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# Samuel Rutherford's contribution to Reformed republicanism

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## Opsomming

Rutherford se werk *Lex, Rex*, beklemtoon die republikeinse idee dat soewereiniteit (afgelei van die goddelike oppergesag) by die volk berus en nie by die heerser nie. Hiermee het Rutherford 'n duidelike alternatief tot Jean Bodin se teorie van gesentraliseerde onsigbare soewereiniteit gestel, as gevolg waarvan Skotland as die bakermat van die verbondsmatige uitdrukking van Reformatoriese republikanisme na vore getree het.

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## 1. Introduction

The rival political ideas in England, preceding the civil wars in the 1640's were not as clearly demarcated as they had been in France in the last quarter of the sixteenth-century. In France, the right to resist political oppression had become firmly attached to the ancient idea that political power resides in the people. The duty of passive obedience was firmly attached to the idea of monarchical divine right, while Jean Bodin had laid the basis of a theory of constitutional unity under monarchical rule. In England the Tudor monarchs enjoyed the support of a substantial middle class; no faction had any serious interest in supporting royal absolutism with a theory of divine right and none had to seek a theoretical defence for the right to resist political oppression because the consequences of a break between the powers of the constitution, such as the king and parliament or the king and his courts, had not yet been strained too heavily.

By the end of the sixteenth century two main regions of stress appeared on the English political scene: firstly, the old question of the church and secular government transformed into an internal problem involving national relations with the English Church and other streams of Protestant dissent: Presbyterian, Independent, and sectarian – all these theological positions had political implications that had to be addressed;<sup>3</sup> secondly, there was the issue of the centralisation of political power and its impact on the various parts of government.<sup>4</sup> Over and against the Puritans subjecting human reason to the authority of the Holy Scriptures, Thomas Hooker (1553-1600) in his *The Laws of Ecclesiastical Polity*<sup>5</sup> endeavoured to vindicate Elizabethan ecclesiastical supremacy and to defend the theological and political position of the Church of England – thereby subjecting political power to the authority of human reason.<sup>6</sup> Hooker held that the law assigned to every man, public or private, his rights and duties, his liberties and his obligations; as well as fixed the standards of justice by which he was constrained to act or forbear, and no less if he were the king than if he were a subject.<sup>7</sup>

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3 See George H. Sabine & Thomas L. Thorston, *A History of Political Theory* (4th edition). Hinsdale (Illinois): Dryden Press (1973), p. 406.

4 Sabine & Thorston, *A History of Political Thought*, p. 406.

5 Books I-IV were published in 1594 and Book V in 1597. Books VI-VIII were added after Hooker's death.

6 To Hooker the law of reason is supreme: it links all men absolutely, even if society and government did not exist.

7 Sabine & Thorson, *A History of Political Thought*, pp. 408-410, 419.

Sir Edward Coke (1552-1643), like Hooker, maintained the supremacy of human reason in legal and political matters, in order to affirm the status of the common law as an expression of human reason – a view monarchical absolutism could not accept.<sup>8</sup> In a conference with James I, the king expressed his repugnance at being subjected to the authority of law, as a consequence of which Coke quoted from Bracton: “Quod rex non debet esse sub homine, sed sub Deo et lege.”<sup>9</sup> The common law, therefore, included all that would now be counted as the constitution, both the fundamental structure of government and the fundamental rights of the subjects.<sup>10</sup>

Although it had long since been held that the king rules *sub Deo et lege*, insights related to the king’s prerogative powers which were considered to be rooted in, and to spring from, his political person, had undergone decided expansion. Already in the last quarter of the thirteenth century the king had begun to enhance his power, an outflow of the general collapse of feudalism. The process of centralising royal power after the thirteenth-century had the effect of extending the prerogative to meet the new and hitherto unknown aspects of post-medieval social, economic, and political life – an avenue pursued by the Stuart monarchs asserting their absolutist claims in the political and legal realms. Charles I became king while England was at war with Spain, a war he had helped to bring about. Within two years, England was also at war with France. The attempt to fight two great western European powers at the same time and the disastrous military campaigns that followed caused a financial and political crisis in England culminating in Charles’ acceptance of the Petition of Right in 1628. In the following year the king decided to govern without parliament. From 1629 to 1640 Charles applied a policy of “personal rule” – a period also described as “eleven years of tyranny”. Firstly, Charles attempted to censor books and newspapers, a step of which a Puritan wrote that it entailed that “our presses formerly open to truth and piety are closed against them both of late”. Secondly, severe punishments were ordered by Star Chamber. For example, in 1637 William Prynne, Henry Burton and John Bastwick, the first of whom had already suffered harshly in 1633, were sentenced to the loss of both ears in the pillory, a fine of £5 000 and life imprisonment. In addition Prynne was branded “S.L.”, seditious libeller, “for writing and publishing seditious, schismatical and libellous books against the

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8 Sabine & Thorson, *A History of Political Thought*, p. 418.

9 Coke’s *Reports*, Pt. XII, p. 65. In Coke’s view it was the common law which assigned to the king his powers, to each of the courts of the realm its proper jurisdiction, and indeed to every Englishman the rights and privileges of his station, Sabine & Thorson, *A History of Political Thought*, p. 418.

