

---

---

# Samuel Rutherford and the Neo-Thomists:

## Juristic corporation theory and natural law arguments in *Lex, Rex*

*Andries Raath*  
*Research Fellow*  
*Department of Constitutional Law*  
*and Philosophy of Law*  
*University of the Free State*  
*RaathA@ufs.ac.za*

*Shaun de Freitas*  
*Associate Professor*  
*Department of Constitutional Law*  
*and Philosophy of Law*  
*University of the Free State*  
*DeFreitas@ufs.ac.za*

### Opsomming

***Samuel Rutherford en die neo-Thomiste: Juridiese korporasie-  
teorie en natuurreg-argumente in Lex, Rex***

*Die Skotse teoloog en politieke teoretikus se politikologiese werk Lex, Rex, is sterk deur die Christelike humanisme van die sestiende en sewentiende eeu beïnvloed. Verwysings na talle klasieke werke van Griekse en Romeinse filosowe asook Middeleeuse bronne kom in dié werk voor. Rutherford maak ook van talle Neo-Thomistiese bronne gebruik by die ontwikkeling van sy standpunte oor die soewereiniteit van die populus en sy benadering tot natuurreg en natuurlike regte. Alhoewel*

*Rutherford in talle opsigte van die Neo-Thomistiese teologie verskil het, het dit hom nie verhoed om wel bepaalde politikologiese argument uit dié bronne oor te neem, binne die konteks van sy Reformatoriese teologie te herinterpreteer en toe te pas nie. Met dié benadering het Rutherford daarin geslaag om standpunte te ontwikkel wat vir sowel Reformatoriese Christene as andersdenkendes van belang is. Sy werk Lex, Rex, (Die reg en die heerser) verkry daarmee 'n universaliseerbare betekenis.*

## 1. Introduction

The sixteenth-century revival of Thomism in European ecclesiastical and legal theory carried in its wake a re-orientation of fundamental importance for the development of the modern natural law theory of the state. The tone for which was to become a most influential political theory was set by Francisco de Vitoria (c. 1485-1546), a prominent Dominican. Vitoria's ecclesiastical school of natural law theory included amongst others Diego de Covarrubias (1512-1577), a prominent jurist, and Dominican ecclesiastical authors like Fernando Vasquez (1509-1566) and Domingo de Soto (1494-1560). The Dominican views on ecclesiastical and political matters were re-interpreted and developed by Cardinal Robert Bellarmine (1542-1611), and Spanish Jesuits including Gregorio de Valencia (1549-1603), Gabriel Vasquez (1549-1604) and Francisco Suárez (1548-1617). The turn brought about by the Neo-Thomist writers facilitated the development of a highly influential theory of general public law based on natural law precepts.<sup>1</sup>

The main political aim of the Dominicans and their Jesuit followers was the refutation of the political views of the evangelical Reformation in general and the Lutheran views on law and politics in particular. Three aspects of Reformational thought alarmed Jesuits and Dominicans alike: firstly, the mistaken view credited to Wycliffe and Hus that dominion is founded in grace; secondly, the erroneous belief that civil power cannot remain in the hands of the ruler, and thirdly, the Lutheran rejection of natural law as the basis of the political order.<sup>2</sup>

---

1 Cf. Gierke, *Natural Law and the Theory of Society*, I, p. 36. Cf. e.g. : Franciscus Victoria (Dominican), *Relectiones tredecim* (1580); Dominicus Soto (Dominican), *De justitia et jure* (1556); F. Vasquez, *Controversiarum illustrium aliarumque usu frequentium libri III* (1572); Gregorius de Valentia, *Commentarii theologici* (1592); Balthasar Ayala, *De jure et officiis belli* (1597); Ludovicus Molina, *De justitia et jure tomus VI* (1602 & 1614); Leonardus Lessius, *De justitia et jure libri IV* (1606); Cardinal Robert Bellarmine, *De potestate summi pontificis in rebus temporalibus* (1610); Johannes de Lugo, *De justitia et jure* (1670).

2 Cf. Q. Skinner, *The Foundations of Modern Political Thought*, II, p. 138ff.

---

In their refutation of the evangelical views on political society, the Thomist authors of the sixteenth-century gathered elements of the Medieval interpreters of Roman law concepts related to legal personality, the power the people yield in opposing tyranny, and Marsilius of Padua's views on popular sovereignty, which they re-interpreted and applied to the political environment of sixteenth-century European political thought.

Dominican and Jesuit political works in many respects popularized the application of Roman law concepts and the idea of popular sovereignty, and served as standard sources of reference to students of European and English universities – influences the English and Scottish Puritans could not escape. After 1600 students in England and Scotland were increasingly being exposed to the writings of Jesuit and other Neo-scholastic theologians and ecclesiastical authors on natural law. Quotations from Bellarmine, Vasquez, Molina, Durandus, De Soto, Suárez and other Neo-scholastics abound in the notebooks of students from Cambridge, Oxford and Puritan colleges.<sup>3</sup> Although the main purpose with reading these Neo-Thomistic works was to study the aims, arguments and views of the enemies of the Reformation, Neo-Scholastic works contained information appealing also to candidates of Reformed persuasion and receiving tertiary education heavily influenced by Christian humanism.<sup>4</sup>

Although the Puritan divine Samuel Rutherford (1600-1661), reacted negatively to many aspects of Neo-Thomistic thought in his political work *Lex, Rex*, he utilised a number of key-aspects associated with the rising natural law tide in political philosophy. In answering the question as to whether the Jesuit doctrine of lawful defence is the same as that of the Puritans, Rutherford takes pains to explain that the doctrine that sovereignty is originally and fundamentally located in the people, was taught by the “fathers, ancient doctors, sound divines, lawyers, before there was a Jesuit or a prelate whelped, *in rerum natura*”.<sup>5</sup> In answer to the view that both Jesuits and Puritans say that it was a privilege of the Jews that God chose their king, Rutherford maintains that the Jesuits and Puritans are in opposing camps on this issue because in post-Biblical times kings are not appointed by extraordinary revelation from God.<sup>6</sup> Rutherford also explicitly rejects Jesuit teaching that man is not justified by faith only, but also by works.<sup>7</sup> Elsewhere

---

3 Cf. M. Todd, *Christian Humanism and the Puritan Social Order*, p. 72.

4 Todd, *Christian Humanism and the Puritan Social Order*, pp. 72-73, 76, 79.

5 *Lex, Rex*, Q 41, p. 206.

6 *Lex, Rex*, Q 5, p. 9 f.

7 *Lex, Rex*, Q 5, p. 9 f.

Rutherford accuses the Jesuits of siding with Armenians on matters of nature and grace.<sup>8</sup> Those who have the view that parliaments diminish the king's majesty, is described by Rutherford as "a faction of perjured Papists, Prelates, Jesuits, Irish cut-throats, Strafords and Apostates; subverters of all laws, divine, human, of God, of Church of state".<sup>9</sup> Rutherford is also explicitly opposed to the view that the clergy is exempted from the laws of the civil magistrate.<sup>10</sup> As for Maxwell's argument to Suárez, who endeavoured to prove monarchy not to be natural, but of free consent, because it varies in different nations, Rutherford answers: "(I)t is the Jesuits' argument, not ours. ... Let Jesuits plead for Jesuits."<sup>11</sup> Rutherford also rejects the papists' and Jesuits' allegations that the early Protestants, Waldenses, Wycliffe, and Huss founded dominion upon grace as its essential pillar.<sup>12</sup>

Particularly in theological matters Rutherford rejects the Jesuit teachings that the Pope is no antichrist, that Christ locally descended to hell to free some out of their prison, that it was sin to separate from Babylonian Rome, that men are justified by works, that the merit of fasting is not to be condemned, that the mass is no idolatry, and that the Church is the judge of controversies.<sup>13</sup> However, regarding political principles Rutherford does not disagree with the Jesuit Neo-Thomists on a number of points. Rutherford for example does not disagree with the Jesuit doctrine that sovereignty is "originally and radically" in the people – a view held long before the Jesuits agreed to the same principle.<sup>14</sup>

## 2. The reception of juristic corporation theory and popular sovereignty in Medieval and early modern European political thought

### 2.1 *Azo and the fourteenth century jurists*

The twelfth century jurist Portius Azo (1150-1230) and his pupils in their commentaries on the Roman *Codex* recovered from Roman legal and moral philosophy cogent defences of civic freedom, self-government and popular

---

8 *Lex, Rex*, Q 8, p. 30 f.

