

# Personhood, human nature and the foundations of fundamental rights in Martin Luther's theology

## ABSTRACT

This essay investigates the implications for the idea of fundamental rights of Luther's views that the laws of political and legal development are not autonomous and independent of those of morality and religion; that religion may not become the servant of civilisation, law or politics, and that reason, the instrument for ordering civil and legal affairs, is informed by deeper driving forces of Christian religious commitment. It is found that Luther related his theological views, in this context, to the conscience of freedom and its corollary of freedom of conscience.

## 1. INTRODUCTION

The dominant late medieval scholastic tradition of natural law employed the notions of nature and human reason to arrive at knowledge of natural law and natural rights.<sup>1</sup> St. Thomas Aquinas took nature as the intrinsic, operative principle of the human subject and the properties and inclinations natural to human beings, to uncover the basic elements of the law of nature. Thomas maintains that those things to which human beings are naturally inclined pertain to the law of nature (*Summa Theologica* (S. T.), I-II, q. 94, art. 4).<sup>2</sup>

Thomas identifies three categories of inclinations operative in human nature: first, the preservation of human life or the impeding of death; secondly, the inclination to learn naturally; thirdly, the inclination to what is good according to the nature of reason. Thomas explains how natural law is common to all creatures as follows: Because all things are subject to divine Providence which rules and measures them with an eternal law, it is clear that all share in some way in that eternal law in so far as they receive their inclinations to their acts and ends from the impression left in them by the eternal law. But amongst all other creatures, the rational creature is subject to a more excellent way to divine Providence in so far as it is made to share in Providence by acting with foresight on its own and others' behalf (S.T., I-II, q. 91, art 2).

It has to be noted though that in Thomas's legal philosophy the phrase "law of nature" is used in a dual sense: firstly, it refers to the physical order intrinsic to nature, the result of divine wisdom;

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1 The modern Western concept of subjective rights was adumbrated in what Harold J. Berman calls the "great revolutionary upheaval of the late eleventh century and early twelfth century," when the papacy established its independence from imperial and royal control and its political and legal supremacy over the clergy of Western Christendom" (Berman, 1997:177).

2 "Ad legem naturae pertinent ea ad quae homo naturaliter inclinatur" ("(T)o the natural law belongs those things to which man is inclined naturally").

secondly, it refers to the moral nature as the found of moral obligation, known by reason. Only in its second meaning does natural law refer to natural right – natural inclination to moral good arises from the preceding obligation revealed to man by reason, and the human being’s inclination to moral good because he knows it. Therefore, the inclination in man is never obligation but a consequence effected in the human person by the obligation already rationally discerned. Inclination is always a physical effect produced in man by the rational apprehension of moral obligation. St. Thomas, therefore, does not regard inclination as the sole constitutive element of morally obliging natural law, but subjects it to reason, and considers it only as approved by reason: “All the inclinations of any parts whatsoever of human nature pertain to natural law in so far as it is regulated by reason” (S.T., I-II, q. 94, art. 2, ad. 2). Natural law in St. Thomas’s legal philosophy is therefore rational rather than natural because it originates in man’s reason, not from the subjective nature of his inclinations.

Luther’s embracing of St. Paul’s idea of natural law as a law “written in (men’s) hearts” and the Gentiles, who do not have the law of the Scriptures, doing “by nature the things contained in the law” (Ro 2:14-15)<sup>3</sup>, and St. Paul’s rejection of the Greek idea that the divine will is accessible to human reason, led Luther to reject the Greek legacy of rationalism in Scholastic legal philosophy.<sup>4</sup> St. Paul’s view that human nature is something to be overcome, that God’s laws are not to be understood in terms of human understanding, and that the divine dictates are not rational in terms of human reason, provided the basis for Luther’s view that the necessary knowledge of the divine will can only be spiritually discerned (1Co 2:11,14), and this only in the sense that God has made it known to us “according to his good pleasure which he hath purposed in himself” (Eph 1:9)<sup>5</sup>. Luther, therefore, subscribes to the Pauline approach that the “will of God has no other ground to will as He wills that He wills so” and not in any laws binding Him whatsoever, or eternal truths; so that what God gives He gives in full freedom, by grace alone. Luther – like St. Paul – through his emphasis on will as the source of ethical norms, strengthened the tradition of voluntarism in the quest to harmonise the metaphysical position that saw the absolute in God’s will with that which saw it in His wisdom or reason. Because the absolute is in God’s will, God is absolutely free to decree what norms He pleases for man, and the human aids to His decrees are conscience and revelation. Thereby Luther rejected the idea of the absolute contained in God’s reason, together with the notion that God is bound to decree according to His reason, and that reason is the human aid to God’s decrees.

Luther’s theological break with Aristotelian interpretations of theology was facilitated by the influences of nominalism exerted by Duns Scotus, William of Ockham and Gabriel Biel, as well as the upcoming trend of Christian humanism reflecting a pronounced Ciceronian spirit<sup>6</sup> in its

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3 See Luther’s description of natural law in his commentary on St. Paul’s letter to the Romans, as the true and eternal rule of righteousness presented to the men of all nations and all times, who would frame their lives conformably with the Will of God, for although the Gentiles did not receive the written law of Moses, yet they received the spiritual law which is impressed upon all, both Jews and Gentiles, to which all are under obligation.

4 For an informative analysis of the influence of Anselm, Bernard of Clairvaux, Duns Scotus and William of Ockham on Luther’s break with scholastic theology, cf. Moss, 2005:1-19.

5 From an epistemological perspective Luther rejected the belief that man can truly understand the will of God by his reason or truly reflect it in his law, as well as the concept of God as a God of reason and of law (cf. Berman, 1997:189).

6 The Renaissance saw a rebirth of the interest in the philosophy of Greece and Rome. In many respects Cicero’s works were of foundational importance for the development of a distinct culture of Christian humanism. The effect of late medieval nominalism on Luther’s theology is apparent in his reflection of

opposition to Thomistic theology and philosophy. Within his evangelical theology Luther fruitfully accommodated the nominalistic distinction between philosophy and theology, as well as the Ciceronian emphasis on duties and man's moral commitments in the quest for peace, justice and the promotion of the common good in the public sphere.

To Luther man's fall into sin corrupted all man's natural faculties and endowments. All of man's physical and spiritual properties reflect the devastating effects of sin. In effect Luther rejected not only the notion of the "natural light" emanating from man's reason, but also the implications that human nature somehow supplies man with uncorrupted images of moral duties and rights. Luther's efforts to return to the evangelical roots of man's obligations towards God and towards his fellow-man demanded from him a scriptural explanation of man's knowledge of natural law as the fountainhead of moral duties and rights towards his neighbour. To this end Luther utilised the theological perspectives he had developed pertaining to man's personhood, human nature and man's moral duties and rights receiving their form from the moral law, in the formulation of his metaphysical perspectives on duties and the idea of right in the public sphere.<sup>7</sup>

## 2. THE IMAGE OF GOD IN MAN AND HUMAN NATURE

### 2.1 Man's createdness in the image of God

Luther's views on law, human rights and the legal order are closely related to his views on the personhood and nature of human beings. To Luther mankind occupies a unique place in God's creation due to man being created to the image of God (LW (AE), 1:57 (LG, Ge 1)).<sup>8</sup> Luther's understanding of the image of God is that Adam had it in his being and that he not only knew God and believed that He was good, but that he also lived a life that was wholly godly, "that is, he was without the fear of death or of any other danger, and was content with God's favour" (LW (AE), 1:62 (LG, Genesis 1)). In Adam there was an enlightened reason, a true knowledge of God, and a most sincere desire to love God and his neighbour (LW (AE), 1:63 (LG, Genesis 1)). Also man's rule over creation is a reflection of God's rule over the whole universe.

