts in the society in which it exists".¹¹¹ An understanding of the law cannot escape that which, although being beyond the law itself, gives meaning to the law and serves as a seedbed for the law. Assisting this understanding of the law is the knowledge of the contextual circumstances within which a specific foundational understanding of the law is moulded. During the time of the ancient Hebrew authors and then the Patristic Fathers, together with the Constantinian influence, and approximately up and until the end of the eighteenth century, it was especially understood and accepted in Europe that the law cannot be separated from God, and that religion and the law, as well as church and state, overlap substantially with one another. Harold Berman contends that the folk law of the peoples of Europe in the sixth to the tenth centuries was merged with religion and morality, "and yet it was law, a legal order, a legal dimension of social life."¹¹²

In the dominant exclusivist anthropocentric character of the law, the law has come to be understood largely as "a body of rules" which are usually understood as being derived from statutes, judicial precedent and jurisprudential contributions based upon reason. Together with this, the law has come to be understood as, in Lon Fuller's view, "the enterprise of subjecting human conduct to the governance of rules", a view which emphasises legal activity over legal rules. Harold Berman adds to this understanding by emphasising "law in action", which consists of people legislating,

¹⁰⁸ Stephen L. Carter, "The Inaugural Development Fund Lectures: Scientific Liberalism, Scientific Law", (Lecture Two: The Establishment Clause Mess), *Oregon Law Review*, Vol. 69, (1990), 523.

¹⁰⁹ Hubert Rottleuthner, *Foundations of Law*, in *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 2, Enrico Pattaro (ed.), (Dordrecht: Springer, 2005), 181-184.

¹¹⁰ Rottleuthner, *Foundations of Law*, 183.

¹¹¹ Rottleuthner, *Foundations of Law*, 4.

¹¹² Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 80.

adjudicating, administering, negotiating and exercising other legal activities.¹¹³ In this exclusivist anthropocentric framework of the law (and which is substantially fed by an anthropocentric dimension of reason), different branches developed such as positivism, social contractarianism, the purpose of maintaining order in society, law as instrument towards the good, substantial liberty (the protection of individual rights), majoritarian democracy, utilitarianism and socialism. Not only has a theocentric understanding of the law become lost in the process, but within the anthropocentric theories, there is also an unwillingness to emphasise the meta-jural aspect to such theories. In contrast to what the law meant in Rutherford's time, the law in Western society today primarily aims towards the ordering of society in the sense of being a practical tool for the accommodation of various pockets of normative cultures, which differ substantially from one another in many instances. The meta-legal framework within which the law functions in this regard is nothing other than pragmatic by nature and does not reflect the monologous and encompassing idea of the law found in seventeenth-century Europe, which was permeated by a Christian ethos, and which is so clearly illustrated in the works of Rutherford.

To the medieval mind the universe was understood as being a single articulated and organic whole and every single being within this universal whole was viewed as being strictly determined by the whole and the laws governing the whole. The social order, like the cosmic order, existed because God existed, and was good because God had decreed it to be.¹¹⁴ Law was therefore understood as having a universal and divine attribute, permeating the entire world and including the ordering of society. For a long period prior to the eleventh century, law did not exist as a separate system of regulation or of thought.¹¹⁵ However, in the late eleventh, twelfth and thirteenth centuries, law became disembedded,¹¹⁶ where the law in the West was conceived to be an organically developing system.¹¹⁷

Although the understanding of the law in this period was not alienated from its religious connotations, this idea of law as a separate and distinct field made it easier

¹¹³ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 4-5.

¹¹⁴ Anton-Hermann Chroust, "The Corporate Idea and the Body Politic in the Middle Ages", *The Review of Politics*, Vol. 9, 4(1947), 432-433.

¹¹⁵ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 85.

¹¹⁶ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 86.