9 *Lex, Rex*, Q 9, p. 36.

10 *Lex, Rex*, Q 13, pp. 50 f.

11 *Lex, Rex*, Q 13, p. 54.

12 *Lex, Rex*, Q 41, p. 205.

13 *Lex, Rex*, Q 41, p. 206.

14 *Lex, Rex*, Q 41, p. 206.

sovereignty. Azo and his followers made pioneering contributions to political thought by interpreting and amplifying general concepts from Roman law concerning the location, character, and limits of political power. Arguably the most renowned contribution to juristic-political theory was Azo's development of the Roman law texts concerning *iusdictio* and *imperium* into a concept of sovereignty.<sup>15</sup>

In later medieval thought the juristic thought of Azo's followers were substantially strengthened by the ideas of republican self-government contained in the rediscovered Aristotelian corpus – particularly notions of civic autonomy relevant to the Italian city-republics. The juristic idiom of the legal commentators sought to adapt the Roman law theory of *imperium* to the conditions of the Italian city-republics.<sup>16</sup> The emerging republicanism was solidly grounded on the principle that any individual or group, once granted sovereignty over a community will tend to promote particular interest at the expense of the common good. Pursuing the classical republican ideas of liberty, representation and legal personality, juristic treatises intended to defend republican *libertas* against encroachments from pope and prince alike. By the fourteenth century the jurist Bartolus and his pupils sought to defend the refusal by Tuscany to allow external political interference by superiors in its temporal affairs. The school of Bartolus produced a legal theory according to which the ultimate bearer of sovereignty in any independent political entity must be the *universitas* or corporation of the people as a whole.<sup>17</sup>

Justinian's *Digest* was a particular fruitful source of principles which could be re-interpreted to suit the claims of the republicans in defence of their liberty.<sup>18</sup> Azo applied the term *universitas*, a central concept in the Roman law of corporations, to defend popular sovereignty.<sup>19</sup> To Azo and his followers the entire body of citizens forms a *universitas*; a political body possessing legal personality and capable of forming and expressing a single unified

---

15 Cf. Myron P. Gilmore, *Argument from Roman Law in Political Thought, 1200-1600*, Cambridge, Mass, 1941, pp. 15-36.

16 Skinner, *Visions of Politics*, II, p. 13: "The authority chiefly invoked by the city-republics in their earliest attempts to defend their way of life was the Codex of Roman Law. By the end of the twelfth century, a number of Glossators were beginning to reinterpret the passages on public law in Justinian's *Digest* in such a way as to support rather than to question the autonomy of the cities and their elective forms of government."

17 Cf. S. De Freitas, *Law and Federal-Republicanism: Samuel Rutherford's Quest for a Constitutional Model*, p. 87.

18 The culmination of Azo's work was his defence of the doctrine of popular sovereignty.

19 Skinner, *Visions of politics*, II, p. 13.

will in political matters.<sup>20</sup> To Azo, the consent of the body of the people (as a *universitas*) is always necessary if the highest powers of governance (*imperium*) and thus of jurisdiction over the realm (*jurisdictio*) are to be lawfully instituted.<sup>21</sup> From the interpretation of the *Lex Regia* (in Book I of the *Digest*), Azo concluded that the power of the emperor to make law is only lawful to the extent that it was assigned to him by the people in whose hands such power must originally have vested.<sup>22</sup> This interpretation basically amounted to denying legitimate political authority of the ruler from the consent by the body of the people.<sup>23</sup> Additionally Azo argued that after instituting a ruler with full *imperium* and *iurisdictio*, the people continued to possess it after the transfer of power.<sup>24</sup> Azo's bold interpretation flowed from the principle that the *populus* has the legal standing of a *universitas*.<sup>25</sup> A further implication of his juristic interpretation is that it is not the people who are excluded by the *Lex Regia* from the power to make laws, but merely the individuals composing the body of the people.<sup>26</sup> The emperor's power to pass legislation is thereby relegated to ceded authority by the *populus sive universitas* (the ultimate bearer of sovereignty) to pass legislation. A number of important political consequences emanated from Azo's juristic argumentation: 1. Rulers only wield the power transferred to them by the people; 2. The people retain the capacity to depose their rulers and resume the exercise of their sovereignty should the rulers fail to discharge their duties satisfactorily; 3. The people retain the power to establish their own forms of government.<sup>27</sup> In brief Azo's argument regarding the source of sovereignty proceed as follows: all rulers have *imperium* because they have *iurisdictio*; the right to establish law. The source of that lawmaking right is the *corpus*, the *universitas*, the *communitas*; therefore jurisdiction does not descend downward from the emperor but

---

20 Skinner, *Visions of politics*, II, p. 14.

21 Skinner, *Visions of Politics*, II, p. 15.

22 Digest, I.4.1: "quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat." Cf. Johnston, "The General Influence of Roman Institutions of State and Public Law", p. 98.

23 Azo, *Lectura super codicem*, I, XIV, 11, 44: "potestas legis condendae ... in eum transtulit populus."

24 Azo, *Lectura super codicem*, I, XIV, 11, 44: "potestas legis condendae ... si populus ante habebat, et adhuc habebit."

25 Skinner, *Visions of Politics*, II, p. 15.

26 Azo, *Lectura super codicem*, I, XIV, 11, 44: "hic non excluditur populus, sed singuli de populo ... ideo singuli excluduntur, non universitas sive populus."

27 Azo, *Lectura super codicem*, I, XIV, 11 & VIII, LIII, 2, 67: "unde non est major potestatis imperator quam totus populus, sed quam quilibet de populo."

proceed upward from the corporate community.<sup>28</sup> The implications are that the ruler himself became a constitutional figure, “a legally defined officeholder, whose *imperium* was limited by his *iurisdictio* (his legitimate authority).<sup>29</sup> The constitutional limitations of the ruler’s power also include the subject’s right of resistance to the ruler’s wrongful commands, extending to the right and the duty to kill a tyrant (*Rex Tyrannus*).

In the early stages of the fourteenth century Azo’s views of the sovereignty of the people found support and extension in Bartolus of Sassoferato’s formulation of the doctrine of *sibi princeps*; each independent *civitas* may be regarded as a *princeps* unto itself and hence the bearer of sovereignty.<sup>30</sup> In consequence Bartolus developed a legal theory rewarding sovereignty in any independent city to the *universitas* or corporation of the people as a whole.<sup>31</sup>

Due to metaphorical extensions of the term “persona”, the people as a “person” acquired the legal status of corporation in the writings of the monarchomachs. From the Bartolist theory of corporation the monarchomachs drew much of their political inspiration.<sup>32</sup> Bartolus’ bolstering of early fourteenth century republican theory necessarily included discussing the concept of tyranny and formulating the practical consequences of the abuse of power by rulers. Bartolus’ views on tyranny became the standard points of reference in following centuries for distinguishing between tyrants by practice from tyrants without title.<sup>33</sup>

28 H.J. Berman, *Law and Revolution*, p. 292: “Jurisdiction did not descend down from the emperor but upward from the corporate community.”