Man's whole person and nature carried the image and likeness of God. However, due to man's fall into sin, not only is man's flesh disfigured by the "leprosy of sin," but everything we use in this life has become corrupt (LW (AE), 1:63 (LG, Ge 1)). Through the Gospel the original image

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the view of Duns Scotus that love and will hold prior place over the intellect, and the human need of revelation in addition to our natural knowledge (see Micklem, 1953). This influence was carried forward by William of Ockham and his German follower Gabriel Biel – founders of the *via moderna*. Biel appealed to St. Paul for the view that love, when directed to God, makes human beings truly wise, whilst Scotus represents a widening gulf between theology and philosophy. In Scotus theology deals with what is given to us to believe by supernatural means in revelation; philosophy deals with whatever comes within the scope of natural reason.

7 Van Wyk, 1986:44f. describes Luther's ethics as an ethics of faith, of love, and of freedom. Also cf. Vorster, 2004:73-74.

8 The specific work of Luther referred to, is noted, e.g. *Lectures on Genesis* (LG), and the relevant scriptural citation given where applicable. Abbreviations for Luther's particular works used: *Lectures on Genesis* (LG); *The Three Symbols or Creeds of the Christian Faith* (TS); *Lectures on Deuteronomy* (LD); *Selected Psalms* (SP); *Lectures on Titus, Philemon and Hebrews* (TP&H); *The Catholic Epistles* (CE); *Word and Sacrament* (W&S); *The Confession Concerning Christ's Supper* (CCS); *Sermon on the Mount and the Magnificat* (SM&M); *Sermons on the Gospel of St. John* (SJ); *Lectures on Romans* (LR); *The Freedom of a Christian* (FC); *Disputation Against Scholastic Theology* (DST); *The Book of Concord* (BK); *Sermons* (S); *Lectures on the Psalms* (LP); *Lectures on the Minor Prophets* (LMP), and *On the Councils of the Church* (CC).

has been restored. Although man's intellect and will have remained impaired by sin, the Gospel ensures that we are formed once more according to "that familiar and indeed better image," because we are born again into eternal life" or rather into the hope of eternal life by faith, that we may live in God and with God and be one with Him, as Christ says"<sup>9</sup> (LW (AE), 1:63 (LG, Genesis 1)). The image of the "new creature" begins to be restored by the Gospel in this life, but it will not be finished in this life. But when it is finished in the Kingdom of the Father then man's will will be truly free and good, the mind truly enlightened, and the memory persistent. The godly have within themselves the unfinished image which, on the Last Day, God will bring to perfection in those who have believed His Word (LW (AE), 1:64 (LG, Ge 1)).

Luther concludes that the image of God was something most excellent, in which was included eternal life, everlasting freedom from fear, and everything that is good (LW (AE), 1:65 (LG, Ge 1)). To Luther also man's actions reflect the divine image. Whereas the rest of the animals are designated as "footprints of God," man alone is God's image (LW (AE), 1:67 (LG, Ge 1)). In the remaining creatures God is recognised by His footprints; but in the human being, especially in Adam, God is truly recognised because in him there is such wisdom, justice, and knowledge of all things that he may rightly be called "a world in miniature" – he has an understanding of heaven, earth, and the entire creation (LW (AE), 1:67 (LG, Ge 1)). To Luther the effects of sin on man's person and nature were profound: in opposition to the view that the image and similitude of God remain even in a wicked person (see LW (AE), 1:60 (LG, Ge 1), Luther states that the image of God in man disappeared after sin in the same way that the original world and Paradise disappeared; after sin all these things were marred to the extent that all creatures and the things which were good at first later became harmful on account of sin (LW (AE), 1:90 (LG, Ge 2)). Regarding the believer's regeneration, Luther observes that God rejoiced in the counsel and work by which man was created, so today too, He takes pleasure in restoring this work of His through His Son and our Deliverer, Christ (LW (AE), 1:68 (LG, Ge 1)).

## 2.2 Image and substance

Luther's distinction between image and substance demarcates the sphere of creation from divine nature. To Luther all images are defective in that they do not have and are not composed of the same single substance or nature of that which is being depicted. They have a different substance or nature. When a painter, a woodcarver, or a sculptor depicts a king or a prince on a canvas, in wood, or in stone with all the exactness that he can possibly produce, then, although it is indeed an image or "counterfeit," it is still not the substance or nature of the original: "It is a mere figure, image, or form of its original, with a different substance" (LW (AE), 34:220 (TS)). Therefore it can neither be nor be called an image of the substance of a person. Although it is called an image, it cannot be an image of the original substance or nature, "nor has it arisen from his nature or come into being and of his nature, either" (LW (AE), 34:220 (TS)). Thus it remains and must remain an image of the person fashioned out of a different substance or nature (LW (AE), 34:220 (TS)). Applied to God's image and similitude in man, this means that even if man were to be regarded as the "counterfeit" of God, man in no way can be regarded as partaking in the divine substance or nature (LW (AE), 34:220 (TS)). Luther's reluctance to subscribe to the Aristotelian-Augustinian view in Augustine's *On the Trinity* (IX-XI), that the image of God is the powers of the soul-memory, the mind or intellect, and the will (LW (AE), 1:59 (LG, Genesis 1)), is to be understood in the light of Luther's fear that one or more aspects of man's existence will be clothed in divinity

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9 John 17:21.

– in particular views concerning free will, which have their origin in that image (LW (AE), 1:60 (LG, Genesis 1)). In all respects, to Luther, man remains the product of God’s creational work, without any divine qualities or abilities. Although man is a product of God’s creational endeavours, there is a mysterious side to man’s existence – man is unable to find the being or end of his person, and therefore is unable to understand himself completely (see LW (AE), 4:63 (LG, Ge 21)).

### 3. PERSONHOOD, THE NATURE OF MAN AND EQUALITY

#### 3.1 The personhood of man and the equality of all human beings

Parallel to the Ciceronian view of the moral equality of mankind, Luther held that all men, as persons, are morally equal. All men and all races of men, to Cicero’s mind, possess the same capacity for experience and for the same kinds of experience, and all are equally capable of discriminating between right and wrong: “Out of all the material of the philosophers’ discussions, surely there comes nothing more valuable than the full realisation that we are born for Justice, and that right is based not upon man’s opinions, but upon Nature. This fact will immediately be plain if you once get a clear conception of man’s fellowship and union with his fellow-men. For no single thing is so like another, so exactly its counterpart, as all of us are to one another. Nay, if bad habits and false beliefs did not twist the weaker minds and turn them in whatever direction they are inclined, no one would be so like his own self as all men would be like others” (L, 1.10.28-29).

Cicero infers that, because all men are subject to one law and therefore are fellow-citizens, they must be in some sense equal. For Cicero equality is a moral requirement rather than a fact; in ethical terms it expresses much the same conviction that Luther expressed by saying that God is no respecter of persons.

Luther believed that the human person is composed of both soul and accompanying faculties and abilities. Apart from the human body, metaphorically speaking, serving as the “building” of man’s person, the human being is also composed of soul (LW (AE), 5:23 (LG, Ge 26)); heart (denoting the essence of man ) (LW (AE), 8:24 (LG, Ge 45)), and reason ( see LW (AE), 1:63 (LG, Ge 1)).

