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MARTIN LUTHER ON JURISPRUDENCE— FREEDOM, CONSCIENCE, LAW

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INTRODUCTION

Martin Luther, who studied law at one time, coined the expression: "Lawyers—bad Christians." Luther struggled not only against canon law, but also against both the legally organized Catholic Church and the state, represented by a Catholic emperor. In direct contrast to this struggle was Luther's attachment to the sovereign of Saxony, his encouragement of governmental support for the Reformation, his advocacy of the caretaker function of the state—the government seeking to guarantee obedience to the Ten Commandments—and his opposition to violent resistance during the Peasant War of 1525. Based on this dichotomy, which was due to the historical situation, Rudolf Sohm formulated the thesis that a contradiction exists between canon law and the Lutheran concept of Church.¹ This thesis of a contradiction between a pragmatic affirmation of the law and an initially theoretical animosity toward the law has remained through the twentieth century, hindering the discovery of a Lutheran understanding of the law. In order to show that an original concept of law was also the basis of the religious Reformation, the idea of conscience and the concepts of freedom and law, which can be understood as the basic elements of Lutheran jurisprudence, as well as of all legal concepts, should be considered.²

THE PRE-LUTHERAN CONCEPT OF FREEDOM OF CONSCIENCE AND LAW

The Thomist concept of conscience and freedom differentiated between *synteresis*, the basic or original conscience, and *conscientia*, the conscience as applied through practical reason. Witnessing, investigating, binding, accusing or excusing (*testificari, instigare vel ligare, accusare vel excusare*) were, for Thomas Aquinas, attributes of the *conscientia*, the conscience in action.³ He saw conscience as

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†Translated by Patricia Sofroniew.

1. R. SOHM, *KIRCHENRECHT*, I (1918) ("The nature of canon law is in conflict with the nature of the Church." *Id.* at 700).

2. See also H. SCHOLLER, *FREIHEIT DES GEWISSENS* (1958); H. SCHOLLER, *DAS GEWISSEN ALS GESTALT DER FREIHEIT. DAS GEWISSEN ALS SINNGESTALT UND STRUKTUR-PRINZIP IM VERFASSUNGSRECHT*, (1962); H. Scholler, *Gewissen, Gesetz und Rechtsstaat*, in *GEWISSEN IN DER DISKUSSION*, 406 (1976).

3. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. 1, question 79, art. 13 ("*conscientia dicitur testificari, in quantum cognoscintus nos aliquid fecisse vel non; . . .*

merely a function of the *synteresis*. Conscience was not a capability or power or a physically distinct entity; rather, it was a specific function, namely, the application of knowledge.⁴ As the application of knowledge (*applicatio scientiae*), *conscientia* had the function of practical reason,⁵ which subsumes ideas, applying knowledge to individual cases. Aquinas mentioned that *conscientia* was also referred to as that which controls the spirit (*spiritus corrector*) and guides the soul (*paedagogus animae*); however, such characteristics were for him essentially the dictates of reason (*dictamen rationis*).⁶ *Conscientia* as the dictate of reason incorporated a goal-oriented system of knowledge (*ordo scientiae ad aliquid*) and was therefore only an act of practical reason that Aquinas also described as the affirmative or negative judgment of practical reason (*iudicium rationis practicae affirmantis vel negantis*).⁷

Beginning with this concept of conscience, the west experienced widespread moral and intellectual development, culminating in the American constitutional guarantees of liberty of conscience. A complete change in the perception of the theological and anthropological importance of conscience was the focal point of this development. Every declaration of human rights involves the concept of conscience, not as mere dictate of reason (*dictamen rationis*), but rather as dictate of conscience (*dictamen conscientiae*). The concept of a dictate of conscience first appeared in the draft of the Constitution of the English Levellers in 1647: "because therein we cannot remit or exceed a title of what our conscience dictates to be the mind of God."⁸ According to this conceptualization, conscience dictated "the mind of God" directly to the faithful; conscience was not application of the law (*applicatio legis*) or dictate of reason (*dictamen rationis*), but a means through which God's will was proclaimed to mankind. In the later constitutions of the North American colonies, and in documents such as the Bill of Rights, the guarantee of liberty

instigare vel ligare, in quantum iudicamus aliquid esse agendum vel non . . .; accusare vel excusare, in quantum cognoscimus nos bene vel male fecisse").

4. *Id.* ("*Conscientia non est potentia, nec habitus; sed est actus, scilicet applicatio scientiae*").

5. *Id.* at art. 13, reply objection 3 ("*conscientia est actus synteresis idio quandoque ponitur pro ea*").

6. *Id.* at art. 13, reply objection 1 ("*conscientia dicitur spiritus corrector et paedagogus animae, id est, dictamen rationis*").

7. *Id.* at art. 13. ("*conscientia definiri potest iudicium rationis practicae affirmantis vel negantis aliquid circa res particulares*").

8. *The Agreement of the People*, 28 October 1647, reprinted in G. Jellinek, *Die Erklärung der Menschen- und Bürgerrechte*, VÖLKERRECHTLICHE BEITRÄGE, Bd I H. 3, 78 (1919).

of conscience usually was referred to as the liberty to worship God according to the dictates of one's own conscience, or, as it is expressed in the Constitution of New Hampshire:

Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience and reason and no subject shall be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and reason most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion⁹

This concept of conscience eventually led to the idea of the sovereignty of the people. Natural law theories cannot be considered as the origin of the idea of the sovereignty of the people because philosophical or natural law theories are not capable of creating groups in society that undertake the realization of natural law ideas. On the contrary, the construction of a temporal order emerges by way of analogy to the metaphysical-religious ideas of social groups.¹⁰ Organized groups stood behind Browne, Williams and the Baptists, but not behind Althusius, Grotius or Pufendorf, in whose philosophical systems the religious movements took the sublime but insubstantial form of a natural law of reason.¹¹

The concept of human rights, closely connected with the new concept of conscience, originated in the revolutionary churches of England long before Pufendorf. Their new theory of the soul, which was similar to the concept of conscience developing in the theology of sects, was initially, however, incapable of establishing churches.¹² At first, the concept of conscience had no effect beyond the formation of sects. However, this theology of the sects eventually led to the establishment of new churches, as well as to new constitutional

9. N.H. CONST. pt. 1, art. 3 (1784). See Z. GIACOMETTI, QUELLEN ZUR GESCHICHTE DER TRENNUNG VON STAAT UND KIRCHE 684 (1926). The same definition of liberty of conscience: "according to the dictates of the conscience," can be found in the following constitutions: MASS. CONST. art II (1780); N.J. CONST. art. XVIII (1776); N.Y. CONST. art XXXVIII (1777); VT. CONST. ch. 1, art III (1777); VA. CONST. art. 1, § 16 (1776).

