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978-0-521-81842-1 - The Reformation of Rights: Law, Religion, and Human Rights in
Early Modern Calvinism

John Witte

Excerpt

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Introduction

In his *Origins of Totalitarian Democracy* (1952), J. L. Talmon described the French Revolution as the harbinger of modern forms of both liberal democracy and totalitarian fascism. The political ideas of the French Revolution, said Talmon, were sufficiently “protean” and “provocative” to guide these juxtaposed political movements along paths that the *philosophes* could never have anticipated. A Lincoln and a Marx, a Roosevelt and a Mussolini could all take inspiration from the core teachings of the French Revolution.¹

An analogous claim can be made about the Calvinist Reformation. This Protestant movement first broke out in Geneva under the leadership of the French theologian and jurist, John Calvin (1509–1564), and then swept over large parts of France, Scotland, the Netherlands, Germany, England, and North America in the next 250 years. Calvin’s original political ideas were also sufficiently “protean” and “provocative” to inspire a wide range of both totalitarian and democratic tendencies. It is easy enough to expose the totalitarian tendencies of many leading Calvinists – Calvin himself, Theodore Beza, Oliver Cromwell, Samuel Rutherford, John Winthrop, Cotton Mather, and their ample modern progeny. It is easy enough to compile an ample list of victims who were reviled, censored, imprisoned, tortured, banished, and even executed by Calvinists for their religious beliefs – Michael Servetus, Jean Morély, Jacob Arminius, Hugo Grotius, Richard Overton, John Lilburne, Roger Williams, and Anne Hutchinson, to name a few. It is easy enough to find early modern Calvinist tracts and sermons, on both sides of the Atlantic, earnestly defending all manner of monarchy, slavery, chauvinism, racism, bigotry, elitism, persecution, and other shameful forms of pathos and injustice. Any honest appraisal of the Calvinist tradition of law, religion, and human rights must acknowledge these brute and brutal facts.

¹ Jacob Leib Talmon, *The Origins of Totalitarian Democracy* (Boston, 1952).

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This volume tells the human rights side of the Calvinist story, while also acknowledging its grimmer side. It shows how Calvin and his followers developed a distinct theology and jurisprudence of human rights and gradually cast these rights teachings into enduring institutional and constitutional forms in early modern Europe and America. The first and most essential rights for early modern Calvinists were religious rights – the rights of the individual believer to enjoy liberty of conscience and free exercise of religion, and the rights of the religious group to enjoy freedom of worship and autonomy of governance. Already in Calvin’s day, the reformers discovered that proper protection of religious rights required protection of several correlative rights as well, particularly as Calvinists found themselves repressed and persecuted as minorities. The rights of the individual to religious conscience and exercise required attendant rights to assemble, speak, worship, evangelize, educate, parent, travel, and more on the basis of their beliefs. The rights of the religious group to worship and govern itself as an ecclesiastical polity required attendant rights to legal personality, corporate property, collective worship, organized charity, parochial education, freedom of press, freedom of contract, freedom of association, and more. For early modern Calvinists, religious rights thus became, in Georg Jellinek’s words, the “mother” of many other human rights.²

Religious rights also became the “midwife” of many constitutional laws in the early modern period. Calvinists discovered through hard experience that religious and other human rights have little salience in societies that lack basic constitutional structures and procedures that give them meaning and measure. Human rights have little value for parties who lack basic rights to security, succor, and sanctuary. Human rights have little pertinence for victims who lack legal standing in courts or procedural rights to pursue apt remedies against political officials or fellow citizens who have abused their rights. Human rights have little cogency in communities that lack the ethos and ethic to render rights violations a source of shame and regret, restraint and respect. And so, over time, early modern Calvinists worked with others slowly to develop a human rights culture and a set of constitutional structures dedicated to the rule of law and to the protection of the essential rights and liberties of all peaceable believers.

Calvinists took the lead in producing a number of landmark constitutional documents that gradually expanded the Western regime of

² Georg Jellinek, *Die Erklärung der Menschen- und Bürgerrechte: Ein Beitrag zur modernen Verfassungsgeschichte* (Leipzig, 1895), 42.