10 Sabine & Thorson, *A History of Political Thought*, p. 418.

Hierarchy". Thirdly, the king threatened the judges. Charles had few qualms about putting pressure upon them to gain the outcome he desired. John Morrill states that the king's behaviour during that period "surely constituted a formidable prima facie case of legal tyranny".<sup>11</sup> In 1637 Charles I ordered a revised version of the English Prayer Book to be used in the church services in Scotland. In the Cathedral of St. Giles, in Edinburgh, a crowd of several hundred, most of them women rioted against the prayer book. The Scots objected to the changes in the church liturgy contained in the book and to its introduction without proper consultation. The means Charles used to stamp out resistance bred further dissatisfaction. Samuel Rutherford's *Lex, Rex* was one of the most important works opposing Charles' abuse of the law and his tyrannous government.<sup>12</sup> In his Preface to *Lex, Rex*, Rutherford lamented the fact that "(P)opery and defection had made a large step in Britain, and ... arbitrary government had over-swelled all banks of law ..."<sup>13</sup>

Whereas Hooker and Coke endeavoured to limit royal absolutism by postulating the supremacy of human reason and the English common law respectively, the Scottish theologico-federalist, Samuel Rutherford, approached the issues of royal absolutism and the role of law from a much broader angle. To Rutherford the issues pertaining to royal absolutism and the expanding prerogatives of the king could only be addressed by stating the politico-legal context of republicanism in answer to political absolutism; by expounding theologico-political covenantalism as a framework for ordering society, and grounding the political system in Biblical law, magistracy and religion. In this essay the authors consider and evaluate Rutherford's views on the politico-legal context of republicanism as an important contribution to ensure liberty by subjecting government to law and Rutherford's lasting contribution to Christian republican thought.

## 2. The context and structure of Samuel Rutherford's theologico-political republicanism

### 2.1 *The theologico-political federal structure of republican society*

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11 John Morrill (ed.), *The nature of the English Revolution* (Harlow, 1993). Also see Sabine & Thorson, *A History of Political Thought*, p. 420.

12 Graham E. Seel, *Regicide and Republic. England 1603-1660*. Cambridge: Cambridge University Press (2001), pp. 65-67.

13 *Lex, Rex*, xxi.

### 2.1.1 *Federal views of republicanism in Italy and Switzerland*

Rutherford's theologico-political views drew from two streams of republican thought emanating from Italy and Switzerland. The Italian city-republics existed from the eleventh through the middle of the seventeenth century. Florence became the model of the new republicanism of civic humanism – Savonarola being one of its most prominent representatives. By the middle of the fourteenth century, central Europe from the Mediterranean to the Baltic was dotted with these medieval republican corporations – the outcome of corporation theories to establish and protect the sovereignty of cities from interference from inside and outside – views eloquently formulated by the Italian Reformer Peter Martyr Vermigli. In Switzerland (the heartland of republican Europe) the republican city states were established on a network of civic associations with a distinct contractual basis. The Swiss city-republics reflected fundamental characteristics of covenant society: reliance upon mutual trust not animated by any vision of society but only by the need of people to protect themselves and to cooperate in pursuing their peace and prosperity. In Switzerland Zürich became the republican seat from which Bullinger spread his covenantal views. By 1531 Zürich was already an aristocratic republic in its efforts to become a holy commonwealth, whilst in Bern, Oecolampadius (from 1528) played major role in establishing republican reforms based upon distinct reformational principles. However, it was Bullinger's development of Zwingli's ideas of the covenant that established a distinct theory of theologico-political federalism.<sup>14</sup> Proceeding from the Biblical covenant Bullinger preferred "a republic, a democracy," though other forms of government were acceptable so long as they adhered to God's covenant scheme and constitutional stipulations in the Ten Commandments. Through the works of Vermigli and Bullinger respectively Rutherford gained access to both these republican paradigms.

During the reign of Edward VI (1537-1553), a number of continental theologians carried covenant ideas from Europe to England, including Peter Martyr Vermigli (1500-1562), John Tremellius who came in 1547, Martin Bucer (1491-1551) and Paul Fagis (or Fagius) (1504-1550) who arrived in 1548. In Scotland in particular covenant ideas

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14 For the meanings attached to *federalism* see Shaun de Freitas & Andries Raath, "The Reformation Legacy of Theological-political Federalism" in Ann Ward & Lee Ward, *The Ashgate Research Companion to Federalism*. Surrey: Ashgate (2009), pp. 49-68.

were developed by John Knox (1505?-1572), Robert Rollock (1555-1599), Robert Bruce (sixteenth century), and Samuel Rutherford (1600-1661) among others. Like the Huguenots and Covenanters the Puritans applied the idea of the covenant to politics as well as theology and developed republican conceptions of the polity in their battles against Anglican episcopacy and royal absolutism.

The religious covenants of Reformed Protestantism gave birth to covenanted commonwealths, the political expressions of those ideas, from Italy, Switzerland to Scotland and then in British North America and Puritan England. Those commonwealths preserved the old medieval unities of religion, state, and society, "but in a new republican ideational, institutional and behavioural framework".<sup>15</sup>

Daniel J. Elazar observes that perhaps the greatest political revolution of modernity was the republican revolution – the restoration of the idea that the polity was a *res publica*, a commonwealth, the possession of its citizens, and not of some single individual group who happened to rule it. Elazar adds that the republican revolution was born out of the revolt against the divine right of kings, in itself a heresy that grew out of the rejection of medieval constitutionalism in the middle of the previous epoch. To Elazar republicanism represents the ultimate triumph of the covenant idea in politics – no republic can exist without the covenant of its public.<sup>16</sup> Implicit in the idea of consent is the notion of covenant, compact, or contract. To this approach Samuel Rutherford contributed substantially through his theologico-political federalism.

### 2.1.2 *The context of Rutherford's federal-republican views*

In *Lex, Rex* Rutherford states that a republic appointing rulers to govern them is not an indifferent act, but a moral action, because for a *populus* to set no rulers over themselves amounts to a breach of the fifth commandment.<sup>17</sup> Elsewhere, in answer to Maxwell's views that the subjects in the commonwealth do not have the power to punish a tyrant, Rutherford states that in the perfect republic subjects must

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15 Daniel J. Elazar, 1996. *Covenant & Commonwealth. From Christian Separation through the Protestant Reformation. The Covenant Tradition in Politics*, Vol. II. New Brunswick (U.S.A.): Transaction Publishers, pp. xiv-xv.