29 Henry of Bracton (early thirteenth-century English jurist) developed Azo’s view into the principle that the law makes the king, therefore the king must make a return to the law by subjecting himself to its rules (De Freitas, *Federal-Republicanism*, p. 100).

30 Skinner, *Foundations*, I, pp. 53-65.

31 Canning, *The Political Thought of Baldus de Ubaldis*, pp. 93-131; Berman, *Law and Revolution*, p. 292.

32 Bartolus, *Digestum Novum Commentaria*, (1562), XLVII, XXII, p. 779: “civitates Tusciae, quae non recognoscunt de facto in temporalibus superiorum.” Skinner, *Foundations*, I, p. 394; F. Calasso, *I Glossatori*, pp. 83-123; J.A. Wahl, “Baldus de Ubaldis and the Foundations of the Nation-State”, pp. 8-96; J.P. Canning, “Ideas of the State in Thirteenth- and Fourteenth-Century Commentators on the Roman Law”, pp. 23-27; J. Najemy, “Stato, Commune e ‘Universitas’”, pp. 245-263.

33 Cf. Canning, *The Political Thought of Baldus de Ubaldis*, pp. 93-131.

## 2.2 *Marsilius of Padua and the philosophical basis of popular sovereignty*

Marsilius of Padua (c. 1275-1342), a Christian Aristotelian, applied Aristotle's philosophy of causes, to describe the final, material, formal, and moving cause of the commonwealth. The final cause (the purpose of the commonwealth) is to ensure the good life, and the good life consists in being engaged in the activity of becoming a free man. This forms the ground for the other kinds of causes (material, formal, and moving) of the commonwealth and its parts. In an effort to address the political challenges to the independence and political freedom of the Italian city-republics, Marsilius proposed that the ruler should be the whole body of the people so that no factional rifts can undermine the libertarian aims of the city-republics.<sup>34</sup> He equates the figure of the legislature with the people or the whole body of citizens or the majority thereof.<sup>35</sup> Different to the views of Thomas Aquinas, Marsilius insists that the whole body of citizens remains the sovereign legislature at all times, regardless of whether it makes the laws directly by itself or entrusts the law-making function to a specific person or persons. Marsilius also emphasizes that even if the people agree to transfer the right to exercise their sovereignty, a supreme ruler or magistrate, such an official can never become the legislator in the absolute sense. The ultimate authority at all times remains in the hands of the people, who can always check or even depose rulers if they do not act in accordance with the limited powers entrusted to them. The consequences of Marsilius' position on popular sovereignty vesting in the whole body of the people had important implications for guarding civic liberty in the city-republics: 1. Jurisdiction must always be voluntarily transferred; 2. The ruler appointed by the people must not be allowed more than the minimum discretion in administering the law; 3. Constitutional checks should be imposed to ensure that rulers remain responsive to the citizens who elected them.<sup>36</sup> This implies that in every commonwealth, the fundamental political authority is not the government or the ruling part but the human legislator is the people, the whole body of the citizens; the only legitimate sovereign is the people and is to be distinguished from the government. The government ought to be elected by the whole citizen body and ought to be responsible to it; the government must rule in strict adherence to the laws and if it transgresses a law it is liable to punishment by the whole citizen body;<sup>37</sup> the legislative power must be entirely in the hands of the whole citizen body; the government ought to

---

34 Skinner, *Foundations*, I, p. 61.

35 Cf. Skinner, *Foundations*, I, p. 61; De Freitas, *Federal-Republicanism*, p. 120.

36 Skinner, *Foundations*, I, p. 64.

37 Strauss, "Marsilius of Padua", p. 256.

be elected by the whole citizen body and ought to be responsible to it; the government must rule in strict adherence to the laws and if it transgresses a law it is liable to be punished by the whole citizen body.

Marsilius' theory of popular sovereignty provided the philosophical structure for supporting Bartolus' views on the juristic underpinnings of corporation theory undergirding popular sovereignty. The consequences of the emerging popular sovereignty underpinning the republican claims of the Italian city-republics in the course of the fifteenth century grew into a systematic defence of republican liberty against tyranny and despotism.<sup>38</sup>

The pervading legacy of popular sovereignty expounded by Marsilius and the Bartolist School of jurists was the stronger and more active involvement of the people in the art of practical government and to prevent any individual or faction in the commonwealth from legislating in its own selfish interests.<sup>39</sup>

### **2.3 Catholic Monarchomachian theories of popular sovereignty**

#### **2.3.1 *Salamasius and the origins of monarchomachian political thought***

The religious wars of the sixteenth century and the ensuing political instability of European states demanded theories to preserve states from becoming a meaningless struggle for existence. The pioneering work *Patritii Romani de Principatu* (The Sovereignty of the Roman Patriciate (1544)), a book of an unknown author, probably a Spaniard Jesuit who wrote under the name of Marius Salamonijs (c. 1450-1532) and designated himself as Patricius Romanus, was the first serious effort in the genre of monarchomachial publications to address issues related to civic freedom and faction conflicts in the state. In this work "an essentially Bartolist theory of inalienable popular sovereignty is presented as the most suitable form of government for the city of Rome".<sup>40</sup> The work reflects influences of Roman law, Aristotelian and Stoic political philosophy and Marsilius' views on popular sovereignty.<sup>41</sup> Salamonijs' work is composed of a series of dialogues in which the participants are agreed on the validity

38 The idea of a covenant, compact or contract that bound together the people, rulers, and God was echoed by Marsilius of Padua and Nicholas of Cusa. Cf. J. Witte, *Reformation of Rights*, pp. 135-136.

39 Skinner, *Foundations*, I, p. 181.

40 Skinner, *Foundations*, I, p. 148.

41 Skinner, *Foundations*, I, p.149, states that Salamonijs "was one of the leading jurists of his age, a famous commentator on the Digest, and a pioneer in seeking to incorporate the historical methods of the humanists into his own legal philosophy".

of divine and natural law as the ground on which the commonwealth must be established. A central theme of the work is that a ruler is a tyrant if he does not abide by the rules emanating from divine and natural law sources. Salamonius proceeds to address issues related to the ruler's authority to make laws and the limits to his lawmaking powers: How can the power of the ruler and the making of law be justified? Salamonius offers the Roman construction of the *Lex Regia* to answer this question.<sup>42</sup> The ruler is an agent of the people; his lawmaking power is delegated on certain conditions to him by the people.<sup>43</sup>

Salamonius also introduces the Ciceronian concept of the people as a *societas*, more specifically a *societas civilis*; the rules by which the people are ordered in the form of laws, are a *consensus in idem, pactum et stipulation* into which the members of society have entered. By such pacts (*pactiones*) the individual citizens have bound themselves to the welfare of the *utilitas populi*.<sup>44</sup> From this Ciceronian perspective, Salamonius constructs the function of rulership. The ruler is one of the *socii* like the other members of the community, bound by the same laws and obligations.<sup>45</sup> The ruler has to perform his functions of rulership *praepositus vel institutor societatis* – for the welfare of society. The ruler is the functioning member of the society similar to the functions and duties of a father as a functioning member of the family. Salamonius applies the fatherly metaphor to the lawmaking function of the prince and the coercive power he wields.