¹¹⁷ Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, 119.

for early Enlightenment thought to further the separation of the law from religion, to such an extent that law was to develop into an understanding that it has totally been freed from any religious meanings and attributes. Rutherford was positioned around the late Renaissance and the early Enlightenment, and his political and legal thought was committed towards retaining an understanding of the law as that which cannot escape its religious meta-law dimension. The law according to Rutherford had foundational transcendence to it, an encyclopaedic character, which, in turn, had everything to do with theology. This loyalty to some or other presuppositional meaning to the law and its relation to, and meaning for society cannot escape even the irreligious. An understanding of the law can never be separated from the ideological aspect to which it is always anchored; but this understanding of the nature of the law is either vehemently ignored or taken lightly by popular contemporary sentiments in Western liberal and postmodern societies.

Rutherford's views on republicanism, the covenant, the rule of law idea and as the ruler's role in religious matters not only confirms his contribution towards political and legal thinking in general, but also provides a better understanding of the law according to Rutherford's mind and through the lens of especially Presbyterian thinking. To Rutherford the law begins as an attribute of God, finding expression in His covenantal relationship with man and society and working towards a messianic and salvatory purpose. This, together with scholarship on Rutherford's views on the moral, judicial and ceremonial law, and his views on the natural law and its relationship with the Decalogue, presents a more informative and encyclopaedic take on Rutherford's understanding of the law. In this, an understanding of the law as fact or as a mere body of moral rules for society is exceeded, hereby providing a more lucid picture of Rutherford's 'idea of the law'. In this lies a description and explanation of a specific value to be connoted to the law, which in turn further opens up not only Rutherford's theological mind, but also his thinking on politics and the law. This in turn tells us more about Rutherford's quest for a constitutional model in which the law enjoyed such a superior status and played such an important role.

It was also confirmed that Rutherford's legal and political thought is of enduring relevance. In this regard, Rutherford confirmed and elaborated upon republican norms pertaining to the ordering of society. Law to Rutherford is primary in the ordering of

society, and here the maintenance of justice, the common good, self-preservation of society and the individual, peace in society and resistance towards political oppression, enjoy emphasis. In line with classical pagan thought, Rutherford views the foundations of the law as consistent with nature, eternal, universal, moral and of divine origin. The law in this regard precedes and is superior to political power and should be adhered to by the people. Then there is the importance of the relational (contractarian) aspect in the ordering and day-to-day functioning of society, where not only rights and corresponding duties are established, but these rights and duties are inextricably connected to a normative dimension that transcends political power as well as merely positivistic law. It also acts as authority to political power, participatory citizenship and resistance towards oppression. Even though the importance of the equality of all men should be supported, it was of fundamental importance that man might not be given unlimited authority, as man's constitution with its inherent weaknesses necessitated the assistance of the moral law, with its universal and eternal sense of justice and equity. In this regard, the risks of arbitrary views of majoritarian decision-making or absolutist governance are countered. Furthermore, the inviolability of the oath that is of prominence in covenantal thinking presents a mechanism by which the ruler can formally commit towards ruling in accordance with the moral law, equity and justice.

Regarding the protection of the conscience, Rutherford provides the relevant concerns related to the risks of external influences on the consciences and religious beliefs of individuals, and he gives a reminder of the dangers of limitless tolerance pertaining to religion, worship and the myth of neutrality in the public sphere in this regard. Rutherford also deals with aspects of Communitarian views, which question the idealist expectations originally connoted to liberal individualism and the risks inherent to such individualism. The emphasis is also placed in this regard on the organic nature of society where the importance of communal identity against the background of a sense of duty towards others and towards the collective under the authority of the moral law is reflected. The atomistic model of society proclaimed by liberal individualism negates the duty aspect of individuals towards the common good and, where rights protection is ignorant of corresponding duties to be exercised, not only amongst individuals and amongst individuals and societal entities, but also towards government. The law is also to be understood as working towards a higher

purpose, a purpose inextricably connected to justice and morality, rather than merely an end in itself by its endeavour towards the regulation and accommodation of various pockets of normativity within society and the related interests of individuals and groups of individuals sharing the same fundamental interests. Rutherford reminds one of a more encompassing and enduring understanding of the law in which the law is understood as including universal and eternal prescriptions that may not be amended by mere majoritarian consensus. Although theorists of the time, such as Grotius and Bodin, referred to the importance of the Divine law and the law of nature, their political and legal theories did not make sufficient space for, in Grotius's case, a proper appreciation of the Decalogue, and in Bodin's case, proper regard not only for the Decalogue, but also for the superiority of the Divine law or law of nature.