10. See A. DEMPF, SACRUM IMPERIUM 57 (2d ed. 1954).

11. H. TROELTSCH, AUFSÄTZE ZUR GEISTESGESCHICHTE UND RELIGIONSPHILOSOPHIE 305 (1925). Welzel's deduction of the American human rights theory from Pufendorf's natural law theory is unconvincing, although Pufendorf's ideas did influence the American preacher, Whight. H. Welzel, *Ein Kapitel aus der Erklärung der Menschenrechte*, in RECHTSPROBLEMS IN STAAT UND KIRCHE. FESTSCHRIFT FÜR R. SMEND IN DER REIHE DER GÖTTINGER RECHTSWISSENSCHAFTLICHEN STUDIEN, 387 (1952).

12. A. DEMPF, *supra* note 10, at 57.

concepts. Thus, the idea of sovereignty of the people had its roots in the new concept of conscience and can be understood as a transference of religious individualism to the political level, as an analogy to the doctrine of a general priesthood. Troeltsch characterized religious individualism as follows: "This religious individualism is the opposite of all ecclesiastical authoritative religion. It acknowledges only one authority, God and one's own conscience, through which God speaks."¹³ Calvinists and Baptists equated Christian freedoms with civil rights and Christian communities with civil communities, suggesting the transfer of the metaphysical principle of the community of the faithful (*communio sanctorum*) to the civil community.¹⁴ Hence, the principle of self-government within Christian communities, when transferred to the political sphere, led to the principle of the sovereignty of the people.¹⁵ This doctrine of self-government was inherent in the Reformatory churches' underlying tenet of an anti-hierarchical general priesthood. This general priesthood had its basis in the significance of conscience as the direct forum for God's word, without the mediation of historical or traditional cult institutions. The question of the role that the concept of conscience played within Reformation dogma is therefore the central problem (*punctum saliens*) in evaluating the sociological, political and legal effects of the religious revolutionary movements of the sixteenth and seventeenth centuries. The effect of the new concept of conscience was not confined to the practical and theoretical realization of the idea of the sovereignty of the people. Many modern fundamental constitutional principles, such as freedom of religion, separation of powers, and separation of church and state (*laicism*), can be attributed to the development of the concept of conscience. Within Protestantism not all movements, denominations, and sects contributed to the formation of the new concept of conscience to the same extent. On the contrary, a vast gradation can be found, based on differences in personal theology, historical connections with traditional orders, and the status of the church or sect within the state.

LUTHER'S CONCEPT OF CONSCIENCE AND FREEDOM

From a sociological viewpoint, Lutheranism played the smallest role in the development of new social formations, although Luther's

13. H. TROELTSCH, *supra* note 11, at 220.

14. K. BARTH, *CHRISTENGEMEINDE UND BÜRGERGEMEINDE* (1946).

15. H. WEINGARTEN, *DIE REVOLUTIONSKIRCHEN ENGLANDS* 288 (1868) ("The right of each religious community to self-determination and self-government was the basis of the doctrine of the sovereignty of the people, which they introduced to modern political consciousness").

new concept of conscience was the crucial impetus for the development of the concept of the sovereign conscience as it was later found in the Baptist-influenced Calvinism of the Netherlands, England, and North America. Within Calvinist and Baptist theology, the dogma of predestination and the doctrine of the continuing revelation of God, can be regarded as significant shifts of emphasis from the word of God as it is revealed in the Scripture to the word of God as it is revealed by conscience. For Max Weber, this shift was the basis of Calvinism's influence on economics and business affairs.¹⁶ According to Weber, free enterprise and the resulting capitalism are the economic analog of religious individualism. Similarly, the sovereignty of the people can be regarded as the political analog of the general priesthood of the faithful, based on the sovereignty of conscience.

In Luther's dogma, however, conscience is not a direct and absolute entity. God's word as it is revealed in the Scripture is only absolute within the context of the Scripture. Conscience itself does not have an absolute freedom because the word of God as revealed in conscience has a subjective (*i.e.*, indirect and relative) determinant.¹⁷ According to Barth, Protestantism cannot be equated with political or economic freedom, as this would constitute a confusion of the Reformation with humanistic individualism.¹⁸ Nevertheless, Luther's concept of conscience was the basis for a number of new political social structures, although only Calvinism subsequently achieved a systematic organization of society.

For Luther, *conscientia* was not an application of the law or knowledge (*applicatio legis vel scientiae*) as it was for Aquinas. Rather it was the mystical sphere in which a gigantic struggle for the redemption of the soul took place, in which the condemning law (*lex mortis*), the wrath of God (*ira Dei*), and the powers of temptation¹⁹ raged against sinners.²⁰ *Conscientia* was the ultimate temptation (*ultima tentatio*), the theological prison (*carcer theologicus*)

16. M. WEBER, GESAMMELTE AUFSÄTZE ZUR RELIGIONSSOZIOLOGIE, Bd. 1: DIE PROTESTANTISCHE ETHIK UND DER GEIST DES KAPITALISMUS 158-61 (1920).