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human rights in the early modern period. These documents included the Ecclesiastical Ordinance (1541/61) and the Civil Edict (1568) of Geneva; in the Netherlands, the Union of Utrecht (1579) and the Act of Abjuration (1581); in France, the Edict of Nantes (1598); in Scotland, the Solemn League and Covenant (1643); in England, the Petition of Right (1628), the Bill of Rights (1689), and the Toleration Act (1689); in New England, sundry documents from the Body of Liberties (1641) to the Massachusetts Constitution (1780). Supporting these and other legal texts on point were thousands of Calvinist pamphlets, sermons, declarations, briefs, and learned tracts that defined and defended an ever greater roll and role of rights in church, state, and society.

Chapter 1 herein shows how John Calvin laid many of the foundations for this development of rights in his work in Geneva. Calvin began his reformation movement there in 1536, freshly armed with the first edition of his *Institutes of the Christian Religion*. In his early years, Calvin echoed the Protestant calls for liberty already made famous by Martin Luther a generation before – liberty of the individual conscience from canon laws and clerical controls, liberty of political officials from ecclesiastical power and privilege, liberty of the local clergy from central papal rule, liberty of the young Protestant churches from oppression by church and state alike. Initially, Calvin tinkered with this Protestant inheritance more than he transformed it. He spent time rooting these Protestant claims for liberty in the Bible and in selected classical and Catholic sources, and showing how spiritual and political liberty are both different than and essential to republican constitutionalism. In these early years, Calvin also called for general toleration of Catholics, Protestants, Orthodox, Jews, and Muslims alike.

In his mature writings, Calvin worked out a much fuller theory of law, religion, and human rights. His mature theory became more parochial in its focus, and it rendered Calvin and the Genevan authorities more hostile to moral indiscipline and religious dissent within their community. But this theory also became foundational for the later development of Calvinist theories of rights, particularly religious rights. Calvin developed a strong theory of the liberty of Christian conscience, which provided the eventual cornerstone for the constitutional protections of religious liberty advocated by Calvinists. He developed a detailed theory of moral laws and duties that foreshadowed a whole range of later Calvinist natural law and natural rights theories. He called for protection of “the common rights of mankind” which spurred the development of a number of later Calvinist theories of public, private, and procedural rights.

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Calvin charted a deft course between Lutherans of his day, who tended to subordinate the church to the state, and Anabaptists, who tended to withdraw the church from the state and society altogether. Like Lutherans, Calvin insisted that each local polity (like Geneva) be a uniform Christian commonwealth that adhered to the general principles of the Bible and natural law and that translated them into detailed positive laws of religious worship, Sabbath observance, public morality, marriage and family life, social welfare, public education, and more. Like Anabaptists, Calvin insisted on the basic separation of the offices and operations of church and state, leaving the church to govern its own doctrine and liturgy, polity and property, without state interference. But, unlike both groups, Calvin insisted that both church and state officials were to play complementary legal roles in the creation of the local Christian commonwealth and in the cultivation of the Christian citizen.

Calvin emphasized the uses of the law and the collaboration of church and state in achieving the same within the local community. Both natural laws and positive laws, he believed, are useful in creating two tracks of morals – “civil norms” which are common to all persons and “spiritual norms” which are distinctly Christian. These two sets of norms, in turn, give rise to two tracks of morality – a simple “morality of duty” demanded of all persons regardless of their faith, and a higher “morality of aspiration” demanded of believers in reflection of their faith. This two-track system of morality corresponded roughly to the proper division of jurisdiction between church and state, as Calvin saw it. It was the church’s responsibility to teach aspirational spiritual norms. It was the state’s responsibility to enforce mandatory civil norms. This division of responsibility was reflected in the procedural divisions between the Consistory and the Council in Calvin’s Geneva. In most cases that did not involve serious crimes, the Consistory would first call parties to their higher spiritual duties, backing their recommendations with (threats of) spiritual discipline. If such spiritual counsel failed, the parties were referred to the Council to compel them, using civil and criminal sanctions, to honor at least their basic civil duties.

Calvin’s most original contribution to the Western rights tradition lay in his restructuring of the liberty and order of the church. This he accomplished by combining the principles of rule of law, democratic government, and spiritual liberty into a coherent ecclesiology. First, Calvin urged respect for the rule of law within the church. He devised detailed laws that defined the church’s doctrines and disciplinary standards, the rights and duties of their officers and parishioners, the procedures and methods of the Consistory courts. The church was thereby protected from the intrusions of

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state law and the vicissitudes of its members. Church officials were limited in their discretion. Parishioners understood their spiritual duties. When new rules were issued, they were discussed, promulgated, and made well known. Issues that were ripe for review were resolved by the Consistory. Parties that had cases to be heard exhausted their remedies at church law before turning to state authorities. To be sure, this principle of the rule of law was an ideal that was often breached, from Calvin's day forward. Yet this principle eventually helped to guarantee order, organization, and orthodoxy within the widely dispersed Calvinist churches of early modern Europe and North America.