Regarding man’s personhood, all human beings are equal in the face of God. In his Lectures on Genesis (LW (AE), 3:65 (LG, Genesis 16)), Luther maintains that in spite of great differences between people, for example the life of a king and that of a private person, all men are equal before God (LW (AE), 3:65 (LG, Ge 16)). In the Kingdom of God all men are equal before God in their personhood because God does not regard the person<sup>10</sup> (LW (AE), 4:32 (LG, Ge 21)). God, who distributes His gifts without respect of persons, wants to be feared, even if the world cannot be without distinction of persons. God does not put up with arrogance in His kingdom; and if a person ever becomes insolent He immediately removes him and raises up one who is lesser than him (LW (AE), 7:167 (LG, Ge 41)). God is not only the God of the Jews but also the God of the Gentiles (LW (AE), 7:201 (LW, Ge 41)). God does not take any person’s position into consideration when he confers salvation (LW (AE), 7:184 (Ge 41)). God will not suffer the bonds of human wisdom and reason to be imposed upon Him. Because God does not regard persons or the inequality between them, they cannot please God except solely through the circumcision of the heart (LW (AE), 9:110 (LD, Deuteronomy 10)). The fact that God does not regard persons implies that He judges for the widow and the orphan (LW (AE), 9:113 (Dt 10)). Alluding to the Biblical history of

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10 Luther refers to Acts 10:34; Romans 2:11; Ephesians 6:9; Colossians 3:25.

David, Luther observes that because God selects without any discrimination when He distributes His gifts, He made the shepherd boy David a great and shrewd and blessed king, while He let Saul the king become a fool and an unhappy and frustrated man (LW (AE), 13:214 (SP, Ps 101)). He regards us all as one dough, one like another, and does with us as He pleases (LW (AE), 13:214 (SP, Ps 101)). Christians are required to follow the example of God's love without pretence – sincere, honest, and authentic, so that they love friends and enemies equally. A love which discriminates between persons is an inactive love, not an active one, “an unauthentic love is not an authentic one”<sup>11</sup> (LW (AE), 29:53 (TP&H, Tit 2)). Loving one's neighbour means placing oneself below the other person and exalting him. Although the gifts of God are manifold and different, so that one person is in a higher position than another, no one knows who is highest before God. Therefore everyone, even if he occupies a high position, should humble himself and honour his neighbour (LW (AE), 30:79 (CE, 1Pe 2)). Luther regards the precepts of love as so eminent that in addition to the three institutions (or orders) of the household (or the community of the family), the ecclesiastical community and civil society, he distinguishes the “common order of Christian love,” in which one serves not only the three orders, but also serves every needy person in general with all kinds of benevolent deeds (LW (AE), 37:365 (W&S, CCS)). All men, in their being human, are therefore all equal before God as persons and should be loved and respected equally. In the human being's deepest seat of personhood, all men are equal.

The “point of contact” between God and man, is man's conscience. Through the preaching of God's Word and the work of the Holy Spirit, man's conscience “opens up”, so to speak, in order for man to serve God and his neighbour, joyfully and with an assured conscience, with works of love. Ebeling describes this “point of contact” between God and man as follows: the Word of God has the power to strike man at his most sensitive point, the very heart of his being, where the decision is made as to what his position should be ultimately (Ebeling, 1980:119). Luther clearly does not follow the idealist interpretation of the conscience as “an independent voice” within man's heart which gives him independence and serves as the basis for man's autonomy: “What he (Luther) means is that man is ultimately a hearer, someone who is seized, claimed, and subject to judgement, and for this reason his existential being depends upon which word reaches and touches his inmost being” (Ebeling, 1980:120). In the same vein Dowey (1984:148) states that conscience in Luther's legal philosophy becomes roughly equivalent to God-consciousness. In effect, as far as conscience is concerned, all are equal before God.

### **3.2 Human nature and the inequality of men**

The Stoic position of man's natural inequalities, in spite of all men being morally equal, found its parallel in Luther's comments on the inequality of men in the order of creation. Although, according to Cicero, all men are equal in a moral sense, they are not equal in learning, and it is not expedient for the state to try to equalise their property. He suggests that inequality is nothing but error, bad habits and false opinions that prevent men from being in fact equal. Cicero adds that the corruption caused by bad habits is so great that “the sparks of fire”, so to speak, which nature has kindled in mankind, are extinguished “by this corruption,” and the vices which are their opposites “spring up and are established” (L, 1.12. 33).

Luther uses the term “human nature” to include man's heart, his reason, and his intellect (LW (AE), 1:43 (LG, Ge 6)). Human nature also includes man's emotions. So, for example, says Luther, God has implanted in man's nature the love of one's spouse, children, and relatives and mercy

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11 Romans 12:9.

towards those who have suffered misfortune (LW (AE), 6:252 (LG, Genesis 35)). Elsewhere Luther draws a distinction between man's "inner" and "outer" nature (LW (AE), 6:355 (LG, Ge 37)), and man's "lower" and "higher" nature (LW (AE), 21: Introduction (SM&M, Mt 5:1)) (corresponding with the distinction between "flesh" and "spirit").

Whereas Luther uses the term "person" mainly to denote man as a human being, created by God, he refers to the human nature of man to explain the impact of sin on man's natural endowments. At the creation of man, Adam was created in a state of original righteousness (LW (AE), 1:164 & 167 (LG, Ge 3)). In Adam's righteous nature he knew God and was the image of God, and in him shone forth the similitude of the divine nature through his enlightened reason, through his justice and his wisdom (LW (AE), 1:65 (LG, Ge 1)). Also Eve had these mental gifts in the same degree as Adam. Her very nature was also full of the knowledge of God to such a degree that by herself she knew the Word of God and understood it (LW (AE), 1:66 (LG, Ge 1)). Because God created Adam in innocence and righteousness, solely because of the excellence of his nature, without any new enlightenment, he had complete knowledge. From this enlightenment there also followed his rule over the animals in accordance with Adam's will (LW (AE), 1:119 (LG, Ge 2)). Originally, therefore, mankind was created with a perfect nature (LW (AE), 1:56 & 62 (LG, Ge 1)). Through man's fall into sin, man's entire nature became depraved (LW (AE), 1:141 (LG, Ge 3)), and man's natural endowments became impaired (LW (AE), 1:143 (LG, Ge 2)). Man's unspoiled nature became corrupt (see LW (AE), 1:80 & 104 (LG, Ge 2)). Because of evil, man's natural endowments became impaired and came under God's wrath and condemnation (LW (AE), 2:121, 123, 127 & 128 (LG, Ge 8)). To Luther nothing good remained in human nature. Therefore, human nature is "a bag of worms" (LW (AE), 22:104 (SJ, Jn 1)); human nature is described as "evil worms" (LW, 24:223 (SJ, Jn 15)); man indulged in self-love (LW (AE), 25:475 (LR, Ro 13)); man's natural reason is impaired and his natural will became bad (LW (AE), 31:376 (FC), also cf. 31:15 (DST)). Although man (as a human person) remained essentially human, human nature was corrupted and changed. Man's natural knowledge of justice and law, too, became infected by sin.

Through the atonement of Christ and the Gospel, man's inner nature is being renewed every day though his outer nature is wasting away (LW (AE), 6:355 (LG, Ge 37)). Through the Gospel, man's nature is renewed by the Holy Spirit to conform to the example of Christ by loving God and one's neighbour.

Because God distributes His gifts and burdens of various kinds to different people, all men should observe the rule that everyone should remain in his calling and live content with his gifts (LW (AE), 3:129 (LG, Ge 17)). The effects of sin also produce all kinds of inequalities – disparities in wealth, abilities and merit. Therefore people should be treated in accordance with the principle of geometric equality in the kingdom of creation. Maintaining the arithmetic proportion would bring about anarchy and destroy order. Hence geometric proportion must be applied in the affairs of the government and the household (LW (AE), 3:130 (LG, Ge 17)).<sup>12</sup> Different from the principle of mathematical accuracy applied in the private affairs of trade, Luther pleads for treating men according to the principle of geometric equality in the light of the fact that "(n)ot all in the same way, for all of you are not equally strong," and because the principle of geometric proportion "does not compare one thing with another, as is customarily done in the market place; but it compares the persons and arranges the matter according to them" (LW (AE), 5:308 (LG, Ge 29)).