17. K. BARTH, DOGMATIK I: PROLEGOMENA ZUR CHRISTLICHEN DOGMATIK 388, 409, (1927). The new Catholic interpretation of conscience avoids intellectualism. Auer, *Das Gewissen als Mitte der personalen Existenz* (lecture at the meeting of the Catholic Academy in Nürnberg, Bavaria, April 2-3, 1960).

18. K. BARTH, *supra* note 17, at 389.

19. JACOB, DER GEWISSENSBEGRIFF IN DER THEOLOGIE LUTHERS, BEITRÄGE ZUR HISTORISCHEN THEOLOGIE, Bd. 4, (1929).

20. *Id.* at 30. LUTHER, PREDIGTEN DES JAHRES 1528, Weimarer Ansyabe [hereinafter cited as WA] XXVII, 152, 4.

through which the voice of God spread fear and mortal terror (*tremor mortis*). As such, conscience was a horrible thing (*tenerrima res*).²¹ It is therefore understandable that, for Luther, freedom of conscience was not as important as the conscience of freedom (*conscientia libertatis*), a freedom from the condemning law and the wrath of God which raged in the conscience. He found this conscience of freedom in the justification based on faith, in "the inner being of conscientia in the primeval verbum."²² Only from this point of view, in order to ensure the conscience of freedom, did he also postulate freedom of conscience from man-made or church statutes that separate man from God.²³ According to Luther, laws that imposed rights and ceremonies that demanded action (*leges operum et ceremoniarum*) and the laws and traditions (*iura et traditiones*) of the constitutional legal Roman Church were a threat to the conscience of freedom.²⁴ Thus, the Lutheran concept of conscience is not in accordance with the *synteresis* or *conscientia* of Thomism; rather, it displays certain characteristics of German mysticism and is reminiscent of Abelard's doctrine.²⁵ A strong attachment to the Scriptures saved orthodox Lutheranism from the religious individualism that for others resulted from this new concept of conscience.

Spiritualists,²⁶ on the other hand, showed a marked shift of emphasis from the objective authority of the Scripture to the authority

21. For Luther conscience dominated over the sacrament. Luther, *Ein Sermon von der Beichte und dem Sakrament*, PREDIGTEN DES JAHRES 1524; WA XV, 485, 20 (1524) ("So ist nun viel besser, das man von der beycht und vom sacrament bleybe, denn das man ungerne hynzu gehe, so bleyben doch die gewissen ungemartert").

22. J. HECKEL, *Lex Charitatis*, ABHANDLUNGEN DER BAYERISCHEN AKADEMIE DER WISSENSCHAFTEN. PHIL.-HIST. Kl. N.F. 1953, H. 3, p. 61 n.416; Luther, *De Capt. Babyl. Eccl.* WA VI, 537, 15.

23. *De Votis Monsticis Martini Lutheri Sententia 1521*, WA VIII, 609, 38. ("Potest enim Christianus omnes omnium hominum leges, ritus mores observare et sese eis accommodare, modo non sint adversus divina mandata, nec in eis fiduciam conscientiae ponat. Conscientia enim Christo et Christus conscientiae, secreta huius sponsi et sponsae cubilia nemo tentet." *Id.* at WA VI, 535, 34; 537, 19).

24. Luther, *De Capt. Babyl. Eccl.* 1520, WA VI, 535, 34 to 536, 7; 537, 12 (1520).

25. W. WINDELBAND, *GESCHICHTE DER PHILOSOPHIE*, 243 (1892).

Abelard (1079-1122), one of the most important personalities of early scholasticism, was condemned by the Synodes of Soissons (1121) and Sens (1140). He emphasized the function of the Holy Ghost as the "soul of the world" (*Wetseele*), stressed the importance of individual moral consciousness, and developed a theory of the Trinity that questioned the equality of the Son and the Holy Ghost with the Creator. His standpoint was psychological, based on an ethical understanding of the human being and an emphasis on conscience.

26. N. PAULUS, *PROTESTANTISMUS UND TOLERANZ IM 16. JAHRHUNDERT* 144 (1911); A. HEGLER, *GEIST UND SCHRIFT BEI SEBASTIAN FRANCK* 260 (1892) ("The faithful

of a subjective and ultimately sovereign conscience. For example, Thamer, a professor of theology in Marburg and an advocate of the Lutheran concept of justification, rejected the notion of the bindingness of Scripture, and demanded that the preaching of the Gospel be based solely on conscience.²⁷ Thomas Browne, the founder of English Deism, rejected all dogmas and denominations in his *Religio Medici*; for him, conscience was the only true guide.²⁸ Politically important interpretations of conscience, in the sense of a mystic and baptist inner light, can be found in the writings of Fox, Barclay, and Penn.²⁹

STATE AND LAW

The union of church and executive power was disrupted and modified by the Reformation. It is difficult to say whether the separation of the ecclesiastical and the temporal power was inherent in Luther's theory of two kingdoms (*Regimentenlehre*)³⁰ or his doctrine of justification, or whether it emerged later as the necessary consequence of his struggles against the Roman Church. The rejection of all mediating influences between God and man—the repudiation of a legally organized church—seems to be contained in his concept of justification *sola fide* (only through faith).³¹ Generated through the word and the sacrament, the belief in the redemption of Christ was not only necessary but also sufficient to justify the faithful and to unite them within the community, the mystical body of Christ. Once Luther rejected apostolic succession and the “power of the keys” as prerequisites for justification, he had to entrust the

has in himself a ‘kingdom of conscience,’ in which he possesses all things. Conscience may not tolerate a mortal master, may not be oppressed and vexed by human imperatives . . .” *Id.* at 99).

These spiritualists included Sebastian Franck, Johann Campanus, Sebastian Castellio, Kasper Schwenkfeld and others.

27. Koehler, *Theobald Thamer*, in RGG V Sp. 1083, 702.

Other extreme advocates of this concept of conscience include the politically insignificant *Conscientiarii* in Germany, Thomas Browne, and Quaker leaders Fox, Barclay, and Penn.