Second, Calvin urged respect for the democratic process within the church. Church officers were to be elected by the congregation and delegates to church synods were to be elected by their peers. Churches were to hold periodic congregational meetings and to give standing to communicant members to air their concerns and press their claims. Implicit in this democratic process was a willingness to entertain changes in doctrine, liturgy, and polity, to accommodate new visions and insights, to remedy clerical missteps and abuses, to spurn ideas and institutions whose utility and veracity were no longer tenable. To be sure, this principle did not always insulate Calvinist churches from a belligerent dogmatism. Just ask Michael Servetus or Jean Morély. But this principle of democracy helped to guarantee constant reflection, renewal, and reform within the church – *semper reformanda ecclesiae* (always reforming the church), in Calvin's signature phrase.

Third, Calvin urged respect for liberty within the church. Christian believers were to be free to enter and leave the church, free to partake of the church without fear of bodily coercion and persecution, free to assemble, worship, pray, and partake of the sacraments without fear of political reprisal, free to elect their church officers, free to debate and deliberate matters of faith and discipline, free to pursue discretionary matters of faith, the *adiaphora*, without undue laws and structures. To be sure, this principle, too, was an ideal that Calvin already compromised in his unusual empowerment of the Consistory in his later years; some New England Calvinists breached this ideal even further in their theocratic experiments. Yet this principle of liberty helped to guarantee constant action, adherence, and agitation for reform by individual church members.

It was Calvin's genius to integrate these three cardinal principles of ecclesiology. Democratic processes prevented the rule-of-law principle from promoting an ossified and outmoded orthodoxy. The rule of law prevented the democratic principle from promoting a faith swayed by fleeting

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fashions and public opinions. Individual liberty kept both corporate rule and democratic principles from tyrannizing spiritual minorities. Together, these principles allowed the church to strike a perpetual balance between law and liberty, structure and spirit, order and innovation, dogma and *adi-aphora*. They also helped widely dispersed Calvinist congregations to adapt and adjust themselves to a variety of locales, and to absorb and accommodate local spiritual and cultural flavors without losing their core religious identity.³

This integrated theory of the church had obvious implications for the theory of the state. Calvin hinted that a similar combination of rule of law, democratic process, and individual liberty might serve the state equally well, though he did not work a detailed political theory. What Calvin adumbrated, his followers elaborated in a variety of ways.

Chapter 2 recounts that, shortly after his death in 1564, Calvin's original theory of law and liberty, and church and state faced its first major crisis. The crisis was the St. Bartholomew's Day Massacre of 1572, in which some 10,000 to 100,000 French Calvinists were slaughtered in a month of barbarism instigated by French Catholic authorities. Calvin's teachings provided little guidance to respond to a crisis of this magnitude. Calvin assumed that each local community would have a single faith. How could Calvinists countenance religious pluralism and demand toleration as a religious minority in a majority Catholic community? Calvin assumed that church and state would cooperate in the governance of a godly polity. What if church and state came into collision, or even worse into collusion against Calvinists? Calvin assumed that Christian subjects should obey political authorities up to the limits of Christian conscience, and bear persecution with penitence, patience, and prayer in hopes that a better magistrate would come. But what if the persecution escalated to outright pogrom? Were prayer, flight, and martyrdom the only options for conscientious Christians? Was there no place for resistance and revolt, even regicide and revolution in extreme cases? These challenges had faced Calvinists in various places throughout the 1540s to 1560s. They became stark life-and-death issues for French Calvinists after 1572.

It was Calvin's hand-picked successor in Geneva, Theodore Beza (1519–1605), who responded most decisively to this crisis. Echoing in part several German Lutherans and several English and Scottish Calvinists of the 1550s

³ This feature of early modern Calvinist churches bears some resemblance to the classic Jewish law principle of *dina d'malkhuta dina*, which allowed Jewish communities in the diaspora to adapt to local legal cultures without losing their core devotion to Halacha. See Elliot N. Dorff and Arthur Rossett, *The Living Tree: The Roots and Growth of Jewish Law* (Albany, NY, 1988), 265–275.