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12 Luther relies on the verbatim quotation from Augustine's monastic rule *Regula ad servos Dei, I, Patrologia, Series Latina, XXXII, 1378.*

Arithmetic proportion has its place in the kingdom of God. There it is proper for all things to be equally distributed among unequals. Therefore it is arithmetic proportion “for the eyes and the feet, inasmuch as they are members of one body, to bear the same and equal burdens” (LW (AE), 3:130 (LG, Ge 17)).

In his lectures on Genesis, Luther elaborates on the principle of geometric proportion in the kingdom of creation: the differences in persons must be considered, and then one must assign to everyone his place and distribute the burdens accordingly. First, therefore, the difference in the person must be observed; then one must consider the duties and/or the station of each person (LW (AE), 8:173 (LG, Ge 48)). According to Luther, Aristotle deals with these matters in a very fine way, thereby expressing the grace which should have a place in the government, in the home and in the state (LW (AE), 8:173 (LG, Ge 48)). Geometrical proportion provides government with a middle course in order to accomplish justice, “(f)or virtue is a quality that resolves about a middle course, as a wise man will determine” (LW (AE), 8:174 (LG, Ge 48)). The test for doing justice according to the principle of geometric proportion in the kingdom of creation is expressed by Luther as follows: to render to each person what is his own; to bother no one; and at the same time, to help others, to promote their welfare, to prevent damage and violence, so that the guilty may be punished and the innocent protected by restraining the wicked and protecting the good, in order for the state to be in good condition and so that each person may in peace enjoy what is his own (LW (AE), 18:260 (LMP, Mic 6)).

The principle of geometric proportion should not be confused with the principle of enforcing criminal justice in an unbiased way. In criminal matters the punishment of the wrongs of offenders should be directed at the wrong and not at the person, and it is also expressive of love in so far as it is intended to help the neighbour, because if punishment were to be withheld, the wickedness of the world would destroy “the government and the church and everything” (LW (AE), 21:78 (SM&M, Mt 5)).

## 4. THE FOUNDATIONS OF FUNDAMENTAL INDIVIDUAL RIGHTS IN LUTHER’S THEOLOGY

### 4.1 Moral duties and rights

Luther rejected philosophy in matters of faith, and he was afraid to acknowledge the philosophical insights of pagan thinkers like Cicero, disdaining to use the language of philosophy in order to communicate his message (see Forrester, 1972:330-329).<sup>13</sup> Luther’s discourses on fundamental

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13 In *LW (AE)*, 13:198 Luther explicitly alludes to the valuable insights of pagan thinkers in the domain of politics: “God made the secular government subject to reason because it is to have no jurisdiction over the welfare of souls or things of eternal value, but only over bodily and temporal goods, which God places under man’s dominion. For this reason, nothing is taught in the Gospel about how it is to be maintained and regulated, except that the Gospel bids people honour it and not oppose it. Therefore the heathen can speak and teach about this very well, as they have done. And, to tell the truth, they are far more skilful in such matters than the Christians ... Whoever wants to learn and become wise in secular government, let him read the heathen books and writings.” Luther mentions the useful contributions of several pagan authors: “God gave and preserved such heathen books as those of the poets and the histories, like Homer, Demosthenes, Cicero, Livy, and afterwards the fine old jurists ... that the heathen and godless, too, might have their prophets, apostles, and theologians or preachers for their secular government ... Thus they had Homer, Aristotle, Cicero, Ulpian and others, even as the people of God had their Moses, Elijah, Isaiah, and others; and their emperors, kings, and princes, like Alexander, Augustus, etc., were their Davids and Solomons” (*LW (AE)*, 13:199 (LP, Ps 101)).



rights, however, show striking similarities to Cicero's arguments concerning duties, natural law, justice and the virtues binding together the individual citizens into a commonwealth subject to justice. The political deduction which Cicero draws from the ethical axiom of equality is that a civil society cannot exist permanently, or at least cannot exist in any but a crippled condition, unless it depends upon, and acknowledges, and gives effect to, the consciousness of mutual obligations and the mutual recognition of rights that bind its citizens together. Civil society, to Cicero, therefore, is a moral community, a group of persons who in common possess the state and its law. Unless political society is a community for ethical purposes and unless it is held together by moral ties, it is nothing. The moral law does not make immorality impossible but in the measure that it does so, it loses the true character of a state: "The commonwealth is the people's affair; and the people is not every group of men, associated in any manner, but is the coming together of a considerable number of men who are united by a common agreement about law and rights and by the desire to participate in mutual advantages" (DRP, 1.25.39).

In his *De Officiis*, Cicero argues in favour of human life being universally subject to moral duties, and states that no phase of life, whether public or private, whether in business or in the home, "whether one is working on what concerns oneself alone or dealing with another," can be without its moral duty, adding that on the discharge of such duties depends all that is morally right, and on their neglect all that is morally wrong in life (DO, 1.2.4). The supreme good is connected with virtue and is measured by a moral standard, enabling one to value friendship, justice and generosity (DO, 1.2.5). To this Cicero adds that "absolute duty" distinguished from "mean duty," is called right (DO, 1.2.8). Among the specific characteristics of man, Cicero enumerates reason, the search after truth, and moral sensibility (DO, 1.4.11-14). He adds that all that is morally right arises from one of four sources: it is concerned either (1) with the quest for truth; (2) with the conservation of organised society, with rendering to every man his due, and with the faithful discharge of obligations assumed; (3) with the greatness and strength of a noble and invincible spirit; or (4) with the orderliness and moderation of everything that is said and done, wherein consists temperance and self-control (DO, 1.4-5.15).

From the perspective of moral duty, Luther links man's stations, offices and vocations in life, and the callings accompanying these divine "institutions", to God's calling of man in all areas of life to serve Him in all of the spiritual and worldly domains and in all hierarchies and estates of creation. In fundamental respects the twofold duty of love – love towards God and one's neighbour – forms the basis of man's moral duties.<sup>14</sup> These duties of love contained in the divine law, and stamped on man's conscience in the form of natural law precepts, have universal application in all spheres of human society.<sup>15</sup> The precepts of natural law do not only contain God's divine ordinances, they also provide man with connatural rights to fulfil his calling and duty towards God and to live in peace with his fellowman. The institution of marriage can be taken as a typical example in Luther's theology. Marriage – the union of man and woman – is an institution according to natural right. Since natural rights are in essence unchangeable, the right to contract marriage and form domestic associations (societies) must always remain. In the Book of Concord

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14 Luther's commitment to the command of love in the social sphere is indicative of his following of St. Augustine and the impact of Biel's appeal to St. Paul's teaching that love, when directed to God, makes human beings truly wise.

15 In his comments on Galatians 5:14, Luther writes: "All men have a certain natural knowledge implanted in their minds (Romans 2:14-15), by which they know naturally that one should do to others what he wants done to himself (Matthew 7:12). This principle and others like it, which we call the law of nature, are the foundations of human law and all good works" (*LW (AE)*, 26:53).

(BK), it is stated that where nature does not change, there must remain that ordinance which God has built into nature, and human laws cannot abolish it. Therefore the union of man and woman “is by nature right” (BK, Apology of the Augsburg Confession, 1, 11, 7). Therefore natural rights are really divine rights because they are stamped on man’s conscience. Luther criticises the arguments of his opponents who say that originally marriage was commanded but that it is no longer commanded, as “ridiculous”: “This is the same as saying that formerly men were born with sex and now they are not or that originally they were born with a natural right and now they are not.” Luther adds: “No one could fabricate anything craftier than this foolishness, thought up in order to circumvent the natural law” (BK, Apology of the Augsburg Confession, 1, 11, 7).