28. H. WEINGARTEN, *supra* note 15, at 310 n.4; BROWNE, *RELIGIO MEDICI*, (“*Totam pharsaliam in pectore tumultuantem sentio, affectum contra affectum, rationem contra fidem, fidem contra diabolum et contra haec omnia conscientiam*”).

29. H. WEINGARTEN, *supra* note 15, at 206.

30. The theory of two kingdoms, *Regimentenlehre*, is based on Tyonius, whose theory was modified by Augustinus in the *Civitas Dei*. A. DEMPF, *supra* note 10, at 121. The German contributions with regard to Augustinus are discussed by Hans Maier in *Klassiker des Politischen Denkens* I 87 (1968).

31. R. SOHM, *supra* note 1, at 481 (“Leave us the gospel and a free conscience, in order that we do not have to consider ecclesiastical law as law”).

administration of the word and the sacrament either to the religious community or to the sovereign. Either option served the same purpose: the rejection of the legally organized church as an hierarchic entity.

Lutheranism, which, like the Reformed Church, was based on the general priesthood of the faithful, entrusted the sovereign with the responsibility for the visible church (*ecclesia visifilis*)³² thereby establishing the territorial sovereign as high bishop (*summus episcopus*). Luther left this task to Melanchton.³³ Due to a dislike for all legal formulation, Luther did not want to establish a new ecclesiastical order. Melanchton conveyed the guardianship over the first table (*custodia primus tabulae*) to the sovereign as the most prominent member of the church (*principuum membrum ecclesiae*). Instead of being dependent on a universal, legally-organized church, the faithful were now dependent on a territorial state. Attempts were made to avoid the danger of a religious dependency by denying significance to external manifestations of the church, thereby reducing the "real" church to an invisible spiritual church over which the state could not exercise power.³⁴

Within theological literature, Luther's doctrine of justification has repeatedly been identified with the postulate of freedom of conscience.³⁵ Luther's words at the Diet in Worms clearly demonstrate that his doctrinal stance against the Church was based on his own conscience. But did Luther emphasize freedom of conscience? Was it not, on the contrary, merely a means of giving the people access to his new doctrine?³⁶ Luther's own statements are controversial. The political result of his reformatory work was the formal principle of separation of powers³⁷ in the spiritual and temporal realms, and the material principle of freedom of conscience.³⁸ When, based on his

32. G. SCHWANHÄUSER, DAS GESETZGEBUNGSRECHT DER EVANGELISCHEN KIRCHE UNTER DEM EINFLUSS DES LANDESHERRLICHEN KIRCHENREGIMENTES IM 16. JAHRHUNDERT (1957).

33. J. Heckel, *Melanchton und das heutige Staatskirchenrecht*, in *UM RECHT UND GERECHTIGKEIT*. FESTGABE FÜR KAUFMANN ZUM 70, 83 (1950).

34. Regarding the reformatory concept of church and theory of conscience see F. Foerster, *Fragen zu Luthers Kirchenbegriff aus der Gedankenwelt seines Alters*, *FESTSCHRIFT FÜR J. KAFTAN* 102 (1920); F. KATTENBUSCH, *DIE DOPPELSCHICHTIGKEIT IN LUTHERS KIRCHENBEGRIFF* 197, 314, 318 (1927-28).

35. Hoffmann, *Reformation und Gewissensfreiheit*, in *AUS DER WELT DER RELIGION, RELIGIONSWISSENSCHAFTLICHE REIHE, HEFT 18*, (1932).

36. K. LEESE, *GEISTESMÄCHTE UND SEINSGEWALTEN* 61 (1946).

37. G. TÖRNVALL, *GEISTIGES UND WELTLICHES REGIMENT BEI LUTHER* 109 (1947).

38. *Conscientia libertatis not libertatis conscientiae* was the concern of the Reformation. J. HECKEL, *supra* note 22, at 61 n. 416.

own conscience, Luther burned the papal bull together with volumes of the *Corpus Iuris Canonici*, he denied the existence of canon law but not of the legal system as such. However, at that time canon law was a nearly inseparable part of the complex legal system.

The rejection of canon law resulted in the denial not only of the divine law (*ius divinum*) but also of all ecclesiastical, legislative and judicial authority, for the sake of freedom of conscience. As a result, all ecclesiastical power was united in territorial governmental institutions (consistories or ministries) that were established for this purpose.³⁹ Under the principles of the invisible church (*ecclesia invisibilis*), the dogmatic antithesis of the concept of an invisible God (*Deus absconditus*), it was believed that the church as a community of the faithful under the leadership of Christ could be saved from the state, the damned (*massa damnata*) under the leadership of the devil, thus obtaining a guarantee of freedom of conscience.⁴⁰ In reality, the theoretical separation of these two realms did not function well, as the state could exercise both legal and de facto power over the church. The state had the power to care for religion and the extraordinary power to change the religion of the country by law (*ius reformandi*). The Reformation thus promoted territorialism, while at the same time authorizing the state to exercise religious powers over the individual.⁴¹ The domination of the individual by the state that had developed during the Middle Ages was by no means interrupted by the Reformation. Freedom of conscience and religion were not achieved prior to the Thirty Years War (1618-1648).

The modern concept of law and state was defined in a limiting way by the Reformation concept of the new church. Although it is not within the scope of this article to determine whether Luther acknowledged the existence of divine law (*ius divinum*) or natural law (*ius naturale*), by limiting the state in defining the church, he did influence the definition of state and law. However, the absence of a systematic natural law doctrine should not be interpreted as approval of an omnipotent governmental power.⁴²

39. Whereas with the young Luther the order of the Church over external affairs was still the concern of the *ecclesia universalis*, in the Church orders of the 16th century a transfer to the temporal powers (*translatio ad regnum terrenum*) took place. J. HECKEL, *INITIA IURIS* 24, 42; G. SCHWANHÄUSER, *supra* note 32, at 21.

