

LC 239

Draft

Published in *Luther – 95 Treasures, 95 People* (Wittenberg: Stiftung Luthergedenkstätten in Sachsen-Anhalt, 2017), 451-455

## The Legal Turn of the Reformation

John Witte, Jr.

### Abstract

*The Lutheran Reformation revolutionized both church and state, theology and law. This brief essay sketches the legal influence of the Reformation, building on Luther's opening call for religious freedom and his more complex theory of the two kingdoms.*

**Keywords:** Martin Luther; law and Gospel; church- state theory; two kingdoms theory; Reformation; legal reform

Martin Luther began the Reformation with a loud call for freedom – freedom of the church from the tyranny of the pope, freedom of the laity from the dominance of the clergy, freedom of the conscience from the strictures of canon law and human traditions.

This revolutionary call toppled many traditional church structures and practices in Germany after 1517. The mediaeval canon law books were burned. Church courts were closed. Monasteries and cloisters were confiscated. Church guilds and foundations were dissolved. Church lands were seized. Clerical privileges were stripped. Mendicant begging was banned. Mandatory celibacy was suspended. Indulgence trafficking was condemned. Taxes to Rome were outlawed. Ties to the pope were severed. “Neither pope nor bishop nor any other man has the right to impose a single syllable of law upon a Christian man without his consent” (WA 6, 536; LW 36:70), Luther wrote famously in 1520. The Bible contains all the law that is needed for proper Christian living. To subtract from the law of the Bible is blasphemy. To add to the law of the Bible is tyranny. “Wise rulers, side by side with Holy Scripture, are law enough” (WA 6, 460; LW 44:203).

Such shrill rhetoric plunged Germany into an acute crisis in the 1520s. On the one hand, Luther had drawn too sharp a contrast between spiritual freedom and disciplined orthodoxy within the church. New Lutheran churches, clerics and congregants were treating their new freedom as licence for all manner of spiritual experimentation and laxness. Widespread confusion reigned over preaching, prayers, sacraments, funerals,

holidays and pastoral duties. Church attendance, tithe payments and charitable offerings declined abruptly among many who took Luther's new teachings of free grace literally. On the other hand, Luther had driven too deep a wedge between the laws of church and state. Many subjects traditionally governed by the church's canon law now remained without effective governance. Local magistrates were quick to take over church properties and institutions, but they offered few new laws and services in place of them. Prostitution, concubinage, gambling, drunkenness and usury thus reached new heights. Crime, delinquency, truancy and vagabondage soared. Schools, charities, hospitals and other welfare institutions fell into massive disarray. Requirements for family life, inheritance, banking and commerce became hopelessly confused. The crisis was made worse by the Peasants' War of 1524–26, which was fought in the name of Christian freedom but harshly repressed in the name of Christian order.

In response, the Lutheran reformation of theology and the church quickly broadened into a reformation of law and the state as well. From the late 1520s, Lutheran theologians cast their theological doctrines into catechisms, confessions and creeds and paid much closer attention to their legal, political and social implications. Lutheran jurists, in turn, joined the theologians in crafting hundreds of ambitious new reformation ordinances for the German cities and territories. By 1570, every major Lutheran land had comprehensive new state laws in place, governing public and private matters spiritual and temporal life alike.

Critics of the day, and many writers since, have seen this legal turn of the Reformation as a betrayal and corruption of Luther's original message of Christian freedom. But Luther ultimately realised that he needed the law and legal profession to stabilise and enforce his reformation movement – even though he still thought jurists were “bad Christians.” Radical theological reforms had made fundamental legal reforms possible. Fundamental legal reforms, in turn, would make the radical theological reforms permanent. After 1530, the Lutheran Reformation became in its essence both a theological and a legal reform movement.

This broadened reformation effort was built on Luther's two-kingdoms theory. God has ordained two kingdoms or realms, the earthly kingdom and the heavenly kingdom, in which humanity is destined to live, Luther argued. The earthly kingdom is the realm of creation, of natural and civil life, where a person operates primarily by reason and law. The heavenly kingdom is the realm of redemption, of spiritual and eternal life, where a person operates primarily by faith and love. These two kingdoms embrace parallel heavenly and earthly, spiritual and temporal forms of righteousness and justice, government and order, truth and knowledge. These two kingdoms interact and depend on each other in a variety of ways, not least through biblical revelation and the faithful discharge of Christian vocations in earthly life. But these two kingdoms ultimately remain distinct. The earthly kingdom is distorted by sin and governed by the law. The heavenly kingdom is renewed by grace and guided by the Gospel. A Christian is a citizen of both kingdoms at once and invariably comes under the distinctive government of each. As a heavenly citizen, the Christian remains free to live fully by the light of the Word of God. But as an earthly citizen, the Christian is bound by law and called to obey the authorities that

God has ordained and maintained for the governance of this earthly kingdom. Therefore, spiritual freedom and equality may well coexist with political bondage and hierarchy.

