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# *Moses and the Magistrate: a Study in the rise of Protestant Legalism*

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'It is now disputed at every table', declared Whitgift in 1574, 'whether the magistrate be of necessity bound to the judicials of Moses'.<sup>1</sup> Edwin Sandys told Bullinger of Zurich in the previous year that it was being maintained, to the great trouble of the Church, that 'The judicial laws of Moses are binding upon Christian princes, and they ought not in the slightest degree to depart from them'.<sup>2</sup> Though often neglected by historians as an important factor in the Reformation, the question of the validity of the Old Testament judicial (as opposed to moral or ceremonial) law frequently arises in the writings of the Reformers, and their various answers made no slight impact on the course of events. It bears directly on Henry VIII's divorce and the bigamy of Philip of Hesse; the treatment of heresy and the possibility of toleration;<sup>3</sup> the persecution of witches;<sup>4</sup> usury and iconoclasm;<sup>5</sup> sabbatarianism and the rise of the 'puritan' view of the Bible as a book of precedents, and the corresponding shift to

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1. *Works*, ed. Parker Society, Cambridge 1851-3 (hereafter cited as PS.), iii. 576.

2. *Zurich Letters*, PS., i. 294f

3. See J. Lecler, *Toleration and the Reformation*, 2 vols, Eng. Trans., London 1960; R. H. Bainton, *Sebastian Castellio, Concerning Heretics* (1554), New York 1935; *Studies on the Reformation*, London 1963.

4. See N. Paulus, *Hexenwahn and Hexenprozess*, Freiburg im Breisgau 1910; H. C. Lea, *Materials Towards a History of Witchcraft*, 3 vols, Philadelphia 1939-; H. R. Trevor-Roper *The European Witchcraze of the 16th and 17th Centuries*, Penguin 1969; G. L. Burr, 'New England's Place in the History of Witchcraft', *Proceedings of the American Antiquarian Society*, NS., xxi (1911).

5. Bainton, 'The Bible in the Reformation', *The Cambridge History of the Bible: the West from the Reformation to the Present Day*, Cambridge 1963.

legalism in Protestant theology.<sup>1</sup> The question is also of fundamental relevance to the thought of the Reformers on natural law,<sup>2</sup> the godly prince and magistrate, and the so-called ‘third use of the [149] law’.<sup>3</sup> This article is an attempt to survey, up to the end of the sixteenth century, the various interpretations of the Mosaic penal and civil laws, with particular reference to the development of legalistic tendencies after Luther.

There was a great deal of variety in the tradition of interpretation which the Reformers inherited from the Fathers and the Middle Ages. The judicial laws were regarded by both Origen and Cyprian as abrogated.<sup>4</sup> Chrysostom and Augustine were opposed to the death penalty for heresy.<sup>5</sup> As long as they were concerned for the restoration of the offender, appeal to the Mosaic laws was ruled out. Augustine’s attitude to the coercion of heretics and schismatics was pastoral and pragmatic, and he had no wish to impose Mosaic legislation on society. In a passage to which Calvin would later appeal Augustine wrote: ‘This heavenly city, then, while it sojourns on earth, calls citizens out of all nations...not scrupling about diversities in the manners, laws, and institutions whereby earthly peace is secured and maintained.... It therefore is so far from rescinding and abolishing these diversities, that it even preserves and adopts them, so long as no hindrance to the worship of the one supreme and true God is thus introduced’.<sup>6</sup> But a different attitude is also present in the Patristic age, though not among its major figures. Lecler regards Firmicus Maternus as the first to appeal to the Mosaic law against idolatry to justify the use of force by the civil power against error.<sup>7</sup> Firmicus, writing in 346, was concerned about surviving paganism; his argument was turned against the Donatists shortly afterwards by Opatus of Milevis: ‘Why should it be wrong to vindicate God by the death of those who are guilty? Are proofs required? The Old

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1. See C. Yule, ‘Continental Patterns and the Reformation in England and Scotland’, *Scottish Journal of Theology*, xxii (1969). An exception to the general neglect or the controversy over the Mosaic judicial law is C. H. and K. George, *The Protestant Mind of the English Reformation 1570-1640*, Princeton 1961, where, however, it is described as ‘one of the most curious and distressing features of clerical legal theory’, and ascribed to ‘the clerics’ peculiarly intense Scripturalism, their bookish isolation from the real issues of social fact’ (231).

2. See A. Lang, ‘The Reformation and Natural Law’, Eng. Trans., *Princeton Theological Review*, vii (1909), and bibliographies for individual Reformers, below.

3. Among the voluminous literature, see G. Ebeling, ‘On the doctrine of the *Triplex Usus Legis* in the theology of the Reformation’, Eng. Trans., *Word and Faith*, London 1963; W. Elert, *The Christian Ethos*, Eng. Trans., Philadelphia 1957, 294-303; Law and *Gospel*, Philadelphia 1967; H. Sick, *Melanchthon als Ausleger des alten Testaments*, Tübingen 1959, 38ff; Gerhard Heintze, *Luthers Predigt von Gesetz and Evangelium*, Munich 1958.

4. Bainton, *Castellio*, 15; Lecler, i. 37f.

5. *Ibid.*, i. 42.

Testament is full of them. How can one forget the terrible examples set by Moses, Phineas, or the prophet Elias?'.<sup>1</sup> Mosaic penalties were reflected in the old imperial laws which were resurrected with dire consequences in the sixteenth century.

While Aquinas accepted the death penalty for heretics—even for those who recanted<sup>2</sup>—his language about the Mosaic judicial laws remarkably anticipated that of Luther. As did the Reformers, Aquinas employed a doctrine of natural law as the basis of his discussion of this question. 'The Old Law is distinct from the natural law, not as being altogether [150] different from it, but as something added thereto. For just as grace presupposes nature, so must the Divine law presuppose the natural law'.<sup>3</sup> Natural law is expounded in positive law which may be moral, ceremonial or judicial, so that 'The determination of the general precepts of that justice which is to be observed among men is effected by the judicial precepts'.<sup>4</sup> The ceremonial and judicial precepts are not irreformable, for, whereas the moral precepts derive their efficacy from natural reason itself apart from the Law, 'the judicial and ceremonial precepts derive their force from their institution alone'.<sup>5</sup> The abrogation of the ceremonial law is more final than that of the judicial law. The ceremonies have been fulfilled in Christ; it would, therefore, be mortal sin to observe them, because this would imply that Christ was yet to appear.<sup>6</sup> The judicial precepts, similarly, 'did not bind for ever, but were annulled by the coming of Christ: yet not in the same way as the ceremonial precepts. For the ceremonial precepts were annulled so far as to be not only dead but also deadly'. The judicial laws, on the other hand, are dead but not deadly. 'For if a sovereign were to order these judicial precepts to be observed in his kingdom, he would not sin: unless, perchance, they were observed, or ordered to be observed, as though they derived their binding force through being institutions of the Old Law: for it would be a deadly sin to intend to observe them thus'.<sup>7</sup> Luther was to make exactly the same point. The

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6. *De Civ. Dei*, xix, xvii, Eng. Trans., Edinburgh 1872; cf. Calvin, *Institutes*, iv. xx. 16. For Augustine and coercion see *Ep.* xciii; Lecler, i. 53ff; P. Brown, *Augustine of Hippo*, London 1967, 236ff.; *Religion and Society in the Age. of St. Augustine*, London 1972, 260ff., R. A. Markus, *Saeculum: History and Society in the Theology of St. Augustine*, Cambridge 1970, 35f, 134ff; Bainton, *Castellio*, 21ff.