40. G. TÖRNVALD, *supra* note 37, at 109, 114.

41. In the Baptist sects, the rejection of the conscience-binding power of law, leads to the rejection of all executive power and to anarchism. G. Holstein, *Geschichte der Staatsphilosophie*, in *HANDBUCH DER PHILOSOPHIE, STAAT UND GESCHICHTE* 75 (1934).

42. Heckel has demonstrated that this interpretation is erroneous. J. HECKEL, *INITIA IURIA* 52. See also note 49 *infra*; F. X. ARNOLD, *ZUR FRAGE DES NATURRECHTS*

Can it be concluded that canon law is functionally dependent upon the concept of church? If so, it can be maintained that, by the same token, state law is dependent upon the concept of state. The Reformation gave us a dualistic concept of the state. On the one hand the state determines the external order of the church, an objective moral order imposed by the sovereign power over the church. On the other hand, the internal order of thoughts and conscience, by guaranteeing a sphere of freedom, does not fall under state domination.⁴³ The freedom guaranteed in the *Allgemeines Preussisches Landrecht* (the Prussian civil law), implicit in concepts like "God" and "divine matter," is not freedom from the state, but freedom in the state.⁴⁴ This sphere of individual freedom must not be understood as a constraint on the functions and active force of the state.⁴⁵ A dualistic concept of the state that distinguishes social and individualistic spheres of belief is the basis of all modern constitutions that bind the executive power to the maintenance of an individual sphere of fundamental liberties and values.⁴⁶

Luther's "religious anarchism"⁴⁷ extended only to certain parts of canon law, but many Spiritualists⁴⁸ went further. Luther's concept of conscience was by all means bound to the word of God and thus

BEI MARTIN LUTHER 75 (1937); K. HOLL, 1 GESAMMELTE AUFSÄTZE ZUR KIRCHENGESCHICHTE, *Luther* 210 (1921) ("On the contrary Luther raises natural conscience into the sphere of a christian one"). Holl also rejected Troeltsch's interpretation of an analogy between Christian and civil freedom. H. TROELTSCH, *SOZIALLEHRE* 496; J. HECKEL, *INITIA JURIS* 52. See also note 49 *infra*.

43. F. Valjavec, *Das Wöllnersche Religionsedikt 1788*, in *ZWISCHEN POLITIK UND WISSENSCHAFT, FESTSCHRIFT FÜR SCHREIBER, HIST. JAHRBUCH DER GÖRRES-GESELLSCHAFT*, 391 (1953).

44. *Allgemeines Preussisches Landrecht*, Tit. 11 TH II § 1 (1794) ("The ideas of the citizens of the state concerning God and divine matter, faith and inner worship, cannot be the subject of compelling laws"); § 2 ("Each citizen must have complete liberty of conscience and faith").

45. R. SMEND, *VERFASSUNG UND VERFASSUNGSRECHT* 162 (1928).

46. W. HAMEL, *DIE BEDEUTUNG DER GRUNDRECHTE IM SOZIALEN RECHTSSTAAT* 32 (1957).

47. Luther, *De. Capt. Babyl. Eccl. Prael.* 1529, WA VI, 536, 7 ("Dico itaque: neque Papa neque Episcopus neque ullus hominum habet ius minutae syllabae constituendae super Christianum hominem, nisi id fiat eiusdem consensu"). "Pro hac dumtaxat clamo libertate et conscientia, damoque fidenter, Christianis nihil ullo iure posse imponi legum, sive ab hominibus sive ab angelis, nisi quantum volent; liberi enim sumus ab omnibus. Quod si quae imponuntur, sic ferenda sunt, ut libertatis conscientia sacra sit. . . ." *Id.* at WA VI, 537, 12.

48. The following representatives of various Spiritualistic movements within the Reformation deserve mention: Sebastian Franck, Jakob Bohme, Sebastian Costellio, Acontius, Nickolaus Zur Kinden, Dirck Coornheert, and John Milton. K. LEESE, *DER PROTESTANTISMUS IM WANDEL DER ZEIT* 14 (1941).

to an objective order (*capta conscientia in verbis Dei*), while Spiritualists acknowledged an inner light as the only binding order. They therefore rejected the Bible as an objective norm.

HECKEL'S DISCOVERY OF A GENUINE LUTHERAN CONCEPT OF LAW

A re-examination of the significance of Luther's Reformation doctrine of law and government was initiated by the works of Johannes Heckel. In a preliminary study Heckel formulated the basic idea that canon law is in a strict sense a humanistic, but not a temporal, law. He subsequently developed and expanded his ideas in *Lex Charitatis*, first published in 1953.⁴⁹ The heated discussions which followed only served to strengthen Heckel in his opinion. As the most important work on canon law after World War II, *Lex Charitatis* attracted wide attention. The essays of Paul Althaus, Franz Lau, and Siegfried Grundmann are of particular significance.⁵⁰ Althaus sketched the problem aptly as follows: "Johannes Heckel's extensive investigation of the place of law in Martin Luther's theology promotes and earns the collective attention of theology. It is of interest to us not only as an historical achievement, as the first comprehensive attempt to present a system of Luther's teachings concerning law, but more than this, it questions the relationship between faith and law . . ." ⁵¹ Heckel's book is a supplement to Karl Barth's *Justification and Law*. While Luther's work did not answer Barth's question whether law plays a role for the freedom of Christians, Heckel found an answer through a new interpretation of Luther. Luther became the principal witness for the christological foundation of law and state, a view shared by Barth.

The focus of Heckel's new interpretation was Luther's doctrine of kingdom and reign. According to Heckel, the doctrine of reign is a part of the two kingdoms doctrine, that is, God controls and rules in

49. The second edition by his son Martin has an unchanged text. Only the references were updated with extensive supplementary entries. The new edition covers a series of contributions from Heckel's work, especially: *Im Irrgarten der Zwei-Reiche-Lehre Luthers*, at 317; *Kirche und Kirchenrecht nach der Zwei-Reiche-Lehre*, at 354; *Die Entfaltung der Zwei-Reiche-Lehre als Reichs- und Regimentslehre*, at 410. The number of annotations in the *Lex Charitatis* remained unchanged.