To Salamonius lawmaking is a function of society as a whole, and laws have the nature of agreements concluded by the whole of society in the form of *pactiones inter cives*. The actual making of law, however, is delegated to the ruler as a servant and perpetual magistrate of society.<sup>46</sup> The ruler, therefore, has no original lawmaking powers, nor can the authority delegated to him be used at his personal

---

42 Skinner, *Foundations*, II, pp.132-133.

43 Salamonius, *De Principatu*, (1544), fo 59; the ruler is the minister of the people who are said to have retained the ultimate sovereign authority over the city at all times (fos 55(a)-(b) & fo 59). This also reflects a covenantal perspective. Cf. Skinner, *Foundations*, II, p. 133. Furthermore no prince can be said to be *legibus solutus*.

44 Salamonius, *De Principatu*, (1544), fos 21(a), 28(b)-29(a).

45 Skinner, *Foundations*, II, p.133.

46 The people is greater than the ruler whom they create (*De Principatu*, (1544)), fos 12(b), 17(a), 21(a).

discretion.<sup>47</sup> Parallel to Marsilius' views on legislation as the product of the people as a whole, Salomonius states that the people are the real legislators in the commonwealth and the ruler must not use his delegated power beyond the limits of the delegation.<sup>48</sup> At the heart of the argument is the power of divine and human law from which the pacts between the people and the delegation of power to the ruler receive their enforcement.<sup>49</sup> In the background of Salomonius' argument lurks the Ciceronian conception of society as a legal order by agreement of its members; a covenantal community bound together by covenantal terms and agreements. The delegation of power to the ruler in terms of the *Lex Regia*, the Marsilian legislator in the form of the people and the corporational status of the *populus* form three cogent principles for securing the liberty of the *respublica* and limiting the powers of rulers. The implications of Salomonius' arguments opened vistas of republican freedom to states rocked by political power struggles between rulers and their subjects.

A most appealing idea was the notion that the members of society form a single entity whose common welfare is not identical with the separate welfare of its individual members and that this legal entity can delegate its authority, while retaining its original power. These ideas synthesised notions of the Aristotelian notion of the "good life" with the Ciceronian views of the *respublica* and the juristic and Marsilian notion of the legal sovereignty of the people and cast it into a cogent theory of the legal rights of the people to dispose of tyrannous rulers and to explain the original powers of the people as a historical entity to determine its own form of government. This implies that the ruler is the servant rather than the master of the laws, and that it must even be possible for a law propounded by a ruler to be abrogated in the name of justice by the sovereign people if they subsequently discover it not conducive to stability and common welfare.<sup>50</sup> The monarchomachs of the sixteenth and seventeenth centuries cast these ideas into a coherent system of thought which appealed to both Protestant and Catholic subjects in their battles against tyrannous rulers.

47 Cf. *De Principatu*, (1544), fo 15(b) & 11(b), 17(a), 21(a).

48 Although the ruler is above each individual citizen in authority (*maior singulis*) he is inferior to the populace as a whole (*inferior universe populo*) (fo 13(a)). Whatever is done by the ruler is in fact done by the authority of the people (fos 13(a)-(b)).

49 Cf. A. Lloyd, "Constitutionalism", p. 260.

50 *De Principatu*, (1544), fo 27(b).

### 2.3.2 *The Catholic monarchomachs on the corporational status of the populus and the delegation of power*

#### 2.3.2.1 The Catholic monarchomachs on the sovereignty of the people

The convergence of Ciceronian republicanism, juristic interpretations of the Roman *Lex Regia* and other Roman law sources, and Marsilian views of the sovereignty of the people contributed to monarchomachism as a trend in political philosophy, driven by the idea that states are autonomous polities in which the people wield the governing power. The Jesuit political authors in particular, contributed substantially towards this movement in explaining and analysing the new trends in monarchomachism as a comprehensive philosophy of law and politics towards establishing the *respublica Christiana* under the spiritual headship of the Pope.<sup>51</sup>

The Jesuit writings of Soto, Molina and Suarez sought to limit the sovereignty of the ruler by reverting to the writings of the jurists of the thirteenth and fourteenth centuries and the notion of popular sovereignty in the classical Marsilian applications of the body of the people as a corporate entity. The people as a juristic conception is not necessarily treated as a *universitas*, but sometimes regarded as a *societas* in the sense that it was applied by Salamonius. To Salamonius the *Civitas* is the *universus populus* which creates the ruler; the people itself is the *societas* and the ruler its *praepositus*.<sup>52</sup> The *Persona Civitatis* acts through the princeps when he issues laws or performs any other act of government.<sup>53</sup> In this regard the view taken of law by Salamonius appears to be precisely the same as that of Marsilius' *Defensor Pacis* of 1324.<sup>54</sup>

Soto distinguished between the people and the ruler as separate personalities. The people have a natural right against its ruler: the *respublica* by divine instruction transfers the right to rule but retains

---

51 Cf. Bellarmine, *De Summo Pontifice*, I: 449 & II, 5-167.

52 J. Marius Salamonius, *De Principatu libri VII*, (1578), I, pp. 16-18. At I, p. 36 Salamonius regards the unity of the people to be a fiction although it forms a unity: "vere populous non aliud est quam quaedam hominum multitudine"). He also treats the people as a *societas* (*De Principatu libri VII*, (1578), I: 36). To Salamonius the people is a contractually united body of persons. The *civitas* (as a *civilis societas*) presupposes binding contracts of mutual obligation between the individual members of the people and the ruler (as *praepositus*) in the *societas*. (Cf. Gierke, *Natural Law and the Theory of Society*, II, pp. 243, 256).

53 Cf. De Freitas, *Federal-Republicanism*, p. 77.

54 De Freitas, *Federal-Republicanism*, p. 77.

the right of deposing a monarch who has become tyrannical in the exercise of its power. The *respublica*, which is the sum of its subjects, is incapable by itself of exercising its sovereignty; only by transferring sovereignty does it become a body which has a head and is therefore capable of political action.<sup>55</sup>

Molina limits the very nature of the state by reserving the inalienable and natural rights of the original sovereign people, upon such sovereignty as had been alienated to the ruler – the collective body of the people confronting the ruler at a number of points as the true and proper state-personality.<sup>56</sup> Although the existence of civil society may be the work of individuals, the power of the associated community over its members proceeds from God.<sup>57</sup> Molina explains the divine and natural law origins of the political body in typical corporational terms. The *societas politica* arises from the union of originally independent individuals which composes the *reipublica*.<sup>58</sup> Sovereignty belongs to the community, whilst the community is driven by the nature of things to transfer its original authority to a ruler, because it cannot as a multitude exercise authority itself. Molina adopts the view that the sovereignty of the people is the authority of a body over its members, but the whole body is the sum of all, whilst the transference of authority to the ruler is a command of natural law. Molina distinguishes two persons in the state: the people and the ruler. The people is the *respublica* and possesses all the authority which it transfers *secundum arbitrium* and on such conditions as it thinks fit.<sup>59</sup> If the rulership is vacated or forfeited the *respublica* recovers the authority from the ruler.<sup>60</sup> The *respublica* also has a right of resistance to tyrants; it can depose or punish the tyrant by the express will of the whole body.<sup>61</sup> However, the ruler is superior to the *respublica* within the terms of the authority granted to the ruler.<sup>62</sup>

In his *De legibus* Suárez argued that men unite by individual will and common consent to establish a single political body, with the

55 Soto, *De justitia et jure*, (1602), I, I, 3; I, 7, 2; IV, 4, 1-2.

56 Gierke, *Natural Law and the Theory of Society*, I, p. 59.

57 Gierke, *Natural Law and the Theory of Society*, I, p. 105.

58 Molina, *De justitia et jure*, (1614), II, 22, 8-9.

59 Molina, *De justitia et jure* (1614), II, 22, 9 & II, 23, 1.

60 *De justitia et jure*, (1614), V, 3.