7. Lecler, i. 42.

1. *Ibid.*, 61f.

2. *Summa Theologica*, II, ii, Q. 11, Art. 4; Lecler, i. 84ff.

3. *Op. cit.*, II, i. Q. 99, Art. 2, Resp.

4. *Ibid.*, Art. 4, Resp.

5. *Ibid.*, Q. 100, Art: 11, Resp.

6. *Ibid.*, Q. 103, Art. 3f.

7. *Ibid.*, Q. 104, Art. 3, Resp.

tradition could thus be made to support both sides on the question of the present status of the judicial law, which was raised with a new urgency in the controversies of the Reformation period.<sup>1</sup>

Before turning directly to the views of the Reformers, it is important to note the complexity of the appeal to law in the sixteenth century. The claim of legality could be made in a number of ways. This is strikingly reflected in the title of the *Dialogus Neobuli*, written almost certainly by Lening (although widely attributed at the time to Bucer, who had a hand in it) in defence of Philip of Hesse's bigamy: *Dialogue, das ist ein freundlich Gespräch, Zweyer personen, Davon, Ob es Gottlichem, Naturlichem, Keyserlichem, and Geystlichem Rechte gemesse oder entgegen sei, mehr dann Eeweib zugleich zuhaben etc.*<sup>2</sup> Here it was apparently felt that, for a water-tight case, the requirements of Biblical, natural, imperial, and canon law all had to be satisfied. This is not surprising in an age when the old customary laws were being replaced by new codes modelled on Roman precedents such as the *Constitutio Criminalis Carolina* promulgated by the emperor in 1532 and based partly on the Bamberg code of 1507. It prescribed the death penalty for witches and heretics. The *Sachsenspiegel*, Luther's preference, [151] also punished heresy with death, for the various codes often agreed. Anti-Trinitarianism and rebaptism were both punishable by death according to Roman canon law and the code of Justinian. The Justinian law dealing with anti-paedo-baptists was formally revived by Charles v at the Diet of Spire in 1529 and confirmed at Augsburg in the following year. In Saxony, where the *Sachsenspiegel* had fallen into disuse, the *Carolina* was not accepted, but in 1572 the Elector August issued a new criminal code, in some respects more severe than the *Carolina*. In this complex and rather fluid legal situation, the Reformers welcomed support even from the canon law.<sup>3</sup>

In Luther we have the only absolutely uncompromising repudiation of the Mosaic judicial law among the continental Reformers. Luther's position depended upon his radical dialectic of Law and Gospel, and the challenge that this received from the 'fanatics' and legalists. Luther deals with the question frequently and at length.<sup>4</sup> His starting point is his perception of the fundamental unity of law in all its forms and disguises. The whole law, moral, ceremonial and judicial; the law with all its trappings of priesthood, temple and cultus, holy city, promised land and theocratic government; precisely the tyranny of law as

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1. Carovingian legislation invoked Mosaic authority for the execution of magicians, 'quos divina lex irretractabiliter punire jubet': Lea, op. cit., 138.

2. H. Eells, *The Attitude of Martin Bucer toward the Bigamy of Philip of Hesse*, Yale, 1924, 184f.

3. Lea, op. cit., 138, 1 078ff.; Bainton, *Studies*, 141, 216. For the imperial laws concerning Jews see W. Nijenhuis, *Ecclesia Reformata*, Leiden 1972, 26ff.

such, has been overthrown by Christ. 'Law for Luther is not a revealed statutory norm to which Ulan then adopts this attitude or that, but Law is fur Luther an existentialist [German: *existential*] category which sums up the theological interpretation of man's being as it in fact is'.<sup>1</sup> The inner liberty of a Christian man is incompatible with the legal relationship, for law is 'whatever has been commanded from a divine or human standpoint, whether it be a matter of ceremonial or a judicial and moral issue'.<sup>2</sup> To accept Moses as our legislator would be to 'deny the gospel, banish Christ, and annul the whole New Testament'.<sup>3</sup> When we are suffering *Anfechtungen* we must defend ourselves against the terrors of the accusing law, and, says Luther with brilliant irony, 'beat Moses to death and throw many stones at him'.<sup>4</sup> The law is indivisible and those who observe it must do so in its entirety, which even the Jews found impossible. They [152] must be circumcised and fulfil all the ceremonial law because the ceremonial and the judicial were different aspects of the same legal arrangement.<sup>5</sup> Luther deals with the Mosaic judicial laws in the wider framework of law itself. Thus when he wants to illustrate Paul's thought of 'the whole law the rudiments of the world', he takes ceremonial law from the Old Testament, but for judicial and civil law he refers to the emperor's laws.<sup>6</sup>

The fact which for Luther reveals decisively that the Mosaic judicial law is now abrogated is the divine judgement on Jerusalem. The Mosaic administration was confined to the occupation of Palestine, but God has scattered the people and the law 'has been in ruins for 1500 years now' and is 'lying in ashes with Jerusalem'.<sup>7</sup> It was no more than the

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4. The main texts are: *The Estate of Marriage* (1522); *Temporal Authority: to what extent it should be obeyed* (1523); *Lectures on Deuteronomy* (1524-); *Against the Heavenly Prophets* (1525); *How Christians Should Regard Moses* (1525); *On Marriage Matters* (1530); *Galatians* (1535); *Against the Sabbatarians* (1538); *On the Jews and their Lies* (1543); together with the *Prefaces to the Old Testament* and the exposition of *Psalms 82* (1530). See also E. Sehlink, *The Theology of the Lutheran Confessions*, Eng. Trans., Philadelphia 1961, 67ff.; F. E. Cranz, *An Essay on the Development of Luther's Thought on Justice, Law, and Society*, Harvard 1959, 105ff.; H. Bornkamm, *Luther and the Old Testament*, Eng. Trans., Philadelphia 1969; Bainton, *Studies*, 20ff. See also, 154 n. 6. I have not been able to consult Hayo Gerdes, *Luthers Streit mit den Schwärmern um das rechte Verstandnis des Gesetze Mose*, Göttingen 1955.