50. P. Althaus, *Luthers Lehre von den beiden Reichen im Feuer der Kritik*, in REICH GOTTES UND WELT 105 (H. SCHREY ED. 1969); *Die beiden Reiche bei Luther. Bemerkungen zu Johannes Heckels "Lex Charitatis"*, *id.* at 517; F. Lau, *Leges Charitates. Drei Fragen an Johannes Heckel*, *id.* at 528; S. Grundmann, *Die Lehre von den Zwei Reichen und ihre Bedeutung für die Gründung des Kirchenrechts in der Sicht von Johannes Heckel*, *id.* at 557.

51. P. Althaus, *supra* note 50, at 105.

both kingdoms, the Kingdom of God and the Kingdom of the Devil. A Christian is not a citizen of both kingdoms, but only a citizen of the Kingdom of God, without any alternative. However, the evil in the Kingdom of the Devil is functionally the reign of the left hand of God. The result of the dualism of the two kingdoms doctrine and the reign doctrine, is a dualistic concept of law. The doctrine of the positive divine church law, which came into existence in Germany for the first time after 1933, was based on this dualism. Canon law in the narrower sense is, however, human law, even though it is not a secular law. In place of obedience to the authorities, there is the love of Christians for each other. This love is the foremost right to be found in the common life of Christians; therefore, the idea that the church republic is based only on the law of love (*republica ecclesiastica unica lege charitatis instituta est*) should be fundamental to all temporal church constitutions. Heckel's work is thus an invaluable part of contemporary Lutheran views of church-state relations.

THE ERROR OF PROTESTANTISM AS A CULTURAL MOVEMENT

The discrepancy between the norm of law and the concept of law was very evident in the concept of freedom of conscience. For modern *Kulturprotestantismus* (Protestantism as a cultural movement), freedom of conscience was the original dogma of the Reformation, but the dogma had its roots in Liberalism and the Enlightenment and was just as unlutheran as it was uncalvinistic. Nineteenth century theological literature reveals that, within Protestant dogma, liberty of conscience became the central tenet that determined the existence or non-existence of the Protestant Church, even though the freedom of conscience of that time did not imply more than the legal guarantee of domestic devotion. Baur expressed it in the following manner: "What is referred to as liberty of faith and conscience and the unalienable right that the Reformation bestowed upon mankind, is only a popular expression for an intellectual autonomy. It is identical to the principle of subjectivity, an absolute self-consciousness of human thinking liberated from an authoritarian faith. Protestantism is the principle of subjective freedom, of liberty of faith and conscience—of autonomy, in contrast to the heteronomy of the Catholic concept of church."⁵²

52. F. BAUR, DIE EPOCHEN DER KIRCHLICHEN GESCHICHTSSCHREIBUNG 257 (1852). Baur gives the following definition of the principle of Protestantism: "It comprises the Protestant doctrine of the Church, the concept of the true Church, which it professes and what it teaches about the relationship between the visible and the invisible Church, the highest principle on which Protestantism is based is the principle of

Baur was already clearly influenced by Hegel's legal and religious philosophy, although the principle of freedom of conscience does not require a Hegelian subordination of individual freedom to the collective freedoms. The Reformation's more religious connotation of freedom of conscience was lost. However, others continued to develop the idea of freedom of conscience as the central concept of Protestantism. For Biedermann, for instance, freedom of research and thinking was absolutely essential to obtaining the final goal of Protestantism.⁵³ For Hundeshagen, the Reformation was not a protest of the intellectual genius against intellectual compulsion, but a protest of the moral conscience against compulsion (*Gewissenszwang*).⁵⁴ According to Schenkel, freedom of conscience and right of conscience (*Gewissensrecht*) were fundamental laws of Protestantism.⁵⁵ From Schleiermacher⁵⁶ to Harnack,⁵⁷ many examples can be found in theology which document freedom of conscience as the basic principle of Protestantism. In the nineteenth century, *Kulturprotestantismus* was thought to be the legitimate successor of the Reformation, without the realization that the postulates of nineteenth century idealistic German philosophy (of, e.g., Hegel) were unwittingly being ascribed to the Reformators.

Troeltsch was the first to challenge the ideals of *Kulturprotestantismus*.⁵⁸ More intensive research on Luther and the result-

freedom of religion and conscience." DER GEGENSATZ DES KATHOLIZISMUS UND PROTESTANTISMUS NACH DEN PRINZIPIEN UND HAUPTDOGMEN DER BEIDEN LEHRBEGRIFFE 401.

53. A. BIEDERMANN, CHRISTLICHE DOGMATIK I 342 (1868).

54. K. HUNDESHAGEN, DER DEUTSCHE PROTESTANTISMUS, SEINE VERGANGENHEIT UND SEINE HEUTIGEN LEBENSFRAGEN IM ZUSAMMENHANG MIT DER GESAMTEN NATIONALENTWICKLUNG, BELEUCHTET VON EINEM DEUTSCHEN THEOLOGEN 27 (1847).

55. D. SCHENKEL, LUTHER IN WORMS UND WITTENBERG 186 (1870) ("Liberty of conscience is the fundamental right of Protestantism and it must be viewed as a severe tarnish of this fundamental right, when later within the Protestant Church the consciences were bound by human formulas, the so-called dogmatic foundations, by taking an oath on them").

56. F. SCHLEIERMACHER, ÜBER DIE RELIGION, ZWEITE REDE 32 (1799); F. SCHLEIERMACHER, ZWEITES SENDSCHREIBEN ÜBER SEINE GLAUBENSLEHRE AN DR. LÜCKE AUS DEM JAHRGANG 1829 DER THEOLOGISCHEN STUDIEN UND KRITIKEN: SÄMTLICHE WERKE, 1. ABT., II 617 (1836).