61 *De justitia et jure*, (1614), II, 6; V, 3.

62 The ruler is limited by the contractual rights of the people (*De justitia et jure*, (1614), II, 23).

agreement to assist one another by establishing a human organisation for a specific political end under one political head.<sup>63</sup> To Suárez the transfer of power is not a delegation but an alienation of power. The right of self-defence in Suárez's theory proceeds from natural law and the contractual nature of society and although the power of the people is alienated, they still retain the right to self-defence as a natural right pertaining to all men.<sup>64</sup> To Suárez Bellarmine's views that the people never transfers its powers to the prince without retaining it in a particular sense for use in certain circumstances, is not a contradiction, and it does not legitimise revolutionary claims to liberty by the people.<sup>65</sup> The circumstances under which people may retain power for use in certain circumstances, are to be understood as either being conditions pertaining to the prior contract or with the requirements of natural justice, because pacts and conventions exist for a specific purpose. If the people therefore transferred power to the king whilst reserving it to themselves in some grave causes and affairs, it is lawful for them to make use of it and to preserve their right.<sup>66</sup>

In Suárez the theory of popular sovereignty reaches its apex in monarchomachian political thought with his theory of legitimate resistance to tyranny. To Suárez the commonwealth, similar to the individual, has the right to preserve its life as the supreme natural right. If a king actually attacks the commonwealth with the aim of destroying and killing the citizens, there is an analogous right of self-defence, which makes it lawful for the community to resist its ruler, and even to kill him, if there is no other means of preserving itself. Even though a community may have transferred its power to its king in the way James I of England alleges, it nevertheless reserves the right to preserve itself. If the king converts his power into tyranny, then it becomes lawful for the community to make use of its natural power to defend itself.<sup>67</sup> The power of deposing a king can only be wielded as a method of self-defence when it becomes vital for a commonwealth to preserve itself against immanent destruction.

---

63 Suárez, *Tractatus de legibus ac Deo legislatore*, (1613), III, 2, 4.

64 Suárez, *Defensio fidei Catholicae et Apostolicae*, (1613), III, 3, 3, 253.

65 Suárez, *Defensio fidei Catholicae et Apostolicae*, (1613), III, 3, 3, 253.

66 Cf. Suárez, *Defensio fidei*, (1613), IV, 4, 16, 819.

67 Cf. Suárez, *Defensio fidei*, (1613), III, 3, 3, 253.

Suàrez applied the basic tenets of Neo-Thomist political theory in his objections to King James I's account of his own sovereignty. In his answer to the question as to whether the people of England are in fact bound by their oath of allegiance to their heretical king, Suàrez concludes that communities have rights similar to those of individuals: just as in the case of an individual person, the right to preserve one's life is also the supreme right possessed by commonwealths, because where a king attacks the commonwealth with the aim of unjustly destroying it and killing its citizens, there must be an analogous right of self-defence, which makes it lawful for the community to resist its ruler, and even to kill him, if it has no other means of preserving itself provided that self-defence is only justified if the community as a whole is in jeopardy. In his objections to James I's statements of his own sovereignty, Suàrez argues that although a community may have transferred its power to a king in the way James alleges, the people nevertheless maintains the right to preserve themselves. If, therefore, the king abuses his power by becoming a tyrant in such a way that his rule threatens the safety of the entire community, people have the right to use the power they naturally have, in order to defend themselves. More specifically, Suàrez answers as to whether the people of England are obliged to accept the new oaths of allegiance, that if the life of the community is genuinely at risk, it does become lawful for the people to resist the ruler in virtue of the natural right they have to protect themselves. This natural right of self-defence is exempted from the original contract by which the community transfers its power to its king.

Whereas the state was regarded to be human structure, created by contract in virtue of natural law, the Jesuits deemed the church to be the higher of the two sovereignties and having spiritual sovereignty superior to the political. Where the church touches the secular sphere the church acts with *potestas indirecta*. Suàrez maintained the superior jurisdiction of the spiritual power, having direct and indirect power over temporal rulers. The Pope has the right to call upon a Christian commonwealth to revolt against an oppressive ruler and he might authorise a foreign prince to invade the realm of a king who had been declared a heretic.<sup>68</sup> Suàrez also maintained that the Pope must be able to wield his indirect temporal power in such a way as to remove a prince and deprive him of his dominion in order to

---

68 Suàrez, *Defensio fidei*, (1613), VI, 4, 16, 819; Salmon, "Catholic resistance theory", p. 240.

prevent him from harming his subjects and absolve his subjects from their oaths of allegiance.

### 2.3.2.2 The Catholic monarchomachs on natural law and natural rights

Monarchomachian political thought reverted strongly to natural law theory to explain the origins of civil society and the power to make laws. Catholic thinkers like De Soto, Molina, Suárez and others used the hypothesis of an original condition of perfect human freedom, equality and independence and governed by the law of nature inscribed in the hearts of human beings as a basis to argue for the formation of the civil state.<sup>69</sup> The law of nature is both a dictate of right reason and an expression of the will of God because all law participate in the *lex aeterna*.<sup>70</sup>

Because to Molina the state of nature does not provide a right of dominion and the law in the state of nature is available to all men in every condition in which it may exist.<sup>71</sup> To the Neo-Thomist natural law theorists every human law must derive from the law of nature in order to be enforceable because natural law expresses the will of God and the divine positive law in Scripture is contained in the law of nature.<sup>72</sup> Both the laws contained in the Decalogue and the New Testament is inscribed in the hearts of all human beings.<sup>73</sup>

Regarding the law of nations (*ius gentium*), most Neo-Thomist authors agreed that it differs from natural law and belongs to the category of human positive law.<sup>74</sup> The first implication of this view is that political society is not directly ordained by God but is set up by its own citizens to suit their particular needs.<sup>75</sup> The second implication is closely attached to the first: political society does not have a natural existence but it is the result of the choice of its citizens.<sup>76</sup> Thirdly, the power to make laws and the ability to establish a commonwealth, flow from the natural state of mankind – a condition of freedom,

---

69 De Soto, *Libri Decem de Iustitia et Jure*, (1569): 17b, 18a.

70 Skinner, *Foundations*, II, p. 157.

71 Luis de Molina, *de Iustitia et Iure Libri Sex*, (1659): 1689.

72 Skinner, *Foundations*, II, p. 150.

73 Suárez, *Tractatus de legibus ac Deo Legislatore*, (1872), I: 109. Cf. Skinner, *Foundations*, II: 151.

74 Skinner, *Foundations*, II, p. 153.

75 Skinner, *Foundations*, II, p. 155

76 Skinner, *Foundations*, II, p. 155.

equality and independence – which implies that all human beings are born free by nature and that no person was the superior of the others. Fourthly, human beings in the pre-civil state act as social beings pursuing common political goals to ensure their well-being.<sup>77</sup>