For Luther, families, churches and states were the three natural orders or estates of the earthly kingdom, but only the state has formal legal authority, the power to pass laws. Citing Romans 13, he called the magistrate God's vice-regent on earth, "a great gift of God to mankind," "an image, shadow, and figure of the dominion of Christ" (WA 30/2, 554; LW 46:237). The magistrate must not only pass laws on the basis of God's natural law, he continued, but also exercise God's judgment and wrath against human sin and crime. Princes and magistrates are "the bows and arrows" of God, (WA 31/2:394-95; LW 17:171), equipped to hunt down God's enemies in the earthly kingdom. The hand of the government official "that wields the sword and slays is not man's hand, but God's; and it is not man, but God, who hangs, tortures, beheads, slays, and fights. All these are God's works and judgments" (WA 19, 626; LW 46:96).

In striking contrast to this harsh political picture, Luther also called the magistrate the "father" of the community (WA 30/1:155), who was to care for his political subjects as though they were his children. Like a loving father, the magistrate was to keep the peace and to protect his subjects from threats or violations to their persons, properties and reputations. He was to deter his subjects from abusing themselves through drunkenness, wastrel living, prostitution, gambling and other vices. He was to nurture and sustain his subjects through poor relief centers, orphanages, asylums, and state-run hospitals. He was to educate them through the public school, library and lectern. He was to see to their spiritual needs by supporting the ministry of the locally established church and by encouraging their attendance and participation. He was to see to their material needs by reforming inheritance and property laws to ensure more even distribution among all children.

These twin metaphors of the Christian magistrate – as the lofty vice-regent of God and as the loving father of the community – described the basics of Luther's political theory and constitutional law. For Luther, political authority was divine in origin but earthly in operation. It expressed God's harsh judgment against sin but also his tender mercy for sinners. It communicated the law of God but also the lore of the local community. The state depended on the church for prophetic direction but it took over all legal jurisdiction from the church. Either metaphor standing alone could be a recipe for abusive tyranny or officious paternalism; but both metaphors together provided Luther and his followers with the core ingredients of a robust Christian republicanism and budding Christian welfare state.

This new Lutheran political theory was reflected in the hundreds of comprehensive new state civil laws that replaced traditional church canon laws in early modern Germany and Scandinavia. Luther himself, alongside his many fellow theologians and jurists, helped to draft a lot of these laws. New church laws passed by the state established religious doctrine, liturgy, sacraments, worship, holy days, church polity, property, parsonages, endowments, tithing, burial and cemeteries. New criminal and public morality laws governed church attendance, tithe payments and Sabbath observance and prohibited

blasphemy, sacrilege, witchcraft, sorcery, magic, alchemy, false oaths and similar immoral offences. New sumptuary laws proscribed immodest apparel and wasteful living as well as extravagant feasts, weddings and funerals. New entertainment laws placed strict limits on public drunkenness, boisterous celebration, gambling and other games that involved fate, luck and magic. New family laws simplified the rules for marriage formation and annulment, introduced new protections and provisions for wives and children, streamlined inheritance rules, and introduced absolute divorce on grounds of adultery, desertion and other faults, with subsequent rights to remarriage at least for the innocent party. New school ordinances created the public state school that provided compulsory education for all persons, boys and girls alike, so that they could acquire sufficient literacy to read the Bible and function in society and prepare for their distinctive vocations. New social welfare laws, centred on the community chest, provided food, clothing and shelter for the poor as well as emergency relief; larger communities added public orphanages, workhouses, boarding schools, vocational centres, hospices and more. And, finally, new laws of civil and criminal procedure regulated the enforcement of these new state laws in state courts.

A good deal of the new state legislation in early modern Lutheran lands drew on Roman law, civil law and even mediaeval canon law prototypes, but these new laws especially reflected and reified new Lutheran teachings. Most of these laws remained in place in Germany and Scandinavia until the great legal reform and codification movements of the nineteenth century born of the Enlightenment. But the legal legacy of the Reformation can still be seen in modern laws on the family, education, social welfare, crime, and church-state relations. And Luther's clarion call for "freedom" against oppression and abuse remains as pressing and poignant today, as it did 500 years ago.