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and 1560s, Beza reconstructed some of Calvin's original teachings, which Beza had initially defended fiercely. Every political government, Beza now argued, is formed by a tacit or explicit covenant or contract sworn between the rulers and their subjects before God as third party and judge. In this covenant, God agrees to protect and bless the community in return for their proper obedience of the laws of God and nature, particularly as set out in the Decalogue. The rulers agree to exercise God's political authority in the community, and to honor these higher laws and protect the people's rights. The people agree to exercise God's political will for the community by electing and petitioning their rulers and by honoring and obeying them so long as they remain faithful to the political covenant. If the people violate the terms of this political covenant and become criminals, Beza argued, God empowers rulers to prosecute and punish them – and sentence them to death in extreme cases. But if the rulers violate the terms of the political covenant and become tyrants, God empowers the people to resist and to remove them from office – and sentence them to death in extreme cases. The power to remove tyrants, however, lies not directly with the people, but with their representatives, the lower magistrates, who are constitutionally called to organize and direct the people in orderly resistance – in all out warfare and revolution if needed.

For Beza, tyrants were rulers who violated the terms of the political covenant – particularly its foundational requirement that all must honor the rights of God to be worshiped and the rights of God's people to discharge the duties of the faith in conformity with God's law. Beza made the rights of the people the foundation and condition of good government. "The people are not made for rulers, but rulers for the people," he wrote famously. If the magistrate rules properly, the people must obey him. But if the magistrate exceeds his authority in violation of the political covenant, the people, through their representatives, have not just the right but the duty to resist him as a tyrant.

The issue that remained for Beza was how to ground his doctrine of rights and to determine which rights were so fundamental that, if breached by a tyrant, triggered the right to organized resistance. Here Beza cleverly reworked Calvin's main arguments, taking his cues from Calvin's own late-life statements on the need to protect the subjective rights of the individual. The first and most important rights, Beza reasoned, had to be religious rights – "liberty of conscience" and "free exercise of religion." Persons are, after all, first and foremost the subjects of the Creator God and called to honor and worship God above all else. If the magistrate breaches these religious rights, then nothing can be sacred and secure any longer. What

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is essential to the protection of the liberty of conscience and free exercise of religion? Beza continued catechetically: the ability to live in full conformity with the law of God. What is the law of God? First and foremost the Decalogue, which sets out the core duties of right Christian living. What do these Ten Commandments entail? The rights to worship God, to obey the Sabbath, to avoid foreign idols and false oaths in accordance with the First Table of the Decalogue, and the rights to marriage, parentage, and a household, and to life, property, and reputation protected by the Second Table. Is the Decalogue the only law of God? No, the natural law that God has written on the hearts of all people teaches other rights that are essential to the protection of a person and a people. Beza touched on several of these broader natural rights: freedom of religious mission and education, freedom of church government and emigration, freedoms of speech, assembly, and petition, and freedom of marriage, divorce, and private contract. Beza did not do much to ground and systematize these natural rights, nor did he make clear which of them was so fundamental that their breach could trigger organized resistance. But he put in place much of the logic of a fundamental rights calculus that later Calvinists would refine and expand.

Chapter 3 shows how Beza's main argument about political covenants and fundamental rights came in for endless variations and expansions over the next two centuries, particularly among later Calvinists who fought against tyrants in the Netherlands, Scotland, England, and eventually America. These types of arguments had immediate application in the revolt of the Dutch Calvinists against the tyranny of Spain. Much like America two centuries later, the Netherlands was ruled by a foreign monarch, the Spanish emperor, Philip II, who became abusive. In the 1560s, Philip imposed a series of increasingly onerous restrictions on the Netherlands – heavy taxes, commercial regulations, military conscriptions, forced quartering of soldiers, and more – in breach of many ancient charters of rights and liberties. Even worse, Philip set up the terrifying Spanish Inquisition in the Netherlands, slaughtering Calvinists and others by the thousands and confiscating massive amounts of private property in a determined effort to root out Protestant heresy and to impose on the Netherlands the sweeping new decrees of the Catholic Council of Trent. In the later 1560s and 1570s, under the inspired leadership of William of Orange and others, the Dutch put into action the early Calvinist principles of resistance and revolution. Whipped up by thunderous preaching and thousands of pamphlets, Calvinists and other Dutchmen eventually threw off their Spanish oppressors. They issued a declaration of independence, justifying their revolt from Spain on the

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strength of “clear truths” about “the laws and liberties of nature.” They established a confederate government featuring seven sovereign provinces and a national government, each with its own constitution and its own bill of rights. Some of these provincial constitutions embraced the most advanced rights protections of the day, rendering the Netherlands a haven for many, though not all, cultural and religious dissenters from throughout Europe.