Although political society has a distinct natural law origin, the needs of human beings in the natural state demand that everybody in the state submit to the law in order to ensure justice for all.<sup>78</sup> Suárez for example states that peace and justice cannot be maintained without convenient laws.<sup>79</sup> Vitoria explains the transition from the natural to the civil state as a consequence of the fact that no society can maintain itself without laws to govern it because each person would pursue his own interests and promote his own views.<sup>80</sup> The power to formalize the natural commitments of mankind flows from the will of God. Suárez maintains that the power to establish a commonwealth is not immediately provided by God. This, says Suárez, is to treat God as both the material and the efficient cause of political society;<sup>81</sup> God merely provided human beings with the power to create a commonwealth for themselves, by creating the circumstances and providing them with the capacities to erect a particular political society. Suárez regards political power to arise from the law of nature but the establishment of political society through human choice.<sup>82</sup>

The transition from man's natural state to the civil state is accomplished by the consent of the people to transfer their powers to a specific person for governing society for the good of the people.<sup>83</sup> Molina maintains that the power of the ruler must be according to the will and approbation of the people. The people transfer their powers to someone for the good of the commonwealth. According to De Soto the people should consent before a ruler can be instituted and the approbation of the people is constitutive for awarding power to the ruler.<sup>84</sup>

---

77 Cf. Francisco Vitoria, *Relecciones*, (1933-1936), p. 183; Skinner, *Foundations*, II, p. 155.

78 Skinner, *Foundations*, II, p. 159.

79 Skinner, *Foundations*, II, p. 160.

80 Skinner, *Foundations*, II, p. 161.

81 Skinner, *Foundations*, II, p. 161.

82 Skinner, *Foundations*, II, p. 161.

83 Skinner, *Foundations*, II, p. 162.

84 Skinner, *Foundations*, II, p. 162.

Only by consent of the people can political society be legitimately established.<sup>85</sup> The implication is also that if the act of consent is absent, the ruler cannot be said to have legitimate legislative power. The consent of the people is provided through the exercise of the general will of the people, unified by consent, bound by bond uniting them as a legal entity in the form of a *universitas*.<sup>86</sup> Because the rules of natural law are accessible by all human beings, all groups of people have the ability to establish political societies.<sup>87</sup> Therefore, the establishment of political society is an act of providence; it has as its basis natural law, flowing from the divine will and is accomplished through the free consent of the people. The natural law Thomists of the sixteenth-century could therefore be credited with providing a strong impetus to modern democratic theory, propagating the notion of the social contract and establishing natural law as the basis of political society.

### 3. Samuel Rutherford and the natural law theorists of the sixteenth-century

#### 3.1 *Samuel Rutherford and the impact of Christian humanism*

The importance of social humanism for Rutherford's social theory lies in the fact that he proposed political reform, which he, together with contemporary Protestant and Catholic authors had derived from the Renaissance and its classical authors. Rutherford's political views were spawned no more from Calvin's *Institutes* (and other Reformation authors) than from Cicero's *De Officiis* (and other Stoic writers). The publication in the original vernacular and English translations provided scholars – like Rutherford – access to Greek and Roman authors like Plato, Aristotle, Xenophon, Plutarch, Seneca, the Church fathers and Medievalists. The availability of these works, under the inspiration of the activism of the Reformed faith, produced specific guidelines on how social and political reform should take place. The religious drive to criticize the *status quo*, to accomplish the reformation of the social and political order and the sources generated by the Christian humanists provided Rutherford in his social and political activism with specific instructions as to how such reform should be accomplished. The substrate of Christian humanism permeating social and political theory of the

---

85 Skinner, *Foundations*, II, p. 163.

86 Skinner, *Foundations*, II, p. 166.

87 Skinner, *Foundations*, II, p. 168.

sixteenth-century established a certain level of consensus between Puritans and Neo-Scholastics. The Aristotelian ontology of cosmic proportion and order provided Puritans like Rutherford with a view of the harmonious, hierarchical order of the universe, governed by divine Providence. However, the Bible to Rutherford was to be the “pre-eminent” guiding force behind the drive to transform society. According to Todd the Puritans’ (like Rutherford) regard for the Scriptures guided their extra-biblical intellectual pursuits: their perception of a biblical concern for individual morality attracted them to the Roman Stoics; the need to understand the Bible contextually drew them to a study of ancient history; the need for a purified text of the Scriptures impelled them to pursue knowledge of Greek and Hebrew and of classical grammar and rhetoric; and the Church Fathers were revered given their proximity to the first century, for the light they shed on the Scriptures. The text of the Bible, however, remained of course, paramount among Christian humanist and Puritan concerns.<sup>88</sup>

The impact of Christian humanism on Rutherford’s political thought is evident both from his reliance on Aristotelian methodology and his references to and quotes from a host of classical, Medieval and post-Medieval sources. Classical sources from Greek and Roman thought are cited frequently: Plato,<sup>89</sup> Aristotle<sup>90</sup> and Cicero<sup>91</sup> are among the most frequently cited classics. References to Beza,<sup>92</sup> Aquinas,<sup>93</sup> Rebuffus,<sup>94</sup> Montanus,<sup>95</sup> Abulens,<sup>96</sup> Jerome,<sup>97</sup> Athanasius,<sup>98</sup> Milevitanus,<sup>99</sup> Gregorius<sup>100</sup> and Lyra<sup>101</sup> are also

88 Todd, *Christian Humanism and the Puritan Social Order*, pp. 27-33.

89 *Lex, Rex*, Q 44, p. 228(1).

90 *Lex, Rex*, Q 8, p. 31(1); Q 9, pp. 37(2), 38(1); Q 10, pp. 40(1), 45(1); Q 13, pp. 50(2), 51(1); Q 15, p. 62(1); Q 19, p. 85(2); Q 24, p. 115(1); Q 25, p. 119(2); Q 29, p. 144(2); Q 36, p. 185(1); Q 40, pp. 198(1), 204(2).

91 *Lex, Rex*, Q 30, p. 178(1); Q 36, p. 193(2); Q 44, p. 233(2).

92 *Lex, Rex*, Q 29, pp. 148(2), 152(1); Q 30, p. 155(1); Q 33, p. 173(2); Q 39, p. 184(1); Q 41, p. 209(1).

93 *Lex, Rex*, Q 18, p. 73(2); Q 41, p. 207(2).

94 *Lex, Rex*, Q 16, p. 68(2); Q 18, p. 72(1).

95 *Lex, Rex*, Q 18, p. 73(1).

96 *Lex, Rex*, Q 3, p. 4(1).

97 *Lex, Rex*, Q 3, 4(2).

98 *Lex, Rex*, Q 3, 4(2).

99 *Lex, Rex*, Q 3, 4(2).

100 *Lex, Rex*, Q 26, 127(2).

101 *Lex, Rex*, Q 29, 152(1).

common in *Lex, Rex*. Also references to the works of the Dominicans occur frequently: Salamoni<sup>102</sup>, Soto,<sup>103</sup> Vasquez<sup>104</sup> and Vitoria,<sup>105</sup> together with citations of Neo-Thomists like Boucher<sup>106</sup> and Rossaeus.<sup>107</sup> Jesuit authors like Valentia,<sup>108</sup> Molina,<sup>109</sup> Bellarmine<sup>110</sup> and Suárez<sup>111</sup> are also cited frequently by Rutherford. He treats these authors within the broader context of his Aristotelian methodology – either in support of his views or by rejecting these as being in conflict with the Puritan perspectives on specific points. He applies Aristotle's theory of the four causes in a Reformational context to state the foundational elements of political society. Rutherford states the *final cause* or purpose of civil government as being the well-being of the people by protecting them and the church so that they may attain the highest good in the knowledge of God in Christ; it explains *why* government exists. The *efficient cause* of government treats with the questions as to whom or what brings government into being. Rutherford answers that God is the *primary cause* who rules all things through His exalted Son and brings government into existence by using the consent of the people as a means (or *secondary cause*); God is the *principle* and the people the agent and it explains *how* government is established. The *formal cause* of government answers the question as to *what* is the essence of government: submission to and embodiment of the law discovered through study and application of his infallible Word, the Bible. The *material cause* of government is the substance out of which government is composed: it is made by ordinary sinful human beings, equal with all others by nature and each of whom is directly accountable to the true living God.