1. Ebeling, art. cit., 75; *Luther's Works*, St. Louis and Philadelphia 1955- (cited as LW), xxxiv. 114ff.; xlvii. 84.

2. Bornkamm, op. cit., 135; LW, xxix. 193f.

3. LW., xl. 92.

4. Cited Bornkamm, op. cit., 146, from the *Table Talk*.

5. LW, xlvii. 79ff; Sehlink, op. cit., 71f.

6. LW, xxvi. 363f

7. Ibid., xlvii. 78, 66.

*Saschenspeigal* of the Jews.<sup>1</sup> Jews now living in Christendom are subject to the imperial laws—as are the judaisers like Carlstadt who wanted to revive the old law.<sup>2</sup> Luther did not of course dispute that they were God-given, but to those who thought that this settled the matter, he replied that it was not enough to know who spoke the word, but to whom it was spoken. The peasants and Thomas Müntzer had raised the cry, ‘God’s word, God’s word’. ‘But my dear fellow’, responds Luther, ‘the question is whether it was said to you’. God never led us out of Egypt. ‘I listen to that word which applies to me. We have the gospel’.<sup>3</sup> On these grounds Luther opposed the iconoclasts: ‘As for the fact that the Jews smashed altars and idols, they had in that time a special command of God for that work, which we in this time do not have’.<sup>4</sup> Luther makes the point that when the Jewish religion was practised outside the territorial boundaries of Israel, by Joseph, Job, Naaman and Daniel, for example, the judicial laws were not observed: ‘Qui iudicialia Moisi iactant, contemnendi sunt. Nos habemus nostra iura civilia, sub quibus vivimus. Sic nee Naeman Syrus nec Hiob nec Iosseph neque Daniel neque ulli alii iudei extra terram suam suas leges, sed gentium, inter quas erant, servaverunt. Leges Mosi solum Iudeum populum in loco, quem elegisset, ligabant, nunc liberae sunt; alioqui si iudicialia servanda sunt nulla est ratio, cur non circumcidamur quoque et omnia ceremonialia servemus’.<sup>5</sup>

Luther was prepared to go further and isolate ceremonial and judicial elements in the Decalogue, which he did not regard as synonymous with the moral law as later Protestant theologians did. He particularly distinguished the laws concerned with the sabbath and images as ceremonial/judicial. He omitted the second commandment from his catechetical versions of the Decalogue, which necessitated dividing the tenth [153] commandment into two to make up the conventional number.<sup>6</sup> He did not hold the letter of the commandments to be binding for Christians. When we have Christ ‘we shall make new Decalogues’ as do Paul and Christ and these will be superior to the original.<sup>7</sup> In a slightly different mood Luther claims that the Decalogue is indeed of the highest value, unsurpassable, ‘the highest doctrine...no more perfect law can be handed on’.<sup>8</sup> But where it does still bind the Christian, this is not because it is Mosaic,

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1.Ibid., xxxv. 167; xl. 98.

2.Ibid., xl. 90; xlvii. 272.

3.Ibid., xxxv. 170f., cf. 164ff.

4.Cited Bainton, ‘The Bible in the Reformation’, 15.

5.Luther to Spalatin, 1524, *Werke*, Weimarer Ausgabe 1883- (cited as WA), Br., iii. 254.

6.Bainton, op. cit., 18f, 29f.; cf. *LW.*, xl. 85ff., 93, 97; Schlink, op. cit., 72.

7.*L W.*, xxxiv. 112f.; P. S. Watson, *Let God Be God*, London 1947, 111. Troeltsch’s misconception of Luther’s view of the Decalogue, and its relation to ‘the Protestant ethic’ is still influential: *The Social Teaching of the Christian Churches*, Eng. Trans., London 1931, ii. 503ff.

but because it perfectly mirrors the natural law. The Christian is free from the Mosaic law in so far as it is Mosaic. As Bornkamm puts it: 'In so far as it is the national law of Moses it no longer concerns us; in so far as it binds us in conscience as an expression of natural law it does not derive from Moses'.<sup>1</sup> All the Reformers appeal to natural law of a sort, as we shall see, but whereas they tend to define natural law in the light of the Bible, Luther himself uses an *a priori* doctrine of natural law to distinguish different levels within the Bible. To the sabbatarians who appealed to the fourth commandment, Luther replied in terms of natural law: 'If the Ten Commandments are to be regarded as Moses' law, then Moses came far too late, and he also addressed himself to far too few people, because the Ten Commandments had spread over the whole world, not only before Moses but even before Abraham and all the patriarchs. For even if a Moses had never appeared and Abraham had never been born, the Ten Commandments would have had to rule in all men from the very beginning, as they indeed did and still do.... All the heathen bear witness to this in their writings, laws, and governments, as can be clearly seen; but nothing is said therein of circumcision or of the laws Moses gave the Jews for the land of Canaan'.<sup>2</sup> It has not been possible to discuss Luther's view of the Mosaic penalties without becoming involved in the vexed question of natural law in Luther's thought.<sup>3</sup> The extremes are represented by, on the one hand, Holl's opinion that natural law played little part in his theology, and on the other, by Arnold's assimilation of Luther's doctrine to a Thomist theory of natural law. A study of Luther's interpretation of the Mosaic law certainly bears out McNeill's statement that 'natural law is determinative for Luther's [154] political thinking'.<sup>4</sup> Luther equates love and right reason with natural law.<sup>5</sup> Where Moses 'rhymes' with these he may be said to bind the Christian 'accidentally'.<sup>6</sup> His doctrine of natural law is practical rather than speculative. With all the Reformers he rejected the Pelagian tendencies in scholastic theories of natural law which would make it an autonomous mediatory ele-

8. *LW.*, xii. 44; cf. xl. 98; Cranz, op. cit., 108.

1. Bornkamm, op. cit., 125.

2. *LW.*, xlvii. 89f; cf. xxvii. 355: 'Natural law, the written law, and the law of the Gospel...differ not so much in their function as in the interpretation of those who falsely understand them... Therefore there is one law which runs through all ages, is known to all men, is written in the hearts of all people, and leaves no one from beginning to end with an excuse, although for the Jews ceremonies were added and the other nations had their own laws, which were not binding upon the whole world, but only this one, which the Holy Spirit dictates unceasingly in the hearts of all' (1519).

3. See J. T. McNeill, 'Natural Law in the Thought of Luther', *Church History*, x (1941); F. X. Arnold, *Zur Frage des Naturrechts bei Martin Luther*, Munich 1937, 47-56; Cranz, 105ff.; M. Schloemann, *Natürliches and Gepredigtes Gesetz bei Luther*, Berlin 1961.

4. McNeill, art. cit., 227.

ment between God and the world, and an assertion of the dignity of human nature.<sup>1</sup> But that Luther's treatment of the present and related questions depends upon a doctrine of natural law is indisputable.

There are, in fact, occasions when Luther does seem to appeal to the Mosaic judicial laws, and these require some consideration. Retreating from his earlier view that 'heresy is a spiritual thing which cannot be cut with steel nor burned with fire, nor drowned with water',<sup>2</sup> Luther came to approve the death penalty for blasphemy and idolatry. In his 1530 exposition of Psalm lxxxii, he argued that heretics deserve punishment because they threaten the body politic. There is an explicit appeal to Moses and Lev. xxiv. 16. Luther points out that he is not coercing belief, but simply forbidding the publication of heresy. 'Such teachers should not be tolerated, but punished as blasphemers...rulers are in duty bound to punish blasphemers as they punish those who curse, swear, revile, abuse, defame and slander'. Heretics take advantage of the protection of Christian society. 'He who makes a living from the citizens ought to keep the law of the city'.<sup>3</sup> In the following year Luther approved Melanchthon's view that Anabaptists should be put to the sword—for sedition—as laid down in the code of Justinian.<sup>4</sup> Although he was happy to have the support of Moses, Luther's argument so far was based on reason and a concern for the stability of society. Sedition was the crime in question, not blasphemy as such. In 1536 Luther signed a document together with Melanchthon, Bugenhagen and Cruciger, stating that the civil power had the duty to suppress blasphemy for itself. 'Concerning this point the text of Leviticus applies (xxiv. 16.), "He that blasphemeth the name of the Lord let him surely die"'.<sup>5</sup> Taken in the context of Luther's other remarks, this may, however, be read as an invocation of natural law as embodied in the Mosaic code. Dealing with usury, for example, Luther in two consecutive points says, 'Charging for a loan is contrary to natural law', by which he means the golden rule, and, 'It is against the Old and New Law, which commands,

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5.Cf. *LW.*, xlv. 128: 'love and natural law with which all reason is filled'. Cf. xxvii. 348. This applies only to the Earthly Kingdom, which is reason's proper sphere. For Luther on reason, love and the Two Kingdoms, see G. Wingren, *Luther on Vocation*, Eng. Trans., Philadelphia 1957 (= *The Christian's Calling*, Edinburgh 1958). B. A. Gerrish, *Grace and Reason*, London 1962, cites: reason is 'the soul of law and mistress of all laws' (12f.).