This brings one to the main finding of this thesis, namely that Rutherford presented a constitutional law model for the ordering of society. It is surprising how absent the works of seventeenth-century federal theologico-political theorists such as Rutherford are in modern-day scholarship on the historical contributions to specifically legal philosophy and to constitutional law. This thesis brings to light the important role that Rutherford played regarding the formulation of a constitutional model that, on the face of it, is very similar to Constitutions and constitutional models in present-day liberal and democratic States. Rutherford's political and legal theory places the 'higher' or moral law (Divine law) above that of political power, unlike Bodin's thinking which served as a catalyst towards Hobbesian political absolutism. The channelling of political power towards effective governance aimed at the common good can only be accomplished through constitutional normative principles emanating from republicanism (which are of universal and immutable character) and laws (including rights and duties) which are just and equitable. Included in these laws is the protection and maintenance of basic rights such as that of human dignity, life, equality, freedom of expression (political and religious), participatory citizenship and the right to religious freedom (individually and collectively). This foundational aspect of the law forms part of Rule of Law and constitutional thinking, the law being understood as something stable and not arbitrary; as something substantive and everlasting. Bearing in mind the ideological context, Rutherford sought the preservation, freedom, peace and well-being of society (both physically and spiritually). Even though Rutherford wrote to a seventeenth-century European

audience, it is clear from the above that there are enduring similarities in his thinking to what is understood today as a constitutional law model.

As stated earlier, in Rutherford one finds the prominence and superiority of the law to that of political power and purely majoritarian law making. Rutherford, by reversing the traditional *rex lex* (the king is law) to *lex rex* (the law is king), acted as one of the pioneering early modern works to give the Rule of Law principle a firm theoretical foundation, which also served as good opposition to the abuses and threats of abuses presented by political power. Similar to ancient Pagan thinking represented by for example, Cicero and the Stoics, Rutherford supported the Divine law, natural law and justice as primary, whilst the attainment of 'order' was secondary, unlike, for example, Plato and Aristotle, who placed the attainment of order as a primary concern. Rutherford's thinking in this regard was similar to the pagan Cicero, who wrote many centuries before that the best governments would not "lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples, and there will be, as it were, one common master and ruler of men, named God, who is the author of this law, its interpreter, and its sponsor."¹¹⁸

This gives the law an added value, as it denotes that the law is in itself something foundational and good. The endeavour towards order in society *per se* does not necessarily mean that the law is of fundamental importance. The law understood in a moral or natural law sense has to be exercised because it is a good in itself, with the ordering of society as a product. The mere aim towards order may rid the law of its foundational and superior status, and in the process allow the law to be understood only in a relativist, popular majoritarian, pragmatic, utilitarian, and/or arbitrary sense. Political power is subject to the moral law for the ordering, self-preservation and good of society. The final cause of government for serving the good, preservation and ordering of society as well as the liberty and equality of the individuals in society can only be accomplished subject to the foundational moral law. The civil government's most fundamental duty is to enact, apply and administer the law towards the public good. This formal cause of government reflects its essence. The civil ruler is awarded

¹¹⁸ David W. Hall, *Savior or Servant? Putting Government in its Place*, (Oak Ridge, Tennessee: The Kuyper Foundation, 1996), 36.

the sword by which he upholds the Rule of Law principle. Government is defined primarily in relation to law and not primarily in relation to power.