16 Elazar, *Covenant & Commonwealth*, p. 50

17 *Lex, Rex*, 5(1). All references to *Lex, Rex*, are to the edition by Sprinkle Publications unless otherwise stated.

have the power to preserve itself from ruin by punishing tyranny.<sup>18</sup> This power to restrain higher powers, to Rutherford, is not limited to monarchs, but extends to all Christian republics, where there is no monarchy.<sup>19</sup>

Rutherford's view that republicanism would serve as a useful alternative to royal absolutism, was the outcome of historical developments in European scholarship from Hebrew, Greek, Roman, Patristic, Medieval, Canonist, Reformational and early Renaissance sources. Political ideas emanating from Reformational authors like Calvin, Bullinger and Vermigli, reflected many principles generally associated with the republican ideal. When Rutherford was drawn into the political debates of the post-Reformational era, he utilised these Reformational ideas and re-interpreted non-Reformation republican views from a biblical perspective in providing justification for resistance to the absolutism of King Charles. The core-ideas in *Lex, Rex* is that the king is not above the law but is the custodian and guardian of the law, that the king is the servant of the people, entrusted with the preservation of their safety and liberties, and that the king is not their absolute ruler and master. Rutherford raises the argument of self-defence: "Self-preservation in all creatures in which is nature, is in the creatures suitable to their nature. The bull defendeth itself by its horns, the eagle by her claws and bill, it will not follow that a lamb will defend itself against a wolf any other way than by flying. So men, and Christian men, do naturally defend themselves."<sup>20</sup>

Rutherford's republican views are firmly rooted in his theory of theologico-political federalism. Following the Huguenot expositions of the Old Testamentary covenants, Rutherford subscribes to a double-covenant model: a covenant between the king and the people, as well as a covenant between the king and the people pledging to God to preserve the true religion.<sup>21</sup> Rutherford's theory of the double covenant contain a number of constitutive elements:

18 *Lex, Rex*, 129(2).

19 *Lex, Rex*, 173(1).

20 *Lex, Rex*, 159(2)-160(1).

21 Gough, *The Social Contract*, 93. Gough refers to the following quotation: "(T)he people, as God's instruments, bestow the benefit of a crown on their king, upon condition that he will rule them according to God's word" (*Lex, Rex*, 59(1)), and the "king is made king by the people conditionally" (59(1)): there is a mutual coactive power on each side (*Lex, Rex*, 54(1)-62(1)).

the covenant between the king and the people is to be distinguished from that of the king with the Lord;<sup>22</sup> God makes a king conditionally by covenant so that the king should rule for the safety of the people; the king's obligation to rule according to God's law is not part of the mediatory, accidental, particular choice of the people because theonomic rule is obligatory for all societies at all times;<sup>23</sup> because the covenant between God and the people is mutual, if the people break the covenant God is no more bound to fulfilling his part of the agreement;<sup>24</sup> and the liberty of both the king and the people can only be ensured by acknowledging and enforcing the terms and conditions of both the theological and political covenants.

The political covenant between the king and the people is established between mortal human beings, they bind themselves before God to each other, adding that the *obligation* of the king<sup>25</sup> in this covenant flows from the peculiar national *obligation* between the king and the estates.<sup>26</sup> In fact, the precise *mechanism* by which governments are founded was that of a covenant between the king and the people.<sup>27</sup> Rutherford combines arguments from natural law, Scripture and history to prove that government must rest on this horizontal covenant between the king and the people. He quotes proof from Scripture to distinguish between this covenant, and the covenant between God on the one side and the king and the people on the other. Rutherford quotes the example of the covenant Joash made with the people, the principle being that whoever makes a promise to another, gives to that other a sort of right (or jurisdiction) to challenge the promise.<sup>28</sup> Also the covenant between David and Israel was a covenant between the king and the people.<sup>29</sup> With reference to Saul,

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22 *Lex, Rex*, 54(1)-54(2).

23 The law is a fundamental condition of the covenant.

24 *Lex, Rex*, 54(1)-55(2).

25 The term "king" is to be understood as being synonymous to government or the civil magistrate (political authority).

26 *Lex, Rex*, 54(1)ff.

27 *Lex, Rex*, 3(1): Government by rulers has its ground in a secondary law of nature (*secundario jus natural, or jus gentium secundarium*). See John Coffey, *Politics, religions and the British Revolutions*, p. 163.

28 *Lex, Rex*, 54(2)ff.

29 Rutherford refers to 2 Kings 11:17; 2 Samuel 5:3. See e.g. *Lex, Rex*, 12(2), 41(2), 54(1), 54(2) and 57(1): "Besides the king and the people's covenant with the Lord, king Joash made another covenant with the people, and Jehoida the priest was only a witness, or one



Rutherford states that there was no *condition* required of him before they made him king, but only that that he covenanted with them to rule according to God's law.<sup>30</sup> Applying these examples to tyrannous rulers, Rutherford maintains that as long as the people and estates had not recalled their grant to the king, the *covenant mutual* stood.<sup>31</sup>

Alluding to extra-Biblical sources Rutherford confirms the established covenant obligation between the king and the people: Romulus covenanted with the people, Xenophon refers to a covenant between Cyrus and the Persians, and Gentilis and Grotius prove that kings are bound to perform oaths and contracts to their people.<sup>32</sup> Under the political covenant the people maintain the right to conserve themselves: the king accepts the crown upon the tenor of a mutual covenant in which he must govern according to the law; the people are bound in this covenant no less than the king; and the king's duty is to compel them to observe the terms of this covenant.<sup>33</sup>