The Dutch Revolt drew to itself a number of powerful Calvinist theorists. The most original work came from the prolific pen of the German-born Calvinist jurist, Johannes Althusius (1557–1638). Drawing on a vast array of biblical, classical, Catholic, and Protestant sources, Althusius systematized and greatly expanded many of the core political and legal teachings of Calvin, Beza, and other co-religionists – that the republic is formed by a covenant between the rulers and the people before God, that the foundation of this covenant is the law of God and nature, that the Decalogue is the best expression of this higher law, that church and state are separate in form but conjoined in function, that families, churches, and states alike must protect the rights and liberties of the people, and that violations of these rights and liberties, or of the divine and natural laws that inform and empower them, are instances of tyranny that must trigger organized constitutional resistance.

Althusius added a number of other core ideas to this Calvinist inheritance. He developed a natural law theory that still treated the Decalogue as the best source and summary of natural law but layered its Commandments with all manner of new biblical, classical, and Christian teachings. He developed a theory of positive law that judged the validity and utility of any human law, including the positive laws of Moses and the canon laws of the church, against both the natural law of Scripture and tradition and the fundamental law of the state. He called for a detailed written constitution as the fundamental law of the community and called for perennial protection of “the rule of law” and “rule of rights.” He developed an expansive theory of popular sovereignty as an expression of the divine sovereignty that each person reflects as an image bearer of God. He developed a detailed and refined theory of natural rights – religious and social, public and private, substantive and procedural, contractual and proprietary. He demonstrated at great length how each of these rights was predicated on the Decalogue and other forms of natural law, and how each was to be protected by public, private, and criminal laws and procedures promulgated by the state. Particularly striking was his call for religious toleration and absolute liberty of conscience for all as a natural corollary and consequence of the Calvinist

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teaching of the absolute sovereignty of God whose relationship with his creatures could not be trespassed.

More striking still was Althusius's "symbiotic theory" of human nature and "covenantal theory" of society and politics. While acknowledging the traditional Calvinist teaching of the total depravity of persons, Althusius emphasized that God has created all persons as moral, loving, communicative, and social beings, whose lives are most completely fulfilled through symbiotic relationships with others in which they can appropriately share their bodies and souls, their lives and spirits, their belongings and rights. Thus, while persons are born free, equal, and individual, they are by nature and necessity inclined to form associations – marriages and families, clubs and corporations, cities and provinces, nation-states and empires. Each of these associations, from the tiniest household to the vastest empire, is formed by a mutually consensual covenant or contract sworn by all members of that association before each other and God. Each association is a locus of authority and liberty that binds both rulers and subjects to the terms of their founding contract and to the commands of the foundational laws of God and nature. Each association confirms and protects the sovereignty and identity of its constituent members as well as their natural rights and liberties.

Althusius applied this Christian social contract theory most fully in his description of the state. Using the political history of ancient Israel as his best example, he showed historically and philosophically how nation-states develop gradually from families to tribes to cities to provinces to nations to empires. Each new layer of political sovereignty is formed by covenants sworn before God by representatives of the smaller units, and these covenants eventually become the written constitutions of the polity. The constitutions define and divide the executive, legislative, and judicial offices within that polity, and govern the relations of its rulers and subjects, clerics and magistrates, associations and individuals. They determine the relations between and among nations, provinces, and cities, and between and among private and public associations – all of which Althusius called a form of "federalism" (from *foedus*, the Latin term for covenant). The constitutions also make clear the political acts and omissions that constitute tyranny and the procedures and remedies available to those who are abused. Althusius produced the most comprehensive Calvinist theory of law, religion, and human rights in the early modern period, and many of his insights anticipated teachings that would become axiomatic for Western constitutionalism and human rights.