The traditional three powers of government distinguished by Rutherford, namely the legislative power (the power for enacting and promulgating law), the judicial power (for restraining the evil doer and praising the good in individual cases), and the executive power (for administering and enforcing the law) serve the common good. All three branches of government are defined in relation to divine law and human laws. The essence of government is the embodiment of the demands and functions of the law, and government is the instrument of the Rule of Law. The moral (natural or Divine) law is the highest manifestation of law and legislatively human laws are only really law if it conforms to and expresses the principles of the Divine law. The judiciary is also under the authority of the Divine law. Executively and administratively, the king may not command what he will, but must also be under the authority of the Divine law. Because the king is the breathing and living law, the king must by obligation of law do what he does as king, namely *Rex est lex viva animate, et loquens lex*, the king reduced in practice.

This implies that the law (in a 'higher' or moral sense) is the real ruler, and therefore obedience to government does not imply blind obedience to exclusively human desires, political oppression and corruption, because the measure of a tyrant is solely and simply the departure from the law which the king is to embody. Human beings, whether in their capacity as rulers or as citizens, are predisposed towards lawless selfishness and enjoyment. For this reason, the law exercised by the government is to limit this weakness in man. Civil government is composed of human beings who are subject to Divine (moral or natural) and human laws and duty-bound towards their subjects in a system of contractual obligations to their subjects over which they rule. Therefore, a clear distinction must be drawn constitutionally between the office of the ruler and the person who holds such office. Because the formal cause of government is the Rule of Law; what makes government a government is its role in exercising the law towards the maintenance, protection and furtherance of the common good. Rulers are bound to the normative duties of their office. The ruler *in abstracto* is the office instituted by God. This office must be filled according to the tenets of the divine law, whilst the ruler *in concreto* is the person who holds such office. Therefore, there is a

distinction between the king as king and the king as a man. The ruler is to be obeyed as the embodiment of the Divine (moral) law and when ruling contrary to this, he acts against the Divine (moral) law and should therefore not be obeyed. The interpretation of the law is also open to various ruling entities (for example, Parliaments) in the context of federalism which in turn enhances the principles of the division of powers and cooperative governance. The efficient and material cause of government is the republican normative principle regarding the important role of the people in political activity based on certain conditions in the context of a mutual relationship between the ruler and the people. The covenant idea carries the foundations of modern constitutionalism with it in that it emphasises the mutually accepted limitations on the power of all the parties to it. The covenant is not only a moral norm, in itself, but also carries the 'higher' law with it as condition for the ordering of society.

The Epilogue starts with a quote by Harold Berman stating, "Law is not only fact but it is also an idea (or concept) as well as a measure of value". This thesis brings to the fore the idea and measure of value of 'law' as presented in the title of Rutherford's political and legal work, *Lex, Rex*. This is of fundamental importance to constitutionalism. The law in this regard is not limited merely to Rutherford's views on the Decalogue, the judicial and ceremonial laws or his views on natural law. *Lex, Rex* goes far beyond this in Rutherford's mind – it unfolds into more clarity on investigating the 'Godly connection' and by discovering his constitutionalist thought. An understanding of the law according to Rutherford starts with it being an attribute of God, which forms an inextricable part of, and relationship with Creation and works towards God's ultimate plan with man. In this regard, the law is foundationally relational in the form of the Covenant. One can say that *Lex, Rex* could also have been formulated as *Deus, Rex* (God, King) or *Rex Divinus* (the Godly king).