6.Bornkamm, op. cit., I 24f.; Cranz, op. cit., 108.

1.Cf. A. P. d'Entrèves, *Natural Law*, London 1951, 69f.

2.Bainton, *Studies*, 20ff.

3.*LW.*, xiii. 61f.

4.Lecler, op. cit., i. 162.

5.Ibid.; cf. WA, 1. 12.



[155] “You shall love your neighbour as yourself”.<sup>1</sup> Similarly, Luther’s harsh view of the treatment due to witches, though the Mosaic law is invoked, is actually based on the natural order of creation: ‘I should have no compassion on these witches; I would burn all of them. We read in the old law that the priests threw the first stone at these malefactors.... Does not witchcraft then merit death, which is a revolt of the creature against the Creator, a denial to God of the authority which it accords to the demon?’<sup>2</sup> Philip of Hesse claimed that Luther had supported his proposed bigamy on the authority of Moses, but the force of this claim is undermined by the remark—so shocking to Bucer—with which Luther is said to have accompanied his similar advice to Henry VIII: ‘Moses is nothing to us’.<sup>3</sup> He upheld some of the Mosaic marriage laws, especially the prohibited degrees, but he qualified his view by adding, ‘This is no longer commanded, but neither is it forbidden’.<sup>4</sup> One of Luther’s most violent appeals to Moses occurs in his 1543 diatribe against the Jews. ‘In Deuteronomy xiii Moses writes that any city that is given to idolatry shall be totally destroyed by fire.... If he were alive today, he would be the first to set fire to the synagogues and houses of the Jews. For in Deuteronomy iv and xii he commanded very explicitly that nothing is to be added or subtracted from his law’. That this is no more than a very unpleasant *argumentum ad hominem* is apparent from the immediately following remark that the Mosaic law was confined to Canaan.<sup>5</sup>

The tension between Luther’s clearly and repeatedly stated view that the judicial law is entirely abrogated, and his willingness to appeal to it in controversy, is resolved by his teaching that it is permissible to follow it, not for any inherent authority that it may possess, but simply when it is useful. He favoured the implementation of the laws relating to tithe, divorce, jubilee, the sabbatical year, and the punishment of disobedient sons.<sup>6</sup> He agreed with Aquinas that it is not wrong to make use of these laws where it is expedient to do so: ‘Neither is it true that the Old Testament was abrogated in such a way that it must not be kept, or that whoever kept it fully would be doing wrong, as St. Jerome and many others mistakenly held. Rather, it is abrogated in the sense that we are free to keep it or not to keep it, and it is no longer necessary to keep it on penalty of losing one’s soul as was the case at that time...it is not wrong to

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1. *LW.*, xlv. 273ff.

2. Cited Lea, *op. cit.*, 422.

3. Eells, *Attitude*, 35f, 211f. See also Faulkner, ‘Luther and the Bigamous Marriage of Philip of Hesse’, *American Journal of Theology*, xvii (1913), 213ff.

4. *LW.*, xlv. 23f.

5. *Ibid.*, xlvii. 269f1:

6. *Ibid.*, xxvi. 448; xxxv. 166f.; xl. 98; Bornkamm, *op. cit.*, 123

ignore them and it is not wrong to abide by them, but it is permissible and proper either to follow them or to omit them.... Hence the precedents for the use of the sword, also are matters of freedom, and you may follow them or not'.<sup>1</sup> Luther refuses to make even the abolition of law a matter of [156] law. Other Reformers did not fully share Luther's confidence in the capacity of the Christian man for responsible exercise of his freedom.

Melanchthon also assumed the threefold division of the law—*leges morales, ceremoniales et forenses iudiciales*—but his settled position is more difficult to assess than Luther's.<sup>2</sup> Kisch has attempted to trace the development of Melanchthon's views from an earlier more favourable attitude to the judicial laws to a later decision in favour of Roman law. We have already noted the declaration of 1536 signed by Melanchthon and others on the repression of blasphemy. A similar statement of 1557, to which Melanchthon, Brenz and others subscribed, advocating the death penalty for Anabaptists and approving the execution of Servetus, claimed that the Mosaic legislation was an inscripturation of natural law: 'God has clearly and explicitly ordered the civil authority to punish by death the public blasphemers within its territory (Lev. xxiv. 16). This law did not only bind Israel; it is a natural law which binds all authorities, kings, princes, judges etc.'<sup>3</sup> The assumption that the laws of the Bible must *ipso facto* be natural laws is, as we shall see, common to a number of second generation Protestants. In the case of Henry VIII's divorce, Melanchthon regarded Leviticus xviii as no longer binding, but paradoxically went on to suggest bigamy on the grounds that 'it is certain that polygamy is not prohibited by divine law'.<sup>4</sup> Although Melanchthon did not in any way suggest that the judicial law as a whole was binding, and regarded its use as a matter of freedom, until the mid-1520s he was more favourably disposed towards it. These laws may be particularly useful among primitive and heathen people, and in any case they are preferable to human laws: 'esseque penes christianos uti vel non uti formis iudicandi Mosaicis, quamquam optarim, pro gentilibus et saepe stultis legibus Mosaicis recipi.... Et verbum Dei decebat praeferre humanis constitutionibus'.<sup>5</sup>

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1. *LW.*, xlv. 96ff.

2. *Corpus Reformatorum* (cited as CR), xxi. 687; F. Hildebrant, *Melanchthon: Alien or Ally?*, Cambridge 1946; Guido Kisch, *Melanchthons Rechts-und-Soziallehre*, Berlin 1967, 102ff.

3. Lecler, op. cit., i. 292; Bainton, *Castellio*, 58.

4. *CR.* ii. 526; Eells, *Attitude*, 36. For the Reformers' attitudes to Henry VIII's divorce, see also the material collected by Burnet, *The History of the Reformation of the Church of England*, ed. Pocock, Oxford 1865, i. 148ff. J. J. Scarisbrick, *Henry VIII*, London 1968, in his treatment of the canon law of the divorce, dismisses the question of the judicial laws with some impatience: 'Henry's proponents... talked at length of the differences between natural and positive, moral and judicial laws—which proved little' (231).