Briefly summarised, fundamental rights, according to Luther, could be described as duty-based legal entities, enforceable within specific moral limits, stamped on man’s conscience, to serve God and one’s neighbour.

#### **4.2 Duty, right, public virtue and the moral law**

Luther followed broadly Cicero’s arguments basing the virtues of justice<sup>16</sup> and charity on man’s moral duties and natural law accessible by human reason.<sup>17</sup> Luther added though that human reason can only gain knowledge of natural law through the enlightening effects of the Gospel and the work of the Holy Spirit. Of the four divisions of moral goodness distinguished by Cicero the first is the quest for truth. This provides the morally correct “right” to pursuit truth (cf. DO, 1.6.18-20). In the pursuit of truth, we should take cognisance of “the wealth of possessions the human mind enjoys,” what the purpose is, to strive after and accomplish that for which we have been born and placed in this world, what it is that unites men, “and what natural fellowship there is among them” (Laws (L), 1.5.16). In addition only after all these things have been made clear can the origin of law and justice be discovered (L, 1.5.16). This includes universal justice in the form of natural law, defined by Cicero as “the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite” (L, 1.5.18). Elsewhere Cicero observes that the origin of justice is to be found in Law, for Law is a natural force; “it is the mind and reason of the intelligent man, the standard by which Justice and Injustice is measured” (L, 1.5.19). In an indirect way Cicero advances justice to the position of the supreme virtue, and knowledge of natural laws and rights to the status of that which is universally manifested as moral right (L, 1.6.19).

To Cicero the corruption of man is so great that the “sparks of fire”, so to speak, which nature has kindled in mankind, are extinguished by corruption, “and the vices which are their opposites spring up and are established” (L, 1.22.33). However, in principle, through “right reason”, man is able to know the precepts of justice, because all men have received justice (L, 1.22.33). In his *De Officiis*, Cicero adds that because the whole of mankind is subject to the same law of nature, all men are forbidden by natural law to wrong their neighbours (DO, 3.6.27). To Cicero injustice is fatal to social life and fellowship between man and man. If men are so disposed that each, to gain

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16 For the status and essence of justice in Luther’s theology, cf. Raath, 2006:335-354.

17 This does not exclude the impact of St. Paul’s argument on the fact that non-Christians have genuine insights into the existence and character of God, supplemented by the Gospel of Christ. At Lystra St. Paul stated the principle that all men are of like nature, and that nature bears witness to the goodness and greatness of God (Ac 14 and 17). To Luther rational thinking was important. Without it the unbeliever and the believer alike could bring disaster upon themselves. Philosophy could be used, but not as a substitute for faith and discipleship. To Luther philosophy was what it was to many great Christians in earlier ages – a good servant but a bad master (see Brown, 1990:136). In effect Luther opposed that which he saw as the “abuse” of reason in its efforts to quench the truth of Christian faith.

some personal profit, will defraud or injure his neighbour, “then those bonds of human society, which are most in accord with nature’s laws, must necessarily be broken” (DO, 3.5.21).

From an evangelical perspective Luther interprets Cicero’s views on justice to entail that man has a natural knowledge, albeit dimmed by sin, of justice, in so far as man was created with true knowledge of God and in the image and likeness of God, in whom the similitude of the divine nature shines forth through his enlightened reason, through his justice and his wisdom (LW (AE), 1:65 (LG, Genesis 1)). Righteousness was not a gift separable from the nature of mankind: it was truly part of its nature to love God, to believe God, to know God, and to honour God (LW (AE), 1:165 (LG, Ge 3)).

The precepts of God’s divine justice in a moral sense were inscribed on the human person’s conscience and the human being was equipped to know and understand what God required of him. In man’s sinful state knowledge of divine justice is only possible to the extent that mankind is regenerated through faith in the Word of God and the working of the Holy Spirit. The light of reason is everywhere kindled by the divine light (LW (AE), 52:57 (Sermons II (The Gospel for the main Christmas Service, Jn 1[:1-14])). The divine law engraved on man’s conscience is a statement of supreme truth; it transcends the human ability to change or manipulate its contents according to the arbitrary human will or to considerations of utility. Divine justice is expressive of the supreme truth, transcends human manipulation, knowledge of which is gained through the Holy Spirit (cf. LW (AE), 11:507 (LP, Ps 119)). In short: justice is a statement of supreme truth (the love towards God and the neighbour), and therefore man’s first, supreme duty is to adhere to it, the nature of which is set out in the two tables of the Decalogue. Holy Scripture praises divine law as the highest manifestation of truth; the voice of this law of truth impressed by God in our hearts will continually be heard, because the Law of justice makes itself heard by all human beings (albeit not to the same degree) through the working of the Holy Spirit, in all its authority, loveableness and power. God’s supreme justice is a manifestation of the Lord’s love, mercy and benevolence towards mankind. This is reflected in God’s Law and impressed upon the conscience of all men.<sup>18</sup>

To Luther, then, fundamental right exists correlatively with the precepts of natural law, as a manifestation of divine law in a moral sense, enabling man to fulfil his calling and duties towards God and his neighbour; it receives its form from the moral law, towards attaining the virtues of love, justice and benevolence in human society.

### 4.3 Duties, rights and social benevolence

The importance of justice in the Ciceronian discourse on duties reflects his observation that the “first office of justice” is to keep one man from doing harm to another; and to lead men to use common possessions for the common interest, and private property for their own (DO, 1.7.20). On the other hand injustice is fatal to social life and to fellowship between man and man (DO, 1.5.21). Justice - doing what is right - and benevolence are closely attached. Cicero states that it is a breach of duty either to do for a friend what one rightly can do, or to do for him what is not right (DO, 3.10.43). Therefore moral right far outweighs apparent expediency (DO, 3.11.47). Cicero follows the Aristotelian emphasis of geometric proportion as the norm for doing justice in the public sphere: moral rightness arises from rendering to each his due (DO, 1.15). The basis for rendering to each his due is contained in acting benevolently towards others. Arguably the clearest statement of the principle of benevolence by Cicero is located in his Laws (1.12.34), to the effect that when

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18 Luther’s high regard for justice is reminiscent of Cicero’s argument in favour of justice as a universal, *per se* valid, rationally known benchmark for positive law embedded in nature (see Cicero, *DRP*, 3.33).

a wise man shows towards another endowed with virtue the kind of benevolence which is “widely diffused among men, that will then have come to pass which, unbelievable as it seems to some, is after all the inevitable result – namely, that he loves himself no whit more than he loves another” (L, 1.12.34).

Luther’s commitment to benevolence flows from the twofold command of love contained in the precept to love your neighbour as yourself and the demand to treat your neighbour as you would like to be treated.<sup>19</sup> Only by practising love for promoting benevolence in social relationships, can human society be steered towards its proper goal and the peace secured that is necessary for society to answer to its callings and to fulfil its offices and estates.<sup>20</sup>

Because peace is an eminent virtue in the temporal domain, the loving of oneself and one’s neighbour are the first steps towards promoting the much-needed peace without which no society can function (LW (AE), 18:260 (LMP, Micah 6)). To Luther, promoting the good and attaining justice are by implication only possible through the work of the Holy Spirit. For this reason we need the Decalogue not only to apprise us of our lawful obligations towards others: we also need it to discern how far the Holy Spirit has advanced us in His work of sanctification and by how much we still fall short of the goal (LW (AE), 41:166 (CC)).