The mutuality of the covenant conditions apply to both the king and the people implying that both parties are subject to the law: all laws of kings, who are rational fathers, and to lead and guide the people by laws which propagate peace and external happiness. This forms part of the contract between the king and the people, and the king at his coronation-covenant with the people gives a most intense consent to be a keeper of all good laws.<sup>34</sup> Quoting Galatians 3:15 Rutherford maintains that no man may annul a confirmed covenant, and the king must place himself under the law by a covenant at his coronation.<sup>35</sup> This relationship between the king and the people is of a contractual nature and cannot be dissolved unless by the joint consent of both, in instances where the conditions of such a contract are violated by neither side.<sup>36</sup>

Rutherford's theologico-political covenantalism differs in marked respects from Thomas Hobbes' absolutistic views on social

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who, in God's name, performed the rite of anointing; otherwise he was a subject on the people's side, obliged to keep allegiance to Joash, as to his sovereign and master."

30 *Lex, Rex*, 57(2).

31 *Lex, Rex*, 59(1).

32 *Lex, Rex*, 61(1)-61(2).

33 See *Lex, Rex*, 118(1).

34 *Lex, Rex*, 129(1).

35 *Lex, Rex*, 200(2).

36 *Lex, Rex*, 201(1).

contractarianism and John Locke's individualistic political theory based on the social contract. Hobbes' secularised form of covenant reflects a relativistic idea of covenantalism,<sup>37</sup> whereas Rutherford's covenantal theory entails that the Divine law is the constant measure by which political society is governed. On the other hand, John Locke's contractual theory reflects a shift of emphasis from the government's obligation to follow the Divine will to the government's obligation to protect life, liberty, and property of the people.<sup>38</sup> As the godly purpose of the covenant was replaced, so did the aura of divinity that had once encompassed rulers: the covenant was no longer entered upon to perform a godly service with Divine assistance, but merely to serve their fellow men, thereby reversing the relative importance in the covenant of the ruler's role and the people's rights and obligations.<sup>39</sup> The idea of secular covenantalism culminated in Jean-Jacques Rousseau's advocating the notion of free men contracting with one another to form a society subservient to the majority will of the nation.<sup>40</sup>

In contrast to the secular contract based on majoritarian rule, Rutherford embraces the idea of the covenant as a bilateral and mutual undertaking in which the community, under leadership of the political ruler is obligated to fulfil the covenantal conditions as prescribed by Scripture. Rutherford follows the covenant tradition as postulated by Bullinger, Mornay<sup>41</sup> and Althusius<sup>42</sup> and makes the covenant relevant to issues pertaining to separation of powers and resistance theory, constitutionalism, the freedoms and liberties of the subjects and the role of God's law in the ordering of society.

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37 See Daniel J. Elazar, "Hobbes confronts Scripture", *Jewish Political Studies Review*, 4:2 (Fall 1992), pp. 21-22; Laurence Berns, "Thomas Hobbes" in Leo Strauss & Joseph Cropsey, *History of Political Philosophy*. (2nd edition). Chicago: Rand McNally (1972), pp. 370-394.

38 See Timothy D. Hall, *Rutherford, Locke, and the Declaration: The Connection*, (unpublished thesis for Master of Theology: Dallas Theological Seminary: April 1984), pp. 91 ff.; Richard A. Goldwin, "John Locke" in Leo Strauss & Joseph Cropsey, *History of Political Philosophy* (2nd edition). Chicago: Rand McNally (1972), pp. 451-486.

39 S. de Freitas, *Samuel Rutherford on Law and the Covenant: The Impact of Theologico-political Federalism on Constitutional Theory* (unpublished dissertation for Master of Law: Faculty of Law, University of the Free state: 2003), p. 92.

40 See De Freitas, *Samuel Rutherford on Law and the Covenant*, p. 93.

41 See *Lex, Rex*, 55(2), 80(1), 98(2), 209(1) and 222(1).

42 See *Lex, Rex*, 65(1), 72(1), 79(1), 115(1), 142(1), 161(1), 171(2), 185(1) and 209(1).

### 3. Rutherford's Reformed republicanism

#### 3.1 Rutherford and the republican ideal

A number of core-principles traditionally associated with the republican tradition emanated from Rutherford's views on political covenantalism. These principles include those highlighting the normative structure of the office of political rulership; the citizenry acting as an active and representative political entity; the division of powers in political activity, and the subject's right to resist political oppression and tyranny.<sup>43</sup> In spite of diverse meanings attached to the concept of republicanism, the central elements commonly associated therewith include the pursuit of the common good through popular sovereignty and the rule of law, under a mixed and balanced government comprising a deliberative senate, an elected executive and a popular assembly or representative lower house in the legislature. Rutherford's views on social bonding through the covenant, the superiority of law, a participatory citizenry, the divisions of political power and resistance to tyranny fit the broader paradigm of the ideal republican commonwealth.

The republican principles mentioned above came increasingly under threat from Grotian and Bodinian influences accompanied by the weakening of the idea of the covenant as a theologico-political ideal. In his efforts to postulate a framework for promoting the political well-being of the state through the rule of law, people's participation in the political processes and limitations on political power, Rutherford applied ideas already postulated by George Buchanan (1506-1582)<sup>44</sup> the French Monarchomachs<sup>45</sup> and Johannes Althusius (1575-1638)<sup>46</sup> in preceding centuries.<sup>47</sup> In Rutherford's *Lex, Rex* these contributions (or influences) culminated in a number of foundational republican perspectives: the covenant as the matrix of social bonding; the superiority of law; participatory and representative citizenship and the division of power.