These concessions to Mosaic law were really incompatible with the doctrine expressed for example in the 1521 *Loci Communes* that all law was abrogated in Christ: ‘universa lex abrogata sit; non ceremoniae, tantum et iudiciorum formae, sed et decalogus’.<sup>1</sup> And although Melanchthon was later to retreat from this Martinian radicalism on the question of the Decalogue and the ‘third use of the law’,<sup>2</sup> the weight of evidence is on the side of the rejection of the judicial law. He opposed the Anabaptists who pressed for the introduction of Mosaic law into the [157] courts: ‘Damnabat omnes leges ab Ethnicis conditas; contendebat in foro Jus ex Mose discendum esse, non intelligens vim et naturam Christianae libertatis’.<sup>3</sup> The destruction of the Jewish State was sufficient evidence that the *politica Mosaica* was not meant to survive: ‘Deus ostenderet non oportere perpetuam esse, funditus et horribili exemplo delevit’.<sup>4</sup> Melanchthon came to favour the old Roman laws as the best legislative system: ‘nusquam extat perfectior et illustrior imago iustitiae quam in his legibus’.<sup>5</sup> And, with Luther, he held that it was part of evangelical freedom for the Christian to observe the honest polities of those people among whom he lived: ‘homini Christiano non necesse sit uti politia Mosi, sed potest vivere secundum honestas politias earum gentium in quibus vivit’.<sup>6</sup> The Mosaic law binds no more than the laws of Solon. Its only validity is as an expression of natural law: ‘Lex Moisi nihilo magis ad nos pertinet, quam leges Solonis, itaque tenemur lege, non propter Moisen, sed quia in natura scripta est... Politia Moisi ideo non est necessaria, quia nobis non est data lex Moisi’.<sup>7</sup> In spite of some initial hesitation, Melanchthon came to speak as forcefully as Luther of the abolition of the judicial law. To observe it would be to sin against the liberty of the Gospel and to tempt God: ‘quisquis alligat conscientiam ad Mosi legem, peccat contra evangelicam libertatem.. . Act. xv vocant apostoli, tentare Deum exigere Mosaicas leges’.<sup>8</sup>

5. *CR.*, xxi. 201.

1. *Ibid.*, 198f.

2. Hildebrant, *op. cit.*, 39; Ebeling, *op. cit.*, 62f, 74.

3. *CR.*, ii. 31.

4. *CR.*, xxi. 1007.

5. Lang, *art. cit.*, 182; Hildebrant, *op. cit.*, 59.

6. *CR.*, xiv. 829. Cf. the similar statement in the *Apology of the Augsburg Confession*: ‘Christ’s kingdom is spiritual; it is the knowledge of God in the heart, the fear of God and faith, the beginning of eternal righteousness and eternal life. At the same time it lets us make use of the legitimate political ordinances of the nation in which we live, just as it lets us make use of medicine or architecture, food or drink or air. The Gospel does not introduce any new laws about the civil estate, but commands us to obey the existing laws, whether they were formulated by heathen or by others, and in this obedience to practice love. It was mad of Carlstadt to try to impose on us the judicial laws of Moses’: *The Book of Concord*, ed. and trans. Tappert, Philadelphia 1959, 222f

7. *CR.*, xii. 473f ; Lang, *art. cit.*, 180ff.

8. *CR.*, i. 733f. (1525). cf 731.

Melanchthon marks the beginning of the shift from the Martinian polarisation of Law and Gospel towards the tendency in the second generation to seek a synthesis of them both, to regard the Gospel as the fulfilment of the Law. This movement towards legalism is also present in the theology of Zwingli. 'For Zwingli there were, strictly speaking, no *adiaphora*'.<sup>1</sup> All things had to find their sanction in Scripture regarded as a book of laws and precedents. But in his interpretation of Scripture Zwingli made a number of important distinctions. The dualism of divine and human righteousness bears some resemblance to Luther's doctrine of the Two Kingdoms and may well have owed something to Melanchthon's [158] M.A. theses on the Double Magistracy. Human righteousness depends on justice and is external; divine righteousness is ruled by love and belongs in the heart. For example, the question of usury receives the answer of divine righteousness that one should give to the needy; but human righteousness permits either a loan without interest, or failing that, an interest regulated by the government.<sup>2</sup> This shows some flexibility in the use of the Old Testament. Zwingli further distinguished various kinds of Biblical law, beginning with the Decalogue and descending to ceremonial matters: 'Ubi quoque notabimus differentiam esse inter leges, praecepta, iudicia et iusta aut ceremonias. Leges sunt certae et perpetuae...praecepta pro re nata mutantur aut tolluntur; iudicia sunt, quae iudicibus praescribuntur ut secundum ea causas discutiant ac iudicent; iusta mores sunt, ritus, consuetudines etc. Ceremoniae pompae sunt...'<sup>3</sup> He recognised that the validity of some laws passed away with their circumstances: 'Adde, quod hae leges pro temporum ratione variantur, ut in civilibus videmus saepe fieri'. But more fundamental for Zwingli's evangelical theology was the distinction between external and internal law: 'Nam de legibus civilibus aut caeremonialibus hic nihil dicaturi sumus, quod eae ad exteriorem hominem adtinent; nos autem de interiore nunc loquimur... Divinae vero leges, quae ad internum hominem pertinent, aeternae sunt'.<sup>4</sup>

So far Zwingli's doctrine of law would have made it possible for him to have followed Luther in rejecting the Mosaic judicial law. But his theology took a different turn when, by making the law the embodiment of the will of God, he conceived of God's will in legal terms—something Luther never could have done. 'Lex nihil aliud est, quam

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1.G. W. Bromiley, *Zwingli and Bullinger (Library of Christian Classics, cited as LCC, xxiv)*, London 1953, 29. The basic texts are: *Of Divine and Human Righteousness*, (CR, lxxxix.) and *Of True and False Religion*, (CR., xc. 706ff.). See also H. Schmid, *Zwinglis Lehre von der gottlichen and menschlichen Gerechtigkeit*, Zurich 1959; J. Kreutzer, *Zwinglis Lehre von der Obrigkeit*, Stuttgart 1909; R. Walton, *Zwingli's Theocracy*, Toronto 1967.

2.Walton, op. cit., 158ff.

3.CR., c. 401f.

4.Ibid., xc. 707.

aeterna dei voluntas.... Lex ergo nihil aliud est quam doctrina de voluntate dei, per quam scilicet intelligimus, quid ille velit, quid nolit, quid exigat, quid vetet'.<sup>1</sup> Zwingli's attempt to assimilate this to the golden rule and natural law is not fully convincing, for although he makes considerable use of natural law, in his thought it has a markedly religious and revealed character, and is not accurately described as 'natural'. He runs the different kinds of law very closely together as all being of God. Only the believer is able fully to acknowledge the law of nature. 'Lex naturae est nihil aliud quam vera religio. Das gsatz der Natur ist nüt anders denn der lüter geist gottes, der inwendig zticht and erlücht'. It is fulfilled in love: 'Caritatem, quae finis et Scopus est omnium legum et praeceptorum'.<sup>2</sup> Zwingli's attempt to reconcile a rigorous biblicism with his scholastic and humanistic background set up tensions which were not fully resolved, and for all his fine words about natural law and the law written on the human heart, he was able to invoke the Mosaic penalties for adultery, witchcraft and offences [159] against property.<sup>3</sup> In his annotations on Exodus, he says of the second commandment: 'Cum vero hic ordo invereretur, idolatriae et toti isti abominationi aperta est fenestra'. His comment on the death penalty for striking a parent may serve to capture his attitude: 'Ecce, quanta puritas divinae legis!'.<sup>4</sup> He was the first major Reformer whose theology made room for the judicial laws of the Old Testament.