The Covenant itself is normative and in agreement with the natural law, sets the conditions for the ordering of society and for society to obey and apply to obtain not only peace and self-preservation, but also salvation. Nature in this regard remains subservient to grace, but nature also has a positive duty to accomplish within the idea of the Covenant. This duty placed on man is more specifically witnessed in political power and its subservience to the law, and Rutherford clarifies this relationship between political power and the law in foundational moral norms that form the

essence of a constitutional model for a Christian society. These foundational norms are housed in the concept of republicanism as investigated in Chapter 2. They aspire towards the natural and moral law goals of the preservation and good of society (both in a worldly and after-worldly sense), as well as, where required, in active resistance against the abuse of political power. In all of this, one finds a constitutional model for the Christian Republic that is inextricably connected to the superiority and importance of the covenant and of the law. This is Rutherford's constitutional model and can only be properly understood within the context of seventeenth-century Europe as explained in especially Chapter 1. The author of this thesis is well aware of the changes that developed over the centuries pertaining to the church and the state, and between religion and the law. In today's pluralist and democratic societies the distinction and separation between church and state as well as between religion and the law has become so prominent that many of the insights related to theorists writing on the subject over three centuries ago has become irrelevant towards solving matters related to religion and the law. In this regard, new proposals require attention, such as for example, the importance of sphere sovereignty, by which religious associations may enjoy the required religious rights and freedoms to be expected from plural and democratic communities.¹¹⁹

This thesis also concludes in the Epilogue that there are irrespective of differing ideological contexts (and irrespective of drastic changes in the relationship between law and religion), enduring and valuable insights for contemporary society (and beyond) in Rutherford's views on the law and its constitutional relevance. In this regard, the idea of the law and its measure of value according to Rutherford serve as enduring relevance to constitutional theory and the inextricably normative dimension of such theory. The law and the covenant have that foundation to it that emanates from the 'higher', moral or natural law, having universal and immutable characteristics that form the basis of a constitutional model for the effective ordering of society.

¹¹⁹ In this regard see for example, Johan D. van der Vyver, *Die Juridiese Funksie van Staat en Kerk. 'n Kritiese analise van die beginsel van soewereiniteit in eie kring* (The Juridical Function of State and Church. A critical analysis of the principle of sphere sovereignty), (Durban: Butterworths, 1972), 87-99 and 182-196. Also see Johan D. van der Vyver, "Sphere Sovereignty of Religious Institutions: A contemporary Calvinistic theory of church-state relations", in *Church Autonomy: A comparative survey*, Gerhard Roberts (ed.), (Frankfurt and Main: Peter Lang, 2001), <http://www.strasbourgconsortium.org/content/blurb/files/Chapter%2032.%20van%20der%20Vyver.pdf> (accessed 15 December 2013).

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SUMMARY

Accompanying early seventeenth-century Europe were challenges related to the limitation of political power, civic participation in public affairs and the attainment of the public interest. Absolute rule and the absence of the individual as well as of the collective in political activity required urgent attention. The republican quest towards a much-needed rearrangement of the guardians and executors of political power as well as a more inclusive role to be played by the individual and the collective was accompanied by a view on the law as something beyond merely law enforced by the governing authorities. At the time, England and Scotland served as a scholarly hub where constitutionalism was vigorously addressed.

The seventeenth-century Scottish theorist Samuel Rutherford contributed towards the formulation of a constitutional model not only suited to the context of his time but which also has overlapping value for contemporary theories on constitutionalism. Rutherford accomplishes this with special emphasis firstly on an understanding of the concept of republicanism, an understanding that was coupled with a rich legacy spanning many centuries and including Ancient Hebrew, Classical Greek and Roman, Patristic, Medieval, Canonist and Scholastic thinking. Secondly, Rutherford argues for the importance of the Rule of Law idea, together with the idea of the covenant. The encompassing framework within which a constitutional model was to be sought was against the background of the view that the law transcends the laws applied by the civil authorities, mere positivism and pragmatism. Rutherford reiterates the Ciceronian idea that the law is something more than Niccoló Machiavelli and Jean Bodin's command of the ruler. Thirdly, Rutherford's constitutionalist thinking also includes valuable insights pertaining to the protection and maintenance of religion and of the conscience. This Rutherford does in reaction to the oppression of religion by the authorities and a more enlightened development in seventeenth-century Britain by which the emphasis was placed on the 'inner light' within man, and which was supported by influential theorists such as Grotius, John Milton and John Locke.