43 See M.N.S. Sellers, *American Republicanism: Roman Ideology in the United States Constitution*, cited in Sellers, "Republicanism, Liberalism, and the Law" in *Cicero and Modern Law*, pp. 514-515.

44 See *Lex, Rex*, 34(1), 84(1), 84(2), 98(2), 143(2), 149(2), 184(1), 208(2)-209(1), 224(2) and 225(2).

45 E.g. Junius Brutus: *Lex, Rex*, 55(2).

46 E.g. *Lex, Rex*, 65(1), 72(1), 79(1), 115(1), 142(1), 161(1), 171(2), 185(1) and 209(1).

47 See Peter J. Hertz, *Covenant to Constitutionalism: Rule of Law as a Theological Ideal in Reformed Scotland* (D.Phil-dissertation, Department of Political Science, University of Carbondale, 2001), p. 154.

### 3.2 *The structure of Rutherford's republican views*

#### 3.2.1 *The covenant and the social bonds of political society*

Central to republican theory is the idea that liberty depends on the sharing in self-government. Already in Roman law the notion of the public contract gave expression to the principle that power is legitimate only when it is under contract. This idea had already, albeit in a limited sense, surfaced in classical Greece, where Plato in the second book of his *Republic* puts in the mouth of Glaucon the notion that the evil of suffering injustice was greater than the advantage of doing it and, therefore, men made a contract that they would not do or suffer it.<sup>48</sup>

In medieval political thought a close relationship was established between Cicero's definition of the state as a *societas* and the legal bonds binding together political society. From the thirteenth to the early sixteenth centuries authors like Thomas Aquinas (d. 1274),<sup>49</sup> Vincent Bellovacensis (d. 1274 or 1264)<sup>50</sup> and Dominicus de Sancto Geminiano (first half of the 15<sup>th</sup> century)<sup>51</sup> alluded to the contractual nature of political society based upon Cicero's scattered statements on the contractual basis of political society and the legal bonds giving structure to the state as a political entity for the purpose of ensuring justice. In his *De Officiis* Cicero places the state among the *societates* of human intercourse: "interius etiam est eiusdem esse civitatis ..."<sup>52</sup> In his *De republica* he links the social bonds uniting the people in the state to the ideals of justice and the common good.<sup>53</sup> With a view to establish a state a scattered and wandering multitude become a body of citizens by mutual agreement.<sup>54</sup> The role of the law is to unite the civic association and the justice enforced by law is the same for all.<sup>55</sup> Fundamentally, according to Cicero, states are assemblies and

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48 See A.W.G. Raath and S.A. de Freitas, "The Covenant in Ulrich Huber's Enlightened Theology, Jurisprudence and Political Theory", *Acta Theologica*, Vol. 26, 2(2006), pp. 221-222.

49 *Summa Theologica* II, 1, q. 105, a 1; II, q. 42, a. 2.

50 *Speculum doctrinal*, books VII-XI (1624).

51 *Lectura super decreto* (1504); *Lectura super libro sexton* (1535); *Consilia et response* (1581).

52 *De Officiis*, I, 17.

53 *De republica*, I, 25, 39: "populous autem non omnes hominum coetus quoquo modo."

54 *De republica*, I, 26, 41.

55 *De republica*, I, 32, 49: "lex civilis societas vinculum, ius autem legis aequale; quid enim est civitas nisi iuris societas?"

gatherings of people associated in justice.<sup>56</sup> The commonwealth is the property of the people and it is established by an agreement or partnership amongst those bound together.<sup>57</sup> Cicero's remarks did not go unnoticed to the early Church Fathers. To St. Augustine the common agreement is the ground for man's obedience to political authority.<sup>58</sup>

Rutherford steers away from the secular conception of the political contract undergirding law and political institutions in the state; he grounds the state and the whole of political life upon the Biblical covenant. Together with the distinction between the office and the person of the ruler, as well as the ruler's responsibilities under oath, ancient and medieval covenantal theories contributed in important respects to Rutherford's *Lex, Rex*.<sup>59</sup> To Rutherford, covenanting is the binding together in one body politic of persons who assume through unlimited promise responsibility to and for each other and for the common laws, under Divine rule: it is government of the people, for the people and by the people, but always under God; it is always "the moral act of taking upon oneself, through promise, the responsibilities of citizenship that binds itself in the very act of exercising its freedom" and "(t)he covenant concept represents the commonality of the individual's good and the public good against the background of the law".<sup>60</sup> In the republican context it implies that the covenant reflects the efficiency of God according to which God and man work together to make kings. To Rutherford the republican idea of the relevance of the people is not merely a secular notion but it is inextricably connected to God's underlying involvement and conditions (laws). Both God and man can be efficient causes to civil government, with God as first cause and the people as the secondary cause.<sup>61</sup>

56 *De republica*, VI, 13: "concilia coetusque hominum iure societati, quae civitatis appellantur."

57 *De republica*, III, 31: "neque esset unum vinculum iuris nec consensus ac societas coetus, quod est populus."

58 *Confessiones*, III, 8: "generale quippe pactum est societas humanae obedire regibus."

59 S.A. de Freitas, *Law and Federal-Republicanism: Samuel Rutherford's quest for a constitutional model* (LL.D-dissertation in Philosophy of Law, University of the Free state (2014), p. 89.

60 De Freitas, *Law and Federal-Republicanism*, p. 163.

61 See Field, "'Put not your Trust in Princes'. Samuel Rutherford, the four causes and the limitation of civil government", pp. 107-108.