In the influential Martin Bucer, the Reformer of Strasbourg, the shift towards Protestant legalism goes yet further. But Bucer's legalism is moderated by his lack of Zwingli's rationalising streak, and by the presence of the powerful love motif in his theology.<sup>5</sup> However, Bucer's biblicism was just as thoroughgoing as Zwingli's: 'God's law is perfect and entire, and its teaching enables us to conform the whole of life to the will of God. Wherefore Scripture is bound to contain oracles to deal definitely, though not in precise detail, with every aspect of public or private life'.<sup>6</sup> Bucer, too, lacked Luther's profound antithesis of law and gospel. According to Bucer the word that God speaks to men is law—a law found

1. Ibid.

2. B. Doumergue, *Jean Calvin: Les hommes et les choses de son temps*, Lausanne 1917, v. 462f.; Schmid, 93ff.

3. Paulus, 150; Kreutzer, 13ff.

4. *CR.*, c. 391, 404.

5. See Eells, *Attitude*; Nijenhuis; K. Koch, *Studium Pietatis: Martin Bucer als Ethiker*, Neukirchen 1962; J. Müller, *Martin Bucers Hermeneutic*, Gutersloh 1965, 150ff.; A. Lang, *Puritanismus and Pietismus*, Darmstadt 1941, 25ff.; W. Pauck, *Das Reich Gottes auf Erden: Utopie and Wirklichkeit*, Berlin and Leipzig 1928, 21ff., 33f.; C. Hopf, *Martin Bucer and the English Reformation*, London 1946, 107f.; 122f.; *Common Places of Martin Bucer*, ed. D. F. Wright, Appleford 1972. T. F. Torrance has drawn attention to the love motif in Bucer, *Kingdom and Church*, Edinburgh 1956, 82ff., 87f.

6. Wright, 303; cf. Koch, 65ff.; Lang, *Puritanismus*, 25ff.

in the entire Scriptures: ‘Tota Lex, id est, omne id quod Scriptura Dei continet.’ As Koch remarks, the gospel is smothered by the law: ‘Ist den gesamte Inhalt der Schrift Gesetz, dann bleibt für das Evangelium kein Raum. Gott spricht in der Schrift nun ein Wort, das Gesetz, das die *doctrina Dei* ist. Das all *doctrina* verstandene Gesetz umschließt das Evangelium, dass das eigentliche Amt des Evangeliums nicht zur Geltung kommen kann.’<sup>1</sup> This led to a rigidity of approach to the Old Testament laws which can be illustrated by Bucer’s statement that although divine law permitted divorce in the case of leprosy, this could not be extended to other diseases because God had not revealed his will.<sup>2</sup> The kingdom of God was conceived by Bucer in terms of obedience to the divine law. ‘Das Reich Gottes’, says Pauck, ‘ist für Bucer ja da, wenn die Gesetze der Schrift verwirklicht sind, d.h. wenn die in der Bibel verlangte Sittlichkeit das gesamte Menschenleben beherrscht.’<sup>3</sup>

Bucer accepts the traditional threefold division of Mosaic law, and pays lip-service to the idea that the judicial law has been abrogated along with the ceremonial.<sup>4</sup> But as often as he declares the Christian to be free [160] of it, he adds in the same breath that it is to be kept anyway. The Christian is freed but not loosed; freedom simply means freedom to take it more seriously.<sup>5</sup> This extraordinary ambivalence is clearly seen in the *De Regno Christi*, Bucer’s blueprint for further reformation in England: ‘For inasmuch as we have been freed from the teaching of Moses through Christ the Lord, so that it is no longer necessary for us to observe the civil decrees of the law of Moses, namely in terms of the way and the circumstances in which they are described, nevertheless, in so far as the substance and proper end of these commandments are concerned, and especially those which enjoin the discipline that is necessary for the whole commonwealth, whoever does not reckon that such commandments are to be conscientiously observed is certainly not attributing to God either supreme wisdom or a righteous care for our salvation.’<sup>6</sup> There follows Bucer’s recommendation of capital punishment for false teachers, blasphemers, sabbath-breakers, dishonourers of parents, murderers, adulterers, rapists and others. Again: ‘Fateor, Moysi legibus civilibus sicut et caeremonialibus datis veteri populo nos libertate Christi donatos non teneri, quod quidem ad externas attinet circumstantial et mundi elementa.

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1. Koch, 66, cf. ‘Verbum Dei, Euangelium Domini nostri Jesus Christi hoc est, lex Dei explicatio et dilucidior’ (67). See also W. P. Stephens, *71e Holy Spirit in the Theology of Martin Bucer*, Cambridge 1970, 93ff:

2. Eells, *Attitude*, 23.

3. Pauck, 23.

4. In relation to Henry VIII’s divorce see Eells, *Martin Bucer*, Yale 1931, 125. For Bucer’s radical teaching on marriage and divorce, see also Koch, 140ff.; Hopf, 107ff.; Wright.

5. Stephens, 96; Lang, *Puritanismus*, 25f.

6. *LCC.*, xix. London 1969, 378.

Tamen cum nullae possint leges magis esse honestae, iustae ac salutes, quam quas Deus ipse tulit, aeterna sapientia et bonitas, –si modo ex Dei sententia nostris rebus atque actionibus applicentur!– non video, cur Christiani in rebus, quae ad ipsorum quoque usum pertinent, non debeant magis Dei, quam ullorum hominum leges sequi'.<sup>1</sup> 'Who would approve of men wishing to be more merciful and just than God? If a magistrate is appointed to punish the wicked, and anointed thus by God, how could he possibly discharge his duty more correctly than by punishing most rigorously what God has decreed to be offences with the penalties he has likewise decreed?'.<sup>2</sup> Bucer sees the Christian magistrate as the successor of Moses, having a special part to play in the scheme of salvation. He should not disgrace what Moses once permitted to the children of God, for anything once allowed by God and not subsequently prohibited in Scripture remains valid.<sup>3</sup> This enabled Bucer to support bigamy in certain circumstances, to advocate capital punishment for the offences specified in divine law, and to invoke that law for the expulsion of the Jews in the *Judenratschlag* of 1538.<sup>4</sup>

However, Bucer did not adopt uncritically the whole bulk of Mosaic penal legislation. He had a doctrine of natural law which enabled him to discriminate between what is valid and what is not. This criterion was the [161] *ratio legis* or *ratio pietatis*, which for Bucer was synonymous with love for God and one's neighbour, the golden rule, or the *Liebesgebot*. It has a definitely Thomistic ring about it: 'Spiritus enim Christi, naturam non tollit, sed restituit'.<sup>5</sup> Bucer distinguished positive law which is outdated by time and circumstances ('Quod temporum, quod personarum etc rationem habet, mutari potest et aboleri') from natural law ('Quod autem in utili et honesto versatur, ullud immutabile remanet, circumstantiis temporum et personarum mutatis'). And the judicial and ceremonial laws are not abolished where they inhere with the *lex aeterna*. In the judicial laws are to be found principles of eternal validity: 'obedientia Dei, studium ordinis, veritatis, iustitiae ac fidei cultus. Haec omnia ideo propria sunt, et aeterna, quia non sunt locarum, vet personarum vet temporum, sed sunt per se propria legis ut Christus et omnes prophetae explicant idcirco aeternum manent'.<sup>6</sup> But even those laws which are not necessary for sal-

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1. Müller, 151 (not included in *LCC* edition of *De Regno Christi*).