Emanating from this study are also enduring insights related to constitutionalism such as the importance of social contractarianism; the centrality and superiority of natural or moral law; the mutual relationship between rights and duties; every individual's participation and duty towards a common good, which transcends mere self-interest; the ruler's accountability primarily before the moral law; the office of the ruling power and its universalist and immutable normative substance; and activism against physical and psychological oppression.

OPSOMMING

Die eerste deel van sewentiende-eeuse Europa is gekenmerk deur uitdagings wat verband gehou het met die beperking van politieke mag, burgerlike deelname in sake van openbare belang en 'n strewe daarna om die belangstelling van die publiek te verkry. Absolute gesag en die afwesigheid van die individu asook van die kollektiewe in politieke aktiwiteit het dringende aandag geverg. Die republikeinse soeke na 'n dringend-nodige herrangskikking van die bewakers en uitvoerders van politieke mag, asook die behoefte aan 'n meer inklusiewe rol deur die individu en die kollektiewe is vergesel deur 'n uitkyk op die reg as iets wyer as die blote wette wat deur die regerende gesag afgedwing is. Engeland en Skotland het op daardie tydstip gedien as 'n spilpunt van geleerdheid waar konstitusionalisme kragdadig aangespreek is.

Die sewentiende-eeuse Skotse teoretikus, Samuel Rutherford, het 'n bydrae gelewer tot die formulering van 'n konstitusionele model wat nie net gepas was vir die konteks van sy tyd nie maar wat ook oorvleuelende waarde het rakende hedendaagse teorieë oor konstitusionalisme. Rutherford het dit vermag deur eerstens spesiale klem te plaas op 'n insig in die konsep van republikenisme, 'n konsep wat gekoppel was aan 'n ryke nalatenskap wat oor baie eeue gestrek het en Antieke Hebreeus, Klassieke Grieks en Romeins, asook Patristiese, Middeleeuse, Kanoniese en Skolastiese denke ingesluit het. Tweedens het Rutherford argumente geformuleer vir die belangrikheid van die oppermagtigheid van die reg, in samehang met die gedagte van die verbond. Die allesomvattende raamwerk waarbinne 'n konstitusionele model aangetref behoort te word, is beskou teen die agtergrond van die uitgangspunt dat die reg die wette wat deur die burgerlike owerhede toegepas word, positivisme en pragmatisme transendeer. Rutherford het die Ciceroniaanse gedagte herbevestig dat die reg veel meer omvat as Niccoló Machiavelli en Jean Bodin se bevel van die regeerder. Rutherford se konstitusionalistiese denke het ook waardevolle insigte ingesluit betreffende die beskerming en handhawing van godsdiens en die gewete. Rutherford het dit gedoen in reaksie op die onderdrukking van godsdiensvryheid deur die owerhede en 'n meer verligte ontwikkeling in sewentiende-eeuse Brittanje waardeur die klem geplaas is op die 'innerlike lig' van die mens, en wat deur invloedryke teoretici soos Grotius, John Milton en John Locke ondersteun is.

Voortspruitend uit hierdie studie vloei ook blywende insigte in verband met konstitusionalisme soos: die belang van sosiale kontraktualisme, die sentrale en oppermagtige posisie wat deur die natuurreg of morele reg beklee word, die onderlinge verhouding tussen regte en pligte; elke individu se bydrae tot en plig teenoor 'n gemeenskaplike welsyn wat blote eiebelang transendeer; die heerser se verantwoordbaarheid voor die morele reg; die amp van die bewindhebbende mag en die universele en onveranderbare normatiewe wese daarvan; en aktivisme teenoor fisiese en psigologiese onderdrukking.

KEY TERMS

Samuel Rutherford

Lex, Rex

Republicanism

Constitutionalism

Constitutional law

Rule of Law

Samuel Rutherford and the law

Samuel Rutherford and liberty of conscience

Samuel Rutherford and republicanism

Samuel Rutherford and constitutionalism