The issues on which Rutherford was generally in agreement with the Neo-Thomist natural law theorists, included a number of aspects flowing from their views on the corporate nature of the people and the natural law foundations of the commonwealth: political society is not directly ordained by God but is set up by its own citizens to suit their particular needs; political society

---

102 *Lex, Rex*, Q 16, 65(1); Q 26, p. 129(1); Q 31, p. 165(2).

103 *Lex, Rex*, Q 3, p. 3(2); Q 5, p. 13(1).

104 *Lex, Rex*, Q 2, p. 2(2); Q 13, p. 51(2).

105 *Lex, Rex*, Q 2, p. 3(1).

106 *Lex, Rex*, Q 41, p. 209(1).

107 *Lex, Rex*, Q 41, p. 209(1).

108 *Lex, Rex*, Q 26, p. 130(2).

109 *Lex, Rex*, Q 1, p. 1(2).

110 *Lex, Rex*, Q 3, 4(1); Q 5, p. 10(1).

111 *Lex, Rex*, Q 2, p. 2(1); Q 3, p. 3(2); Q 5, p. 13(1).

does not have a natural existence but is the result of the concerted action of its citizens; the power to make laws and establish a commonwealth flows from the nature of things; this state is a condition of freedom, equality and independence implying that naturally no person was the superior of others.

### **3.2 Rutherford's support of Neo-Scholastic natural law political theory**

#### **3.2.1 Rutherford on the corporational status of the *populus* and the delegation of power**

##### **3.2.1.1 Rutherford on the sovereignty of the people**

To Rutherford the power of the state is from God, and particular powers of government proceed from God.<sup>112</sup> This power is mediated from God through the consent of the community. Although all powers are awarded by God it flows from the people.<sup>113</sup> The civil office and power are from God alone, but that one rather than another should obtain it is from the will and choice of the people and the people may set boundaries to the exercise of power. Human beings who are united in a community must have the power to fend off violence through the hands of one or more rulers. If all men are born equal regarding civil power, yet one among them is to rule, then the power must be the result of their united decision. By the authoritative voice of the people a private man becomes a public person and is crowned king.<sup>114</sup>

The consent of the people by appointing a ruler is of fundamental importance for establishing legitimate government. If a person does not have the approval of the people he is a usurper. Rutherford maintains that the primary foundation of all power is the community although the precise manifestation of power vary according to the needs, conditions and cultures of specific peoples. Although the community has given power into the hands of the ruler and the states of parliament, it keeps for itself a power to resist tyranny. Because civil power does not flow immediately from nature, subjection by the people is rather civil than natural. Rulers are therefore established by the free consent of the people and not by nature.<sup>115</sup>

---

112 *Lex, Rex*, Q 1, p. 1(1)-(2).

113 *Lex, Rex*, Q 4, pp. 6(1)-9(2).

114 *Lex, Rex*, Q 4, pp. 6(1)-9(2).

115 *Lex, Rex*, Q 9, pp. 33(1)-39(2).

The transfer of power from the people to the ruler takes place through a reciprocal oath between a people and the ruler they appoint. All contracts between men bind the responsible parties under law and claim before men and God. This contract contains specific conditions, and if the conditions are not fulfilled the injured party is released from the contract. When the people appoint any one to be a ruler, the law of nature confirms their act.<sup>116</sup>

The will of the people to appoint a ruler emanate from the people as a single body of persons and this collectivity has more of the image of God in a substantial sense, and they are greater than ruler because many are more estimable than one. The people as a collective body are also above and contain greater dignity than the ruler; therefore the power of the people is superior to the ruler, because every efficient and constituent cause is more consequential than the effect. When a people place a government above themselves this does not mean that they have relinquished all rights to the ruler. The basis of power remains within the people, because civil power has limitations and the foundation of all political power remains in the people as an immortal spring.<sup>117</sup>

Although the ruler is above his subjects as individuals, he is inferior to his subjects when observed collectively for the whole nation because powers of sovereignty reside primarily and entirely in the people. Rutherford cites many examples of the power that resides in the people. All the power that the ruler has in terms of his office derives from the people who made him ruler. In addition the people do not have, either officially or fundamentally, an “absolute” power to give to a ruler. All the power they have is legal and noted to guide themselves in peace and godliness, and to save themselves from unjust violence by the benefit of rulers.<sup>118</sup>

The ruler is not the only person with the power to make laws; the people have some power in making laws.<sup>119</sup> The people are not only the fountain from which the government springs, but also of the statutes enacted as laws. Historically, says Rutherford, the chief purpose of civil law, which has been the foundation of all others, has

---

116 *Lex, Rex*, Q 14, pp. 54(1)-62(1).

117 *Lex, Rex*, Q 19, pp. 77(2)-88(1).

118 *Lex, Rex*, Q 19, pp. 77(1)-88(1).

119 *Lex, Rex*, Q 24, pp. 113(2)-119(1).

been the safety of the people; since the people are the author and foundation, under God, of civil law and power, their own safety must be the principle end for this venture.<sup>120</sup> If a ruler becomes a tyrant, a master, and destroyer of the people, he is subject to the power of the laws of the land. Because law creates the office of the ruler, the holder of that office cannot be ruler of the law.<sup>121</sup> Rulers are, therefore, to be honoured, revered, and obeyed for the sake of their office. However, all subjection to higher powers is rooted in obedience to the office of magistrates. This subjection to the lawful use of civil power and the Scriptures give no indication that this includes abusive or tyrannical power.<sup>122</sup>

### 3.2.1.2 Rutherford on natural law and natural rights

Rutherford argues that historically, natural law presupposed that individuals would naturally join in civil society, and the manner of the union would be a type of political body. The power of making laws proceeds from God as an attribute flowing from nature; this power is not different from creation, nor is it something that results from the observation of nature. All people are naturally born equally free; all authority of human beings over others is artificial because it is not natural to be subject to government.<sup>123</sup>

When a community decides in the light of nature to form a government, with the goal of defending themselves from violence, they do not thereby agree to a specific form of government. It merely implies that the establishment of government is natural to humanity. God made man with a civic nature yet giving individual communities the freedom to establish a particular form of government.<sup>124</sup>

Man is created in the image of God; man is a sacred being and, by the law of nature, can be no more sold and bought than a religious and sacred vessel dedicated to God. Every person is by nature born free; this freedom is natural to all human beings with the exception of the required subjugation to parents. Rutherford stresses the fact that people are naturally born free because in nature no beast is born specifically to rule. Nations and empires were established, not

---

120 *Lex, Rex*, Q 25, pp. 119(1)-125(2).

121 *Lex, Rex*, Q 26, 125(2)-136(2).

122 *Lex, Rex*, Q 9, pp. 33(2)-39(1).

123 *Lex, Rex*, Q 2, pp. 1(2)-3(2).