2. Wright, 412. Cf. 'Cumque melior institutio Reipublicae ea quam Dominus dedit per Moschen a nemine inveniri possit, et illa puniri et tolli sotes praecipiat: verae ac germanae charitatis opus erit, secundum illas Dei leges in sceleratos animadvertere': cited Wendel, *Calvin, the Origins and Development of his Religious Thought*, Eng. Trans., Fontana 1965, 202.

3. Eells, *Attitude*, 26ff., 78ff.

4. Nijenhuis, 24, 44f.

5. Koch, 74f., cf. 69, 219. For the application to usury, see Hopf, 122ff.

6. Koch, 218f. (n. 59f.).

vation, are fitting for Christians, that all things may be done *decentissime atque ordinatissime*.<sup>1</sup> The use of the *ratio pietatis* and Bucer's doctrine of 'love the consummation of all justice'<sup>2</sup> certainly moderated the force of his legalism, but he was too ready to identify divine law with imperial and natural law. For example, he sometimes combined the three forms of law in one statement: 'This is the decree of the divine law and the law of nature as given concerning prisoners by Gratian, Valentinian, and Theodosius'.<sup>3</sup> The ambivalence of his position is revealed in the four reasons he gave why Leviticus xviii does not prohibit a man to marry his brother's widow: 1. the patriarchs had done this; 2. Deuteronomy requires it; 3. Christians are not bound to Moses anyway; 4. the law of Moses may be abrogated in special cases.<sup>4</sup> If the third reason is true, why trouble with the others? The combination of Bucer's legalistic attitude with his failure to take a critical view of natural law, and its facile identification with the Mosaic and imperial laws, justifies Koch's conclusion 'Der Himmelfahrt Christi ist sein Reich in der konstantinischen Zeit eine Realität gewesen, die für die Reformation in England vor-bildlich ist. Die Gestaltwerdung des Reiches Christi in England wird von Bucer retrospectiv als die Restauration der altetestamentlichen and konstantinischen Vorbilder gesehen'. The eschatological element becomes obscured and 'die Theologie als *ars bene beateque vivendi* ist die "Technik"'.<sup>5</sup> It is symbolic of Bucer's attitude that on several occasions he offered to let himself be stoned to death if proved a heretic in disputation.<sup>6</sup>

Luther, Melancthon, Zwingli and Bucer all employed a theory of [162] natural law. But in spite of the strong superficial resemblances, it would be a mistake to assume that they meant the same thing by it. Troeltsch made the useful distinction between absolute and relative theories of natural law. Relative natural law is flexible and willing to make fruitful compromises with the *status quo*, and was regarded by Troeltsch as characteristic of the medieval synthesis and 'church-type' Christianity. Absolute natural law is idealistic, doctrinaire and opposed to the existing state of society, identified with the divine law of the Bible, and characteristic of medieval radical movements and 'sect-type' Christianity. Of the latter view Troeltsch writes: 'God's Being and Will constitute His Natural and Revealed Law; the Bible is the Law-book of revelation, identical

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1. *Ibid.*, 69.

2. Torrance, 87f.

3. *LCC.*, xix. 377, cf. 320ff. Cf. 'the imperial law which at no point diverges from God's law': Wright, 410.

4. Eells, *Attitude*, 40.

5. Koch, 185.

6. Eells, *Martin Bucer*, 16, 26f.



with the Law-book of nature'.<sup>1</sup> Law even tends to take the place of Church and sacraments.<sup>2</sup> While Troeltsch's distinction is not in every way applicable to the Reformers, if its use may be permitted, then Zwingli and Bucer may be said to have held a doctrine of absolute natural law, Luther of relative natural law, with Melancthon and Calvin taking a position between the two extremes.<sup>3</sup>

In Calvin we find the same sure-footed discrimination between Law and Gospel as in Luther, although Calvin was more accommodating to the law in that he admitted the *tertius usus legis*, the normative use, and regarded it as the most important of the three. Law in its totality was integral to the Old Covenant, though even there the Gospel was foreshadowed.<sup>4</sup> Calvin's usual division is between the moral and the ceremonial law, but he does sometimes isolate the judicial law.<sup>5</sup> His record in Geneva shows him to have been efficient and scrupulous, but not legalistic. Monter has pointed out that, 'He made no attempt to increase the punishments prescribed by canon law or by Genevan tradition. His intention was rather to make punishment less severe, while attempting to ensure that all men were equal before the law and that the laws were actually enforced'. All the crimes for which capital sentence was pronounced were also punishable by death according to the *Carolina*.<sup>6</sup>

However, there is some evidence in favour of Calvin's acceptance of the Mosaic judicial laws. His exegesis of the Pentateuch tends to assume its validity, but he shows some uneasiness about its acceptance. Moses 'does not condemn to capital punishment those who may have spread false [163] doctrine only on account of some particular or trifling error, but those who are the authors of apostacy, and who pluck up religion by the roots'. Even so, this would only apply in a situation where 'the religion had not only been received by public consent and the suffrage of the people, but, being supported also by sure and indisputable proofs, should place its truth above the

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1. Troeltsch, i. 347, cf. 257ff.

2. Ibid., 347f.

3. See D. Little, 'Calvin and the Prospects for a Christian Theory of Natural Law', *Norm and Context in Christian Ethics*, eds. Outka and Ramsey, London 1969.

4. *Psalms*, ed. Calvin Translation Society (cited as CTS), Edinburgh 1843-, i. 318ff. See also Doumergue, iv. v; Wendel; E. W. Monter, *Calvin's Geneva*, New York 1967, 150ff.; J. Bohatec, *Calvins Lehre von Staat and Kirche*, Breslau 1937; J. Baur, *Gott, Recht and Weltliche Regiment im Werke Calvins*, Bonn 1965. For an attempt to clear Calvin of later Reformed and Puritan legalism, see H. Rolston, *John Calvin Versus the Westminster Confession*, Richmond Virginia 1972.