Luther’s conception of natural law and natural rights come into play, as stated earlier, at the cross section of man’s callings, stations and estates on the one hand, and love, social benevolence and justice on the other. The divine ordinances inscribed on man’s conscience give rise to natural rights for man to fulfil his calling and duty towards God, to live in peace with his fellowman and to promote justice in society. To put this differently: a person has rights in order to discharge duties. John Witte (2002:302) observes that to speak of one without the other in Luther’s theology is ultimately destructive: “Rights without duties to guide them quickly become claims of self-indulgence. Duties without rights to discharge them quickly become sources of deep guilt (2002:302). Love, expressed as social benevolence, underlies and undergirds all social duties and rights – one person’s duties not to kill, to commit adultery, to steal, or to bear false witness thus give rise to another person’s right to life, fidelity and reputation – to claim one’s own right is in part a charitable act to induce one’s neighbour to discharge his or her divinely ordained duty (2002:203).

#### **4.4 Rights, duties and the common bonds of benevolence**

Cicero’s treatment of the bonds of benevolence constituting civil society also echoes in Luther’s treatment of these matters. Men, says Cicero, are not born for themselves alone, because our friends claim a share of our being; because “men are born for the sake of men,” they are able mutually to help one another (DO, 1.7.22). Men ought to follow nature as their guide, “to contribute to the general good by an interchange of acts of kindness, by giving and receiving, and thus by our skill, our industry, and our talents to cement human society more closely together, man to man (DO, 1.7.22). Human society is based on the principle of fellowship established by nature among men (DO, 1.16.50).<sup>21</sup> The first rule of duty requires man to lend assistance “preferably to people in proportion to their individual need” (DO, 1.16.49). Therefore there is in society a basic

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19 Cf. Raath, 2005:425-454 for the role of love and social benevolence in Luther’s legal philosophy. In this respect he developed the Pauline-Augustinian tradition of natural law.

20 The other side of this argument implies that the association of men in political society ceases to be a commonwealth when it ceases to be guided by the ends for which it exists – justice, benevolence and the common good.

21 In this regard Cicero follows Aristotle’s observation that it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the association of living beings who have this sense makes a family and a state.

necessity of man's helpfulness to man (DO, 2.3.12). Mankind is universally bound together by bonds of fellowship; uniting all men together and each to each (DO, 3.17.69). In Cicero's *De Republica* (1.25.39), by mouth of Scipio, the people constituting the commonwealth are defined as an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good, flowing from a "certain social spirit which nature has implanted in man" (DRP, I.25.39). Scipio adds that in a short time a scattered and wandering multitude had become a body of citizens by mutual agreement" (DRP, I.25.40). A state is an association or partnership in justice (DRP, I.32.49). Elsewhere, Scipio uses the metaphor of musical blending, to describe the harmonies binding together by agreement among dissimilar elements, the citizens in the commonwealth (DRP, 2.43.69).<sup>22</sup>

The "binding together" of citizens in civil society for the promotion of peace, love and mutual helpfulness, also receives emphasis in Luther's social theory. Although covenants, vows and pacts are not works needed by God, in the kingdom of creation these have a valuable role to play (see LW (AE), 4:78). In the public sphere covenants, vows and pacts may be performed as examples of good works, so citizens may swear oaths to government and seek its help, for example (see LW (AE), 4:84). Because women, citizens, princes, and nobles are creatures of God, and because they are all created for certain duties, those who attend to these duties carefully in their respective stations should know that they are pleasing to God provided only that they abstain from sins (LW (AE), 21:99f.). Therefore, covenants, vows and pacts may under particular circumstances be justified and pleasing to God. No one should swear in the making of covenants, vows and pacts unless he has a word of God letting him to do so. Where it is done with the authorisation of a word of God, it is all right to swear. The "authorisation of a word of God" means a command that I do it for His sake in the execution of my office or on order through those who are in office. For example if someone should happen to be imprisoned by the government and were required to swear an oath of non-aggression, or if a prince demanded an oath of allegiance, or if a judge demanded an oath from a witness – then it would be his duty to take the oath. Luther adds the justification contained in the "binding together" of civil society: God has so ordained and constituted the earthly realm that one person must bind himself to another, so that all dubious questions may be adjusted, confirmed, and decided by the use of an oath, as the Epistle to the Hebrews says<sup>23</sup> (see LW (AE), 21:99f.). The first essential for binding oneself by means of an oath, therefore, is obedience to the government, as a confirmation of the truth or as a means of preserving something for the sake of peace and harmony. The other essential is love. Even though an oath may not be required by the government, it may be necessary for the good of our neighbour – "You shall love your neighbour as yourself."

On these two grounds Christians may exercise their right of evangelical freedom by binding themselves. This is fundamentally a freedom of conscience which liberates the conscience from works (LW (AE), 9:73). Freedom reigns in the spirit and conscience; it is also that freedom under which all commandments are summed up. Everything not specifically commanded by God is abrogated and made a matter of free choice (see Luther's pamphlet, *The Freedom of a Christian* (1520) in LW (AE), 31). All the duties and rights contained in the Decalogue flow from the Christian's right of Evangelical freedom, a freedom manifested in and flowing from the conscience of freedom. To Luther conscience itself does not have an absolute freedom because the word of God as revealed in conscience has a subjective determinant.

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22 Although the text of Cicero's *DRP* was lost for more than seven centuries, and a copy of the manuscript discovered in the Vatican Library in 1820, at least one-third of this work had remained, whilst a number of quotations were scattered through the works of Augustine.

23 Hebrews 6:16.

## 4.5 Conscience of freedom and the right to freedom of conscience

Whereas natural law refers to God's ordering of the universe and the functioning of the human will in accordance with God's will, the latter is natural right, or justice, understood in human society as distributive justice; the human conscience is natural right within the human soul, the ability to distinguish between right and wrong (see Dowey, 1984:148). The most fundamental right of the human person is the right to conscience of freedom.<sup>24</sup> This right receives its form from the divine moral law and the duties contained in God's Law. The seat of the right to freedom of conscience is man's innermost being, referred to by Luther as man's "conscience" or "heart" or "soul". Man's "soul" or "conscience" is immune from political governance (WA, 6:259 (Von den guten Werken (1520))<sup>25</sup>; WA, 19:636 (Ob Kriegsleute auch in seligem Stande sein können (1526))<sup>26</sup>). In the kingdom of the creation, worldly regiment has power only over man's body and external conduct, because only God governs the human will and soul (WA, 11:262<sup>27</sup>, 266 (Von Weltlicher Oberkeit, wie weit man ihr Gehorsam schuldig sei (1523)). Elsewhere Luther writes that only the Word of God has power over man's soul (WA, 11:266 (Von Weltlicher Oberkeit, wie weit man ihr Gehorsam schuldig sei (1523)); WA, 12:335 ((Erste) Epistel S. Petri gepredigt und aussgelegt. Erst Bearbeitung (1523))). No man has power over another's soul and religion. To the question whether heresy may be punished with the sword, Luther in principle maintains that heresy cannot be combated with fire or by drowning (see WA, 30(2):422, 426 (Artikel wider die ganze Satansschule und alle Pforten der Hölle (1530)); WA, 11:268 (Von weltlicher Oberkeit, wie weit man ihr Gehorsam schuldig sei (1523)). In his comments on the peasant uprising in 1524/5 Luther advised that the political authorities, in their suppression of the rebellion, may not intrude upon the right of subjective belief of individuals. However, in the event of tumult, violence and the propagation of violence, political authorities may act against individuals (WA, 18:298<sup>28</sup>, 299 (Ermahnung zum Frieden auf die zwölf Artikel der Bauerschaft in Schwaben (1525)). The war against heresy, to

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24 Cf. Heinrich Scholler's interesting observation to the effect that Luther's emphasis was rather on "the concept of conscience of freedom" than a "freedom of conscience" (1981:265-282). Scholler adds: "A law based on this awareness is a Christian-personal law and is closer to the right to give and receive brotherly love (*Nächstenrecht* or *Liebesgebot*) than to a law based on command and coercion (*Befehl* and *Zwang*). Such a Christian and personal law is the basis of neither an uncritical, pious state-oriented obedience, nor an anarchism based on religion. The fact that this position was not understood, and that the problem was reduced to the false dichotomy of obedience or anarchy marked the beginning of tragic developments in Germany."