### 3.2.2 *The superiority of the law*

The notion that political authority is subject to the law, was not foreign to medieval political theory. Aegidius Romanus Colonna (1247-1315) remarked that political authority stands in the middle between natural law and positive law; the latter receives its authority (*auctoritas*) from the ruler and he must adapt it to particular cases.<sup>62</sup> Ptolomaeus of Lucca (ca. 1298) held that the essential difference between the *principatus regalis* and the *principatus politicus* lies in this, that the latter is a responsible government according to the laws, while in the former the *lex* is “in pectore regentiis”, wherefore he can at any time produce as law from the living fount whatever seems expedient to him. Engelbert of Volkersdorf, Abbot of Admont, (1250-1311) distinguished between the *rex* as *lex animate* and *lex inanimate*, the former being better because it can suit itself to the concrete case.<sup>63</sup> For medieval thought, the superiority of the law formed a most important constitutive element for the proper and just functioning of political systems. Bracton, already in the early thirteenth-century, stated “(t)he king must not be under man but under God and the law because the law makes the king.”<sup>64</sup>

By the time Rutherford wrote his *Lex, Rex*, the principle that the ruler is subservient to the law, was already well established. Also the notion that only in a republic is the ruler below the laws, had received attention in the works of medieval authors. Marsilius Patavinus of Maynardina (d. After 1342) in his *Defensor Pacis* (1324-1326) already expressed the view that the legislator in all cases is the people, and the principaris is bound by the “forma sibi tradita a legislatore”. The medieval advocates of the supremacy of the laws often appealed to the Justinian Codex (I, 14): “Digna vox magistrate regnantis legibus alligatum se principem profiteri” – a view which came to expression in the notion that the magistrate rules over the people and the laws over the magistrate (Franciscus Patricius senensis Pontifex Cajetanus (d. 1494)).<sup>65</sup>

Rutherford's readings of Roman law sources should have acquainted him with the historical roots of the idea that only in a republic is the

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62 *De regimine principum*, book III, 2, c. 29): “positive lex est infra principantem sicut lex naturalis est supra.”

63 *De regimine principum*, I, c. 10-11.

64 H.J. Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition*, p. 5.

65 *De institutione reipublicae*, book IX (1595), I, 5 & III, 1.

ruler below the laws. He quotes the Roman legal author Ulpian to the effect that “the law ruleth the just prince” and “Quod principi lacet legis vigorem habet”: “The will of the prince is the law; yet the meaning is not that anything is a just law, because it is the prince’s will, for its rule formally; for it must be good and just before the prince can will it, – and then, he finding it so, he putteth the stamp of a human law on it.”<sup>66</sup>

Rutherford’s prioritisation of the law as reflected in his metaphorical terminology runs parallel to the Roman author Seneca’s understanding that the ruler is the embodiment of law. Ideas on the superiority of the law and the notion that law has a universal moral basis formed part of a long-standing tradition in Western constitutional political and legal thought. The theme of “the law” and its importance is one of the underlying themes in *Lex, Rex* (the law and the king) and which is substantially derived from preceding schools of thinking.<sup>67</sup> DuPlessis-Mornay for example states that “although many emperors, rather by force and ambition, than by lawful right, were seized of the Roman empire, and by that which they call a royal law, attributed to themselves an absolute authority, notwithstanding, by the fragments which remain both in books and in Roman inscriptions of that law, it plainly appears, that power and authority were granted them to preserve and govern the commonwealth, not to ruin and oppress it by tyranny.”<sup>68</sup>

Rutherford uses different metaphors to explain/express the ruler’s duties towards his subjects. The government is to act as a father;<sup>69</sup> a watchman;<sup>70</sup> a servant;<sup>71</sup> a feeder;<sup>72</sup> a fiduciary patron;<sup>73</sup> a tutor;<sup>74</sup> it is

66 See De Freitas, *Law and Federal-Republicanism*, 100-101.

67 De Freitas, *Law and Federal-Republicanism*, 101.

68 Philippe DuPlessis-Mornay, *A Defence of Liberty Against Tyrants*, p. 176.

69 *Lex, Rex*, 26(1), 59(1), 62(1)-62(2), 64(2), 102(1), 116(2), 128(1)-128(2), 164(1) and 218(1).

70 *Lex, Rex*, 59(1), 70(1), 182(1) and 197(2)-198(1).

71 *Lex, Rex*, 59(1), 70(1), 79(2), 145(1) and 197(2)-198(1).

72 *Lex, Rex*, 64(2), 65(1) and 132(2).

73 *Lex, Rex*, 72(1): “To the thinking of the learned jurists, this power of the king is but fiduciary, which is a type of power by trust, pawn or loan”. Also see 86(1)-86(2) (Rutherford refers to the “Gloss” and to “Novel”; 98(2) and 197(2)-198(1).

74 *Lex, Rex*, 69(1), 102(2), 116(2), 128(1)-128(2) and 153(1). These metaphors also figure prominently in Francois Hotman’s *Franco-Galia* – a source quoted in *Lex, Rex* several times.

a marital and husbandry power;<sup>75</sup> the peoples' debtor for happiness;<sup>76</sup> a relative;<sup>77</sup> a pilot (of a ship);<sup>78</sup> and a good and saving shepherd.<sup>79</sup>

It should be noted that the notion that the ruler's powers must be exercised for the benefit of his subjects did not originate in medieval or early modern thought. Already in classical Roman law, the emperor was under the duty to serve and govern subject to the common good (the *utilitas publica*) – a principle supported and developed by the medieval jurists.<sup>80</sup> Medieval jurists also regarded the feudal bond as a fundamental legal relationship or contract without which human interaction in society would be impossible. The medieval politico-legal author Baldus de Ubaldis, for example, held that the emperor is said to be like a father and just as his subjects are bound to obey him well, he is also bound to rule them well.<sup>81</sup>

### 3.2.3 *Participatory and representative citizenship*

Central to the idea of constitutionalism and republican government is the inclusive and active role of the people in the exercise of political authority in society. The Aristotelian idea that the rights of the community are exercised by its active members received considerable attention in the works of the medievalists. Marsilius Patavinus of Mayardina (d. After 1342) in his *Defensor Pacis* (composed between 1324 and 1326) (I, c. 12) observed that the *populus* is sovereign; the *populus* is the *universitas civium*, and a *civis* is one who “secundum suum gradum” takes part in public affairs.<sup>82</sup> Also developments in medieval law of corporations stimulated the view that the exercise of the rights of the people by a representative assembly of larger and smaller territories were regarded as representatives of the people empowered to exercise the peoples' rights. From these

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75 *Lex, Rex*, 69(2) and 116(2).