57. E. HARNACK, *Religiöser Glaube und Freie Forschung*, in WISSEN UND LEBEN 250 (1911).

58. H. TROELTSCH, AUFSÄTZE ZUR GEISTESGESCHICHTE UND RELIGIONSPHILOSOPHIE (1925); H. Troeltsch, *Protestantisches Christentum und Kirche in der Neuzeit*, in KULTUR UND GEGENWART, I, part IV, 1, p. 431 (1909); H. TROELTSCH, SOZIALLEHREN DER CHRISTLICHEN KIRCHEN UND GEMEINSCHAFTEN; H. TROELTSCH, DIE BEDEUTUNG DES PROTESTANTISMUS FÜR DIE ENTSTEHUNG DER MODERNEN WELT (1906). K. Holl and his follower Hirsch referred to Troeltsch's ideas as outdated; however, they are still of great importance to historians.

ing Luther renaissance led to the realization that the concept of freedom of conscience, as it was understood during the period of the Enlightenment, was not the central dogma of the Reformation. Quite possibly, this concept was not a part of the Reformatory dogmas at all, but an historical consequence of the Schism. However, this did not lead to the rejection of the concept of freedom of conscience as the basic principle of Protestantism, but merely to a more critical approach toward the Reformers.⁵⁹

This theological excursus was necessary to demonstrate the divergent meanings attached to the concept of freedom of conscience in the humanities and jurisprudence. Beginning with the theological and philosophical systems of the Enlightenment, the concept of freedom of conscience underwent a further mutation, until, by the middle of the nineteenth century, it became a political slogan with anticlerical and, later, antichristian connotations. In the *Vormarz* and the parliamentary debates of the Frankfurt National Assembly of 1848-49, the principle of freedom of conscience became a postulate of church policy, with the consequence of a complete separation of church and state. In the debates over the fundamental rights in the Frankfurt Paulskirche (a church that served as a meeting place for the German parliament), fierce anticlerical attacks can be found that demanded the abolition of the Church, based on the principle of freedom of conscience. To achieve this goal, the separation of church and state and the abolition of mandatory religious instruction in public schools were demanded. Characteristic of these antireligious tendencies are the contributions of two delegates to the Paulskirche debates.⁶⁰ "The Church as Church must disappear, as an external power, as a power over conscience . . . In one word, the Church provided with external powers hampers the liberty of conscience;

59. H. LANG, *MARTIN LUTHER 164 (1870)* ("The religious struggle of today is plainly a struggle of intellectual freedom against Lutheranism"). A. RITSCHL, *FESTREDE AM 4. SÄKULARTAGE DER GEBURT MARTIN LUTHERS VON 1887*, 17, 18 ("It is in strong contrast to the effects of the powerful spiritual impulse which emanated from Luther, that the guiding idea, namely freedom of conscience as liberty of conscience from the guilt towards God and therewith the idea of a spiritual domination of the world, was not held in esteem and clarity, as it should have been expected").

60. C. Vogt, in F. WIGARD, *BERICHTE ÜBER DIE VERHANDLUNGEN DER DEUTSCHEN CONSTITUIERENDEN NATIONALVERSAMMLUNG ZU FRANKFURT A.M.*, 3. Bd. 1668 (1848) ("Gentlemen, I am for the separation of the Church from the state; but only under the condition that in principle that what is referred to as Church, be destroyed. (Commotion) . . . Gentlemen, for me every Church is deterrant for civilization. Every Church because it wants dogmatic formulas, because it wants faith, hinders the free development of human spirit").

freedom of thought is not possible in such a Church."⁶¹ The draft of the fundamental rights by the Frankfurt National Assembly in the Paulskirche consequently acknowledged the separation of church and state, although other motives besides anticlerical ones contributed to this decision. Catholic delegates and representatives of *Kulturprotestantismus* also voted in favor of the separation.⁶² *Kulturprotestantismus* saw in the separation of church and state the necessary guarantee of the concept of freedom of conscience, and therefore approved of this separation because freedom of conscience as the highest dogma was more important than the continuation of the Holy Alliance of throne and altar.⁶³ The separation of church and state can therefore rightly be regarded as a legal guarantee of the jurisprudential principle of freedom of conscience.

THE CONSEQUENCES OF THE MISUNDERSTANDING OF THE LUTHERAN CONCEPT OF LAW

The process of the rejection of an external authority of the church underwent various stages of development, from the Lutheran concept and the reformed doctrines of the Calvinists to the religious anarchism of the Spiritualists.⁶⁴ The spiritual concept of church within Lutheran orthodoxy included the authority of the state—in the form of a monarchy. Conflict with the state could be avoided only by spiritualizing the church.⁶⁵ The Calvinistic-Reformatory communities were based on the concept of a visible church and on the principle of an externally organized general priesthood. On the basis of this doctrine, a democratically organized church was established

61. S. Jordan, in WIGARD, *supra* note 60, at 1646.

62. R. LEMPP, DIE FRAGE DER TRENNUNG VON KIRCHE UND STAAT IM FRANKFURTER PARLAMENT 27 (1913); K. ROTHENBÜCHER, DIE TRENNUNG VON KIRCHE UND STAAT (1908).

63. T. Mayer-Maly, *Zur Sinngebund von Glaubens- und Gewissensfreiheit in der Verfassungsgeschichte der Neuzeit*, 5 OSTERREICHISCHES ARCHIV FÜR KIRCHENRECHT 238, 244 (1954); T. MAYER-MALY, *Die Grundrechte des religiösen Lebens in der österreichischen Verfassungsgeschichte des 19. Jahrhunderts*, *id.* at 38.

64. H. TROELTSCH, *supra* note 11, at 305.

65. Against the recommendation of the Danish royal preacher, Hektor Gottfried Masius, who described Lutheranism as being especially monarchophile, Thomasius protested in his *Deutsche Monatsschrift*.