25 Luther primarily has in mind man's freedom of religion flowing from man's conscience of freedom: "Ei Lieber, mit welchem Rechte ... setzet der Papst über uns Gesetze? Wer hat ihm die Gewalt gegeben, solche unsere Freiheit gefangen zu nehmen, die uns durch die Taufe geschenkt worden?" (*RS (DE)*: Vol. I, Part 2:98 (*Büchlein von der babylonischen Gefangenschaft der Kirche*)). In the original Latin Luther writes: "Obsecro, quo iure ... papa super nos constituit leges? Quis dedit ei potestatem ...?" (WA, 6:535 (34) – 535 (6)).

26 Luther deems the soul to be the seat of man's innermost being: "But the task of the temporal authority is to protect its subjects and to punish theft, robbery and adultery, as St. Paul says in Romans 13 [4] ... In all this we are to regard that which St. Peter bids us regard; and that is that the power of the temporal authority, whether it does right or wrong, cannot harm the soul, but only our body and our property ..." (*LW (AE)*, 44:91).

27 "Das weltlich regiment halt gesetz, die sich nicht weyter strecken denn uber leyb und gutt und was eusserlich ist auf erden. Denn uber die seele kan und will Gott niemant lassen regirn denn sich selbs alleyne. Darumb wo weltlich gewaltt sich vermisset, der seelen gesetz zu geben, do geryffit sie Gott ynn seyn regiment und verfuret und verderbet nur die seelen."

28 "So ist doch das die Summa, Man solle yhn das Evangelium lassen predigen, Dawidder kan und sol keyne oberkeyt, Ja oberkeyt soll nicht weren, was yderman leren und geluben will..."

Luther, is a spiritual struggle through God's Word (WA, 15:219 (Ein Brief an die Fürsten zu Sachsen von dem aufrührischen Geist (1524); WA, 17(2):125<sup>29</sup> (Luthers Fastenpostille (1525)). In effect this means that every person may believe what he/she prefers, as long as such belief does not lead to uproar and violence (WA, 26:145, 146; WA, 26:145 (22) – 146 (7)<sup>30</sup> (Von der Wiedertaufe an zwei Pfarrherrn (1528)). Furthermore, political authorities should act in an orderly fashion against public manifestations of violence or the propagation thereof (WA, 10(3):9, 14-20 (Predigten (1522)).<sup>31</sup> The duty of political authorities to punish public manifestations of heresy, says Luther, is not a forceful intervention into individuals' right of freedom of conscience (WA, Br. 3:616 (30f.) (Br. 11.11.1525<sup>32</sup>); WA, Br. 4:978)). Although no person may be forced in matters of religion, Luther maintained that public manifestations of heresy may be punished (WA, 31(1):207 (Psalmauslegungen (1529/32). Der 82. Psalm ausgelegt (1530)). This includes heretical statements denying the right of political authorities to govern in the public sphere (WA, 31(1):208 (Psalmauslegungen (1529/32). Der 82. Psalm ausgelegt (1530)). In effect it means that the individual's domain of privacy should be respected as long as heretical statements or manifestations of violence do not occur in public (see WA, 31(1) 213 (Psalmauslegungen (1529/32). Der 82. Psalm ausgelegt (1530)).

#### 4.6 The rights of freedom to truth, virtue and spiritual fulfilment

In Luther's theological system moral freedom is the seat of right – no true right can exist contrary to the moral law, because what is wrong cannot be right and therefore we have no true right to perform action which is forbidden by the moral law. The freedom to act, subject to the moral law, presupposes relationships with other people. These relationships are formed by the moral law, which grants freedom of action to persons and prohibits others from interfering with such actions. A right, therefore, is the authority to act, protected by the moral law which obliges others to respect that faculty.

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- 29 "Auffs ander, wie wyr uns halten sollen gegen die selben ketzer und falschen leren. Nicht sollen wyr sie aussrotten noch vertilgen. Er spricht öffentlich alhie, man soll es lassen mit eynder wachsen. Mit Gottis wort soll man hie alleyn handeln. Denn es gehet also zu ynn diser sachen, das wer heutte yrret, kan morgen zu rechte komen. Wer weys, wenn das wort Gottis seyn hartz rüren wird? Wo er aber verbrend oder sonst eruerget wird, so wird damit geweeret, das er nicht kan zu recht komen."
- 30 "Doch ists nicht recht, und ist mir warlich leid, das man solche elende leute so iemerlich ermordet, verbrennet und grewlich umbringt, Man solt ia eien iglichen lassen gleuben, was er wolt, Gleubet er unrecht, so hat er gnug straffen an dem ewigen feur ynn der hellen. Warumb wil man sie denn auch noch zeitlich martern, so ferne sie allein ym glauben yrren und nicht auch daneben auffrührisch oder sonst der oeberkeit widerstreben? Lieber Gott, wie bald ists geschehen, das einer yrre wird und dem teuffel ynn strick fellet? Mit der schriftt und Gottes wort solt man yhn weren und widder stehen, Mit feur wird man wenig ausrichten."
- 31 To Luther the practicing of love inhibits forceful action: "In den dingen, die da müssen sein oder von noeten sind, als da ist das man in Christum gleuben, handelt die Liebe dennoch also, das sie nicht zwinget noch alzu strenge feret... Dennoch sol die Liebe in diesem stueck nicht gestrenge faren und dieselbigen Messen mit gewalt abreissen: predigen sol mans, schreiben und verkuendigen sol mans, das die Messe auff solche weise gehalten suendlich ist, aber niemand sol man mit den Haren davon reissen, sondern man sol es Gott heim geben und sein wort allein wircken lassen one unser zuthun oder wercke. Warumb? Darumb, denn ich hab nicht in meiner Hand die Herten der Menschen als der Toepffer den Thon, mit jnen zu schaffen nach meinem gefallen, wie Gott aller menschen Herten hat in seiner Hand, sie zubekehren oder zu verstocken. Ick kan mit dem worte nicht weiter komen denn in die Ohren, ins Hertz kan ich nicht komen" (WA, 10 (3): 14-20 (24f.)).
- 32 "Debent enim principes publica flagita, ut periuria, blasphemias nominis Dei manifestas, quales iste, sunt, cohibere interim nihil cogentes, siue credant illi, sive non, qui prohibentur, neque si clam maledicant, sive non ..."

The “connatural” right of freedom of conscience according to Luther’s theological views pertains to all human beings because they are unceasingly moral. This presupposes that human beings have a general and appropriate right to the conservation and use of their faculties. Because a right is a faculty of free activity protected by the moral law, proceeding from the human conscience, corresponding to the duty in others to respect such right, the bearer of a right need not even know that he has such right or even be conscious of the moral nature of such right. Because man, including all his capacities, endowments and faculties, is the product of God’s creational work, man’s fundamental rights arise not from his own activity but from God.