124 *Lex, Rex*, Q 2, pp. 1(2)-3(2).

by the law of nature, but by the law of nations. Therefore, no ruler or potentate is born freer by nature than the other human beings are and a ruler is made by the free consent of the people and not by nature.<sup>125</sup>

The right to make and enforce laws is in the people. This right cannot by choice or by the law of nature be relinquished to a ruler because neither God nor natural law has given them such a power.<sup>126</sup> Because the right to defend one is a natural right, the people have the right to depose tyrants who jeopardise the safety of the people. According to Rutherford there are natural rights which no human being can dispose of.<sup>127</sup>

## 4. Conclusions

Rutherford associated himself closely with aspects of Neo-Thomistic political thought and aligned his views in *Lex, Rex* accordingly. Firstly, Rutherford noted the democratic ideals contained in the political views of the ecclesiastical jurists. The interest in the Neo-Thomist views of the Dominicans and Jesuits was not something peculiar to Rutherford's thoughts. The social activism espoused by the Christian humanists and the Neo-Thomist natural law theorists formed part of the ongoing discourse about social and political reform. Both classical humanist sources and the works of the Neo-Thomist natural law theorists were reinterpreted in the light of the Bible to accomplish the original ideals of the first and second generation Reformers like Luther, Calvin, Melancthon, Zwingli, Bullinger and Bucer. To this end the methodological use of Aristotle's philosophy served as a catalyst/platform from which Puritan theorists formulated the basic principles for reforming state and society. Rutherford's *Lex, Rex* is a clear example of the impact of Christian humanism, Neo-Thomistic natural law theory and Aristotelian methodology on Puritan social and political views. In *Lex, Rex* Rutherford demonstrated the selective use and application of these sources and re-interpreted non-Biblical sources from a Scriptural perspective. The Christian basis the Puritans shared with the Neo-Thomist philosophers facilitated Rutherford's reliance upon both the Dominicans and the Jesuits. Rutherford aligned himself two aspects of the Neo-Thomist political theories in particular: the corporate underpinnings of Neo-Thomist democratic theory

---

125 *Lex, Rex*, Q 13, pp. 50(1)-54(1).

126 *Lex, Rex*, Q 14, pp. 54(1)-62(1).

127 Cf. e.g. *Lex, Rex*, Q 24, pp. 113(2)-119(1).

and the natural law basis of society. These aspects are of foundational importance for Rutherford's political and legal thought. It is most probable that through the works of the Dominicans and the Jesuits Rutherford gained access to the legal and corporation theories of the medieval jurists and political philosophers.

Although Rutherford had strong reservations about the theological underpinnings of the Neo-Thomist political views, he incorporated aspects of their political thought that could be re-interpreted from a Reformational Scriptural perspective without compromising the Reformed faith. Rutherford unhesitatingly criticized the Papist views of the Neo-Thomists but gave credit for insights which could fruitfully be assimilated into the Reformed perspectives on political and social reform.

## Bibliography

- AZO, P. 1966. *Summa super codicem*, Ed. M.E. Viora, Turin.
- AZO, P. 1966. *Lectura super codicem*, Ed. M.E. Viora, Turin.
- BARTOLUS OF SASSOFERRATO, 1562, *Digestum Novum Commentaria*, Basel.
- BELLARMINE, R. 1586. *De Summo Pontifice capite militantis Ecclesia, in Disputationes ... de Controversis Christianae Fidei*, vols. I-III, Ingolstadt.
- BERMAN, H.J. 1997. *Law and Revolution. The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge, Mass.
- CALASSO, F. 1957. *I Glossatori e la Teoria della Sovranità: Studi di Diritto Comune Publico*, 3rd edn., Milan.
- CANNING, J.P. 1983. "Ideas of the State in Thirteenth- and Fourteenth-Century Commentators on the Roman Law", *Transactions of the Royal Historical Society* 33, 1-27.
- CANNING, J.P. 1987. *The Political Thought of Baldus de Ubaldis*, Cambridge University Press, Cambridge.
- DE FREITAS, S.A. 2014. *Law and Federal-Republicanism: Samuel Rutherford's Quest for a Constitutional Model*, unpublished LL.D.-thesis, University of the Free State, Bloemfontein.
- DE SOTO, D. 1569. *Libri Decem de Iustitia et Iure*, Lyons.
- GIERKE, O. 1934. *Natural Law and the Theory of Society, 1500-1800*, vols. I & II, transl. E. Barker, Cambridge University Press, Cambridge.

- GILMORE, M.P. 1941. *Argument from Roman Law in Political Thought, 1200-1600*, Cambridge, Mass.
- LLOYD, H.A. 1996. "Constitutionalism", J.H. Burns (Ed.), *The Cambridge History of Political Thought, 1450-1700*, Cambridge University Press, Cambridge, pp. 254-297.
- MOLINA, L. 1602-1603. *De iustitia et jure libri sex*, vols. I & II, Mainz.
- MOLINA, L. 1614. *De iustitia et iure Libri Sex*, vols. I & II, Cologne.
- MOLINA, L. 1659. *De iustitia et iure Libri Sex*, vols. I & II, Mainz.
- NAJEMY, J. 1994. "Stato, Commune e 'Universitas'", *Annali dell'Instituto Storico Italo-germanico in Trento* 20, pp. 245-263.
- RUTHERFORD, S. 1982. *Lex, Rex, or The Law and the Prince ...*, Sprinkle Publications, Harrisonburg, Virginia.
- SALAMONIUS, M. 1544. *Patritii Romani de Principatu libri VII*, Rome.
- SALAMONIUS, M. 1578. *De Principatu libri VII*, Paris.
- SALMON, J.H.M. 1996. Catholic resistance theory, Ultramontanism, and the royalist response, 1580-1620, Ed. J.H. Burns, *The Cambridge History of political Thought, 1450-1700*, Cambridge University Press, Cambridge, pp. 219-253.
- SKINNER, Q. 1978. *The Foundations of Modern Political Thought*, vol. I: The Renaissance, Cambridge University Press, Cambridge.
- SKINNER, Q. 1978. *The Foundations of Modern Political Thought*, vol. II: The Age of Reformation, Cambridge University Press, Cambridge.
- SKINNER, Q. 2002. *Visions of Politics*, vol. II: Renaissance Virtues, Cambridge University Press, Cambridge.
- SOTO, 1569. *Libri Decem de Iustitia et Jure*, Lyons.
- SOTO, 1602. *Libri Decem de Iustitia et Jure*, Venice.
- STRAUSS, L. 1972. "Marsilius of Padua", Ed. L. Strauss & J. Cropsey, *History of political Philosophy*, Rand McNally College Publishing Company, Chicago, 251-270.
- SUAREZ, F. 1613. *Tractatus de legibus ac Deo legislatore*, Lyons.
- SUAREZ, F. 1613. *Defensio fidei Catholicae et Apostolicae*, Coimbra.
- SUAREZ, F. 1614. *Defensio fidei Catholicae et Apostolicae*, Cologne.
- SUAREZ, F. 1872. *Tractatus de legibus ac Deo Legislatore*, vols. I & II, Naples.
- TODD, M. 2002. *Christian Humanism and the Puritan Social Order*, Cambridge University Press, Cambridge.

VITORIA, F. 1933-1936, *Relecciones Teológicas de Maestro Fray Francisco de Vitoria*, Luis G. Alonso Getino (Ed.), vols. I-III, Asociación Francisco de Vitoria, Madrid.

WAHL, J.A. 1977. "Baldus de Ubaldis and the Foundations of the Nation-State", *Manuscripta* 21, pp. 80-96.

WITTE, J.R. 2007. *The Reformation of Rights. Law, Religion, and Human Rights in early Modern Calvinism*, Cambridge University Press, Cambridge.