The importance of Luther's theory of two kingdoms for today's problems is discussed by H. SCHREY, LUTHERS LEHRE VON DEN ZWEI REICHEN UND IHRE BEDEUTUNG FÜR DIE WELTANSCHAUUNGSSITUATION DER GEGENWART 101 (1956). See also E. WOLF, DIE "LUTHERISCHE LEHRE" VON DEN ZWEI REICHEN IN DER GEGENWÄRTIGEN FORSCHUNG 142 (1958-59); E. KINDER, LUTHERS ABLEITUNG DER GEISTLICHEN UND WELTLICHEN "OBRIGKEIT" AUS DEM 4. GEBOT 221 (1959). K. HAENDLER, LUTHERS ZWEI-REICHE-LEHRE UND IHRE GEGENWARTSBEDEUTUNG, 242 (1964).

with the help of elected clergymen and teachers. This democratically-organized community inevitably came into conflict with the monarchistic state, since a peaceful coexistence did not seem possible between two such heterogenous social structures.⁶⁶ Added to that, the monarchies of the sixteenth and seventeenth centuries retained many clerical privileges and powers that were in direct contrast to the doctrine of the general priesthood of the faithful. The Calvinist church thus laid the groundwork for the rebellion against monarchy.

Especially in France, the monarchomachs fought for the abolition of the monarchy for religious reasons. Later, the monarchomachy became a non-religious struggle against a hated form of government.⁶⁷ Among the secular protagonists of the sovereignty of the people and of an antimonarchistic form of government, Rousseau, who came from the reformed party, should be mentioned. In his *Contrat Social*, the traditional state is contrasted with a society that, on the basis of the sovereignty of the people, exercises all governmental powers.⁶⁸ Basically, a society founded under the *Contrat Social* is identical with the secularized church of the Calvinists.⁶⁹

The Spiritualists, on the other hand, were not capable of developing a concept of government, much less of creating a state, because they denied the existence of an external church. Because of this religious anarchism, they rejected all governmental organizations. The consequence of this negation of the social character of man was that these movements were never able to establish themselves permanently. However, where anarchist and social theories were combined, a strong new movement developed. This movement

66. F. Kern, *Gottesgnadentum und Widerstandsrecht im frühen Mittelalter*, in 1 MITTELALTERLICHE STUDIEN, H. 1, 145 (1914).

67. K. WOLZENDORFF, STAATSRECHT UND NATURRECHT IN DER LEHRE VOM WIDERSTANDSRECHT (1916). F. KERN, RECHT UND VERFASSUNG IM MITTELALTER 106 (1952), rightly emphasizes that the right to resistance in the form of the monarchomachy, must be explained by the concept of law and government in the Middle Ages.

68. J.J. ROUSSEAU, DU CONTRAT SOCIAL, *Texte original publié avec introduction, notes et commentaire par Halbwachs*, liv. II, chap. IV, p. 156 (1943). Rousseau, who refers to the sovereign power "*pouvoir souverain*" as "*absolu*" and "*tout sacré*", "*tout inviolable*", states that this power may not violate the "*conventions générales*" (especially not the principle of equality): ". . . ne passe ni ne peut passer les bornes des conventions générales, et que tout homme peut disposer pleinement de ce qu'il lui a été laissé de ses biens et de sa liberté par ces conventions."

69. F. GLUM, JEAN JACQUES ROUSSEAU, RELIGION UND STAAT (1956).

began as religious socialism and branched into several movements: communism, social anarchism and socialism.

Stahl appropriately recognized the main characteristic of socialism by referring to socialism and communism as social structures of conscience.⁷⁰ The concept of freedom of conscience found its strongest and most radical advocates in the Spiritualists and religious anarchists.⁷¹ Conscience itself, however, stood against the anarchistic and isolating effect of this radical idea of freedom. The social tendency of human nature which enables man to create societies is better expressed by the Lutheran concept of a conscience of freedom.

CONCLUSION

What does this renaissance of Martin Luther's legal concepts and jurisprudence signify in today's situation? The posing of polar alternatives—pious obedience to the state or religious anarchism—has been acknowledged as the result of an historical misinterpretation of Lutheran jurisprudence; it is not the consequence of a Lutheran dialectic. Hans Karl Scherzer argues, "It has been a symptom of the failure of the Lutheran social theology to understand the complex concept of the Reformer and to develop a genuine Lutheran political ethics."⁷² The scholarship after World War I that is the Luther renaissance developed so-called Lutheran theologies which glorified autonomous secular orders such as state, people or race. However, neither Luther nor his theory of two kingdoms can be blamed for this. Luther based his doctrine less on law itself than on the freedom to develop law. This is clearly expressed in the emphasis on the concept of conscience of freedom versus freedom of conscience. 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

70. Stahl, DIE GEGENWÄRTIGEN PARTEIEN, in STAAT UND KIRCHE 1850/51 (1863). Noted by T. RAMM, DIE GROßEN SOZIALISTEN ALS RECHTS-UND SOZIALPHILOSOPHEN 4 (1954). Supposedly characteristic of socialism is the acknowledgement of conscience as the highest goal and measure, and the negation of God. H. VOLZ, CHRISTENTUM UND POSITIVISMUS, DIE GRUNDLAGEN DER RECHTS-UND STAATSAUFFASSUNG STAHL'S (1951). ENGELS, 3 HERRN EUGEN DÜRRINGS UMWÄLZUNG DER WISSENSCHAFT 348 (1956).

71. The successors of this "anarchistic Spiritualism" expressed this idea in the following manner: "*Je ne veux être ni gouvernant ni gouverné.*" F. MUCKLE, DIE GESCHICHTE DER SOZIALISTISCHEN IDEEN IM 19. JAHRHUNDERT, 1909, II 21.

72. Scherzer, *Luther*, in KLASSIKER DES POLITISCHEN DENKENS I 254 n.27 (1968).

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.