The absolute right of freedom of conscience should, however, not be confused with the alleged right of religious equality based on the premise of the individual as the sole competent judge in matters of religion. The right of civil authorities to curb external manifestations of heresy and violence in Luther’s view is based on his rejection of the idea of universal scepticism underlying the right of freedom of expression of religious views and the cry for indifference of civil authorities in religious matters. The individual’s right of freedom of conscience is therefore limited by the rights of others and the state’s right to promote the truth, virtue and spiritual fulfilment, and its general duty to maintain peace, benevolence and justice.<sup>33</sup>

Right, in the theology of Luther, consists of subjective activity, exercised in freedom towards attaining virtue, subject to the moral law, in relationship with other persons on whom rests the duty of respecting such activity. This implies that right presupposes lawful action which is intrinsically good; the human person has no right to perform acts that are morally wrong. It also implies that Luther’s view of right broadly corresponds with Cicero’s statement that the nature of right is to be sought in the nature of human beings (L, 1.5), and more particularly in man’s conscience. Furthermore, Luther’s evangelical views on this issue follow the Ciceronian statement to the effect that we should love other human beings as ourselves because our nature is equal: “If this is the case with nature, so too in their judgment right would be cultivated by all. As the poet says: humans think that nothing human is alien to themselves. – This shows that an almost incredible act is done in the eyes of some people when one wise man bestows such extensive benevolence upon another endowed with equal virtue. Nevertheless, this act is necessary if he is to love another no less than himself. How does he differ, all things being equal?” (L, 1. 12).

The requirement of lawfulness for any action to constitute a right implies that although a person may contemplate immoral action and has the right to freedom of conscience to do so, the performance of acts become degraded through the wrong intention on the part of the person who performs such acts or who uses such acts toward some immoral end. The performance of immoral acts would exceed the limits of rights. In effect Luther’s use of the term “right” comes close to St. Thomas’s view that if one person attempts to infringe another’s right, it would be unlawful. This would not be the case if an effort were made to stop the abuse of right, provided that the person attempting to impede the abuse has the right to do so: “Human nature is changeable; consequently, what is natural to human beings is less than it should be. For instance, natural equity requires that what has been deposited should be repaid to the person who deposits it. If nature were always what it should be, this would always have to be done. Sometimes, however, the human will is turned to evil, and in this case it occasionally happens that the deposit need not be returned, *ne homo perversam voluntatem habens male eo utatur ut puta si furiosus vel hostis reipublica arma deposita reposcat* [in order to prevent a person with bad will from using it badly. For example, an aggressive person or an enemy of the State might ask for the return of the weapons he has handed

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33 This implies that political authorities have the duty to enforce love in the public sphere.



in]” (S.T., II-II, q. 57, art 2, ad 1). This places a moral limit to the right of what is proper to a person. Furthermore a right implies a relationship with other human beings according to which they remain morally obliged not to disturb the exercise of that faculty or moral activity. In essence, it implies that the duty of respecting moral freedom in others does not depend upon this faculty being a right, but on its being a right because others have the duty to respect it.

The moral freedom of conscience constitutes a right when human beings are obliged to respect this right, thereby creating a jural duty to respect this freedom. Jural duty is, therefore, the obligation that one human being has relative to the right of others. The right to freedom of conscience is, therefore, a personal faculty for enjoying that which is lawfully good. Thereby the right to freedom of conscience reflects a dual moral character: firstly, it presupposes lawfulness of the action on the part of the subject; secondly, it demands the moral duty on the part of other persons in relationship with the subject, of respecting that action.

From this fundamental human right it is a small step to identify other categories of rights. The first category of fundamental rights proceeding from man’s right to freedom of conscience includes man’s right to freely seek the truth, virtue and spiritual fulfilment relative to the duty of other individuals and political authorities to promote the truth, virtue and spiritual fulfilment of others. A second category of fundamental rights includes the rights to do justice, to promote peace and to act benevolently towards others.

## 5. CONCLUSION

Luther’s theological message conveys the view that whilst it is possible to arrive at joint statements with non-Christians of some of the rights recognised as pertaining to the human being as an individual entity, it is impossible to seek a common rational justification of such rights. Although, therefore, practical agreement is possible regarding such rights, theoretical agreement between different theoretical positions is impossible. More specifically Luther regards as a misconception the view that it is possible to decide a priori every detail of the norms of human conduct on lines claiming to be dictated by nature and human reason. According to Luther it is arbitrary and artificial to attempt a rational justification of the idea of human rights, or the idea of right in general. Therefore Luther approaches the idea of right from the metaphysical connotations of his theological perspectives in order to trace the moral requirements universally valid, in man’s individual and social existence, both for the human conscience and the written law, as permanent principles and the primal norms of right and duty.

In conjunction with the idea of right, natural law in the social theory of Luther serves as a revelatory “guide”, steering, according to the needs of time and circumstance, the contingent dispositions of human law, and guiding man’s awareness of his obligations and rights towards the eschatological destiny of mankind according to revelation.

Because of the contingent dynamics inherent in man’s existence, Luther’s view on fundamental rights does not allow for a declaration of such rights as an exhaustive and final statement, but rather as a metaphysical comprehension of the idea of right subject to man’s moral consciousness inspired by revelation through the Word and the Spirit, in addressing the practical needs of the times.

According to Luther’s jurisprudence, a clear distinction has to be drawn between God’s divine law, natural law (divine law in a moral sense), and positive man-made legislation. Natural rights (embedded in natural law) involve a concatenation of rights differing in degree, of which some meet an absolute requirement of the natural law, such as the right to liberty of conscience, with others responding to a need of the positive law, based on natural law, but modified in application by the requirements of social benevolence, peace and justice, such as the right to own property, the

liberty of expression, freedom of exposition, and freedom of association. These last types of liberty cannot be elevated to a position of absolute rights, but constitute rights (conditioned by social benevolence) which any society that has attained a condition of political justice is required to recognise. At this point it is clear that Luther would distance himself from modern liberalism's lack of distinction between absolute and relative human rights, and the contradictory arguments inherent in the liberal view to limit the practical exercise of rights which has been confused with the fundamental natural right of man and which theoretically and practically is proclaimed as absolute and sacrosanct.

Arguably the strongest appeal in Luther's theological discourses, is that positivistic philosophy based on observed facts alone, or an idealistic or materialistic philosophy of absolute immanence, is powerless to establish the existence of rights inhering by nature in the human being, which the civil community is required, not to grant, but to recognise and enforce as universally valid, and whose abolition or infringement no consideration of social utility can even for a moment authorise. To Luther, if there is no God, in awarding and determining man's moral rights and duties the only reasonable policy is that "the end justifies the means"; and to create a society where man shall finally enjoy his full rights, it is today permissible to violate any right of man if this is necessary for the purpose in hand.

Political society is not the only social entity subject to natural law. The family group and ecclesiastical society are under natural law as well, anterior to the civil society. It would thus be important in a declaration of rights to indicate precisely the rights and liberties deriving under this heading and which human law does no more than acknowledge. Furthermore, if it is true that the foundations of human rights lie in the divine moral law (natural law), which is at once the basis of duties and rights – these two concepts being correlative – it becomes apparent that a declaration of rights should normally be rounded off by a declaration of man's obligations and responsibilities towards the communities of which he is a part, notably the family group, the ecclesiastical community and the civil society.

In particular, it would be important to highlight the obligations incumbent on the conscience of the members of a society of free men, and the right of that society to take suitable steps – through accepted institutions for the guarantee of peace, justice and rights – to protect liberty against those who seek to use it in order to destroy it, to disrupt political society from within and to arouse among men the desire to deliver themselves from liberty itself.

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## KEY WORDS

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## TREFWOORDE

Welwillendheid  
Menseregte  
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Natuurreg

University of the Free State  
Department of Constitutional Law and Philosophy of Law  
E-mail: [raathA.RD@mail.uovs.ac.za](mailto:raathA.RD@mail.uovs.ac.za)