76 *Lex, Rex*, 103(1).

77 *Lex, Rex*, 123(2).

78 *Lex, Rex*, 102(2).

79 *Lex, Rex*, 179(1)-179(2).

80 A.W.G. Raath, “Ulrich Huber’s statement of the Roman-Dutch legal principles of constitutionalism in his *de Jure Civitatis* (1673)”, pp. 23, 24-25.

81 Canning, *The Political Thought of Baldus de Ubaldis*, p. 90.

82 An opinion shared by Thomas Aquinas, *Summa Theologica*, II, I, q 105, a 1 and Franciscus Patricius Senensis Pontifex Cajetanus (d. 1494), *De institutione libri IX* (1594), I, 3, p. 22, who defines *civis* as being an “active citizen”; active burghers were entitled to participate in the powers that were ascribed to the community.



developments in corporation law Nicolaus of Cues (1401-1464), in his *Opera Omnia* (1565), developed a comprehensive theory of representative parliamentarism: elected governors are to represent communities; assemblies of such governors are to represent the lands and provinces; and an *universal imperial* to represent the *Reich*. By the time of Rutherford composed his *Lex, Rex*, the idea of political representatives acting on behalf of the people and exercising the right to depose unjust kings had already received considerable attention. Together with views that the *Lex Regia* provides for a revocable delegation of the rights of the people there arose arguments that the people is above the Emperor (*populous maior imperatore*) and is entitled to rescue the imperial power. Views in favour of the sovereignty remaining in the people despite the institution of a monarch and interpreting the relation between the people and the ruler as being a bilateral legal relationship, reserving sovereignty for the people (*Populus maior principe*), implied that if the ruler neglected his duties, the people might sit in judgement upon him and dethrone him. In the *Somnium Viridari* (1376 or 1377) (I, 141) a commentator expresses the view that if a king imposes unjust taxes, denies justice, fails to defend the country, or neglects his duty, the people may depose him and choose another ruler.

In considering the people's right to defend their rights and depose unjust rulers, Rutherford had recourse to a rich legacy of political thought not inimical to maintain the peoples' rights in this regard. His views on the role of active and participatory citizenship strongly attest to his opposition to political absolutism and the subjects' power to depose tyrannical rulers – both principles closely associated with medieval and Reformational ideas on the active role of citizens in the commonwealth.

Rutherford follows the Italian Reformer Peter Martyr Vermigli's (1499-1562) emphasis on the importance of the people in the commonwealth. To Vermigli the "people" is a group of humans, united through legal consent and who share mutual interests.<sup>83</sup> The people are held together by laws and their common interest; these bonds of unity are established through the *communes leges et publicam utilitatem*.<sup>84</sup> Rutherford, reflecting upon the Biblical text of 1 Samuel 7:11, quotes Vermigli's interpretation to the effect that

83 *In librum Iudicum (...) commentarii doctissimi (...)*. Zürich: Froschauer (1561), fol. 142f.

84 *Ibid.*

the said text does not award the ruler unlimited power.<sup>85</sup> In addition, Rutherford cites Vermigli to emphasise the importance of the power of the estates and the resistance to tyranny.<sup>86</sup>

Rutherford provided a deeper Reformational basis to both principles – a basis reflective of Rutherford's idea of the covenant. To Rutherford the people acts as a medium through which God's sovereign will used human beings as a secondary cause towards the attainment of his divine purpose. The ruling authority is instituted by God in a mediate sense, whilst in an immediate sense through working of the people constituted in a legal entity. By arguing that the people could constitute in a ruler the power of government instituted by God, and by arguing that in doing so they would effectively be governing themselves, Rutherford managed to maintain that both sovereignty came immediately from God and that the people had the power to transfer government to the ruler. Ford puts it as follows: "The solution to the legal problem lay in recognizing that although the people did not formally have the power of government to transfer, their power of transfer was itself a virtual power of government."<sup>87</sup>

Rutherford states that although royal power is in the people, it is in the people as the principal cause; it is in the people as in the instrument. Rutherford quotes examples from the Old Testament where the people made David their king at Hebron, and in the same act, God, by the people using their free suffrages and consent, makes David king at Hebron.<sup>88</sup> Elsewhere Rutherford states that the people being the fountain of the king, the king must rather be the fountain of the laws – ideas expressed by Beza (1516-1605), Ponet (1516?-1556) and Goodman (in their emphasis of the importance of the consent and election of the king by the people.<sup>89</sup>

The notion that the people act as a legal entity with legal personality had its roots in Roman law. Although law corporations did not have legal personality, the medieval scholastics extended juristic corporation theory to include citizen bodies composed of a plurality

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85 See *Lex, Rex*, 8(1).

86 De Freitas, *Law and Federal-Republicanism*, 108.

87 Ford, "Lex, rex iusto posita: Samuel Rutherford on the origins of government", pp. 270-271.

88 *Lex, Rex*, 70(1)-70(2).

89 See *Lex, Rex*, 114(2).

of human beings as abstract unitary entities distinct from their human members under the rubric of legal persons. Whilst the Glossators had almost universally identified the corporation with its members, the Commentators viewed it on the one hand as a distinct unitary entity, and on the other as the plurality of men who composed it.<sup>90</sup>

In addition to the citizen's active participation in the political affairs of the commonwealth, Rutherford strongly supported the idea of representative citizenship. To him the parliament, senators, inferior judges, associates and magistrates act as representatives of the people.<sup>91</sup> The office of the king as well as those of the estates and inferior judges was representative of the people who elected them, and were obligated to serve the interests of the people within the parameters of the Divine Law. The representative element forms part of the office of the king and that of the other inferior ruling parties, and once the obligations of such an office, which automatically causes the representative element to disappear. The breaking of the covenant condition by the king results in the cessation of the king's representation of the community.<sup>92</sup> The office of the king does not only contain the Divine precepts, but is also a power that is representative of the people. To Rutherford, in addition to division of the king needs other judges to assist him, rather than placing absolute power in one man's hand, "for a sinful man's head cannot bear so much new wine, such as exorbitant power is."<sup>93</sup>

## 4. Conclusion

Rutherford's republican theory represents a serious effort to consolidate some of the most foundational political principles of preceding centuries into a coherent political theory. The constituent factors of Rutherford's republican theory are the covenant and the law. The covenant formed an important facet of Rutherford's constitutional model: the ruler and the people have mutual obligations to live in society and this obligation involves the need for

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90 See Joseph Canning, "Ideas of the State in Thirteenth and Fourteenth-Century Commentators on the Roman Law", *Transactions of the Royal Historical Society*, Fifth series, Vol. 33 (1982), p. 23.

91 See *Lex, Rex*, 70(1), 99(1) and 126(2).

92 See De Freitas, *Law and Federal-Republicanism*, p. 140.

93 *Lex, Rex*, 121(1).

government.<sup>94</sup> Covenant obligations do not depend for their validity upon official recognition by written or vocal contract. The presupposition underlying the choice of a ruler is what Rutherford refers to as “the general covenant of nature”. This implies an inherent awareness in all parties that they are bound by the law of God to mutual responsibilities. The voice of nature is therefore a covenant voice, echoing the voice of Scripture itself, declaring not only the lawfulness of setting up a king but also the necessity of establishing conditions for his rule.<sup>95</sup> In addition, God himself inaugurated a covenant relation with his people. From this perspective, Rutherford's political theory served as the last stalwart within the theologico-political federalist tradition, arguing for the relevance and application of the idea of the Biblical covenant for Christian society.<sup>96</sup>

By reversing the traditional *rex, lex* (“the king is law”) to *lex, rex* (“the law is king”), Rutherford is among the pioneering early modern works to give the Rule of Law-principle a firm theoretical foundation, consequently serving as a strong voice in opposition to the abuses of political power.<sup>97</sup> In *Lex, rex* Rutherford observed that the king is subservient to the law: “That he is called absolute prince not in any relation of freedom from law, or prerogative above law, whereunto, as unto the *norma regula ac mensura potestatis suoe, ac subjectionis meoe*, he is tyed by fundamental law and his own oath ...”<sup>98</sup>

To Rutherford the king is “the breathing law”. *Lex, Rex* makes it clear that the interpretation that is apt in this regard is similar to George Buchanan's view that the king is the living law because he should embody that law (or live that law). *Lex, Rex* served as an important reminder that the Bodinian-like view of the king “as the breathing law” was not the correct interpretation to follow. Although the ideas associated with theologico-political covenantalism had already surfaced in the Reformational works of Heinrich Bullinger, Peter Martyr Vermigli, John Knox, and other Biblical federalists, *Lex, Rex* gave added impetus towards a strong commitment to the idea of the Rule of Law, countering in the process Bolivian temptations towards absolute rulership.<sup>99</sup>

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94 See De Freitas, *Law and Federal-Republicanism*, p. 209.

95 Marshall, *Natural Law and the Covenant: The Place of Natural Law in the Covenantal Framework of Samuel Rutherford's Lex, Rex*, pp. 60-61.

96 Raath and De Freitas, ‘Theologically United and Divided: The Political Covenantalism of Samuel Rutherford and John Milton’, *Westminster Theological Journal*, Vol. 67, 2 (2005), pp. 160-161.

97 De Freitas, *Law and Federal-Republicanism*, p. 260.

98 *Lex, Rex*, 218(1)-218(2).

99 See Crawford Gribben, ‘Samuel Rutherford and Liberty of Conscience’, *Westminster Theological Journal*, Vol. 71, 2 (2009), p. 363.

The superiority of the law in *Lex, Rex* is confirmed by Rutherford's reference to the *Magna Charta*, which stated that kings might only act under laws. Rutherford adds: "Justice is more perfect than a just man, whiteness more perfect than the white wall; so the nearer the king comes to a law, for them which he is a king the nearer to a king, *Propter quod unumquodque tale, id ipsum magis tale.*"<sup>100</sup>

Through Rutherford's work republicanism was carried forward in the Anglo-American political tradition. Perhaps the greatest contribution of Rutherford's federalist basis of his republican theory is the idea that sovereignty rests with the people and not with the ruler. Thereby Rutherford offered a clear alternative to Jean Bodin's theory of centralized indivisible sovereignty as a consequence of which Scotland was to emerge as the major basis of the covenantal expression of the Reformation. Through his theologico-federalist republicanism Rutherford made a lasting contribution to Reformed political thought.

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<sup>100</sup>*Lex, Rex*, 101(2)-102(1).

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