5. Cf. *Institutes*, II, ii.; IV, xx, 14; Bohatec, 15.

6. Monter, 152f. See also his *Studies in Genevan Government (1536-1605)*, Geneva 1964, 57-83, 117ff.

reach of doubt'.<sup>1</sup> Calvin certainly advocated the death penalty for blasphemy and for adultery.<sup>2</sup> Commenting on the story of the woman taken in adultery, whereas Luther and Bucer, in their commentaries, had done no more than to point out the fact that in refusing to condemn the woman Christ had preserved inviolate the separation of the Two Kingdoms, Calvin also makes that point, and adds: 'Those who deduce from this that adultery should not be punished by death must, on the same reasoning admit that inheritances should not be divided, since Christ refused to arbitrate between two brothers'.<sup>3</sup>

Against all this must be set Calvin's emphatic and repeated declarations that the Mosaic judicial laws are finally abrogated for Christians.<sup>4</sup> 'Christ made an end of the ministration of Moses in so far as its own peculiar properties distinguished it from the Gospel.... I, for my part, take the abolition of the Law...to apply to the whole of the old testament in so far as it is opposed to the Gospel'.<sup>5</sup> Calvin's guarded permission of usury is enough to prove the point. Doumergue summarises: 'la loi des Juifs n'est pas la loi des chrétiens. La société actuelle n'est pas la société ancienne. Il n'y a pas même *situation de lieu*, et *beaucoup d'autres circonstances* different. *Nostre conjunction n'a point de similitude*'.<sup>6</sup> Against those who wished to implement a Mosaic polity Calvin protested that it would be 'perilous', 'seditious', 'stupid', 'false' and 'most absurd'.<sup>7</sup> Only the moral law or law of love remains binding: 'The judicial form, though it looked only to the best method of preserving that charity which is enjoined by the eternal law of God, was still something distinct from the precept of love itself...when these judicial arrangements are removed, the duties and precepts of charity can still remain perpetual'.<sup>8</sup> But the same principle of charity must now underlie the laws of nations, which must be governed with equity and with regard to circumstances, so that there is no need for punishments to be the same everywhere.<sup>9</sup> In spite of Calvin's undoubted concessions to legalism, it appears that he stands nearer to Luther than to the other continental Reformers, in that they both held the judicial laws to be entirely abrogated, but at the same time their view of natural law as *aequitas* consum-

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1. Pentateuch, CTS, ii. 75.

2. Doumergue, v. 699; Baur, 82ff.

3. *Calvin's Commentaries*, ed. D. W. and T. F. Torrance, Edinburgh 1959- (cited as *CC*), i. 209. Cf. *L W.*, xxiii. 310ff.; Wright, 411.

4. Bohatec, 14ff.; Baur, 36f.; Wendel, 201f; Doumergue, v. 667.

5. *II Corinthians*, *CC.*, 45; cf. *Galatians*, *CC.*, 67.

6. Doumergue, v. 681.

7. *Institutes*, IV, xx, 14, 16 (trans. Beveridge).

8. *Ibid.*, 15.

9. *Ibid.*, 16. Cf. Bohatec 27ff.; Baur, 59ff., 83.

mated in *caritas* enabled them [164] to be flexible in their occasional appeal to the moral principles which were embodied in the Mosaic legislation.<sup>1</sup>

Before passing to the English scene, it remains briefly to mention what attitudes were adopted towards the judicial law on the left-wing of the continental Reformation. The radical Reformation polarised into ‘pacifist’ thinkers such as Schwenkfeld, Frank and Castellio, who regarded any appeal to Mosaic sanctions as alien to the Christian spirit,<sup>2</sup> and agitators such as Müntzer and Carlstadt who managed to combine an evangelical mysticism with legalism and, in the case of Müntzer, violence. He effected a thorough assimilation of natural law to Biblical law, so that to oppose God was to oppose reason and nature, and to oppose Thomas Müntzer, the prophet of God, was to oppose them all.<sup>3</sup> Carlstadt appealed to the Mosaic law to support iconoclasm, sabbatarianism, and even bigamy.<sup>4</sup> There were others who, with Carlstadt, exercised an influence on John, duke of Saxony: Wolfgang Stein and Jacob Strauss who pressed for the introduction of the Mosaic polity.<sup>5</sup> The most extreme and explicit manifestation of Old Testament spirit and forms was in the city of Münster, where the continental judaising movement became finally discredited.<sup>6</sup> Some aspects of it, however, were to experience a new lease of life in the theology of the English separatists and puritans.

Heinrich Bullinger, Zwingli’s successor in Zürich, provides a convenient transition to the English situation on which he exercised considerable influence, particularly through the *Decades* which received the seal of official approval in 1586 as reading matter, for the clergy. Bullinger has the usual threefold division of law, and affirms that the ceremonial and judicial parts are abrogated.<sup>7</sup> To try to apply the judicial law today would be ‘more than half mad’.<sup>8</sup> But the capital laws against incest, sodomy, bestiality and adultery are natural laws.<sup>9</sup> He invokes the death penalty for magic and witchcraft.<sup>10</sup> He rehearses at great

1. For Calvin and natural law, see Bohatec, 27ff.; Baur, 47f1., 71ff.; Lang, ‘The Reformation and Natural Law’, 193. Lang is criticised by Doumergue, v. 465ff.

2. Bainton, *Castellio*, ad. lib.; Lecler, i. 226-232, 263, 350ff.; ii. 76; and, for the Anabaptists, *ibid.*, i. 179, 191.

3. Carl Hinrichs, *Luther and Müntzer: ihre Auseinandersetzung über Obrigkeit und Widerstandsrecht*, Berlin 1952, 31f., 172ff.; and for Müntzer’s use of the Old Testament, E. G. Rupp, *Patterns of Reformation*, London 1969, 240, 260.

4. *Ibid.*, 102ff., 123-131.

5. *Ibid.*, 133; G. H. Williams, *LCC.*, xxv. 47f; *The Radical Reformation*, London 1962, 53f

6. For Münster, see e.g., N. Cohn, *The Pursuit of the Millennium*, London 1970, 252ff. and bibliography.

7. *Decades, PS*, i. 209ff.; ii. 255.

8. *Ibid.*, i. 342.

9. *Ibid.*, i. 209f, 412f

length the provisions of the judicial law, remarking how wise and instructive it is.<sup>1</sup> Again the strange ambivalence of the Swiss Reformers recurs: ‘No Christian commonwealth, no city or kingdom is compelled to be bound and to receive those very same laws... Therefore every country hath [165] free liberty to use such laws as are best and most requisite...so yet that the substance of God’s laws be not rejected, trodden clown, and utterly neglected, [namely] those...agreeable to the law of nature and the ten commandments, and whatsoever else God hath commanded to be punished’.<sup>2</sup>

The mainstream of Anglican reformed theology is quite unambiguous in holding the judicial law as such to be abrogated, with the exception of the ban on usury and the doctrine of the prohibited degrees in marriage, both of which, it was held by the English Reformers, were taught by natural law. Tyndale urged Henry VIII to search the laws of God as to whether his marriage to Catherine were valid, but added for the king’s further guidance that, of the three kinds of Mosaic law, only that which is natural and moral remains in force—which includes the prohibited degrees.<sup>3</sup> The abortive *Reformatio Legum Ecclesiasticarum* of 1552, the work of Cranmer, Martyr and others, refrains from appealing to Moses for the punishment of blasphemy or idolatry, although in the case of adultery the Mosaic penalties are cited to prove its heinousness, and the law of prohibited degrees is said to be of permanent binding force and beyond the power of anyone (the bishop of Rome included) to dispense with: ‘quo jure nos et omnem nostram posteritatem teneri necesse est’.<sup>4</sup> The seventh of the 39 Articles declares that ‘the Law given from God by Moses, as touching Ceremonies and Rites do not bind Christian men, nor the Civil precepts thereof ought of necessity to be received in any commonwealth’. Whitgift, like Calvin, believed that the underlying moral principles of the Mosaic capital laws remained valid, but he did not accept them as binding positive laws in their own right. In his support he was able to appeal to the authority of Calvin, Beza, Musculus and Hemingius, as well as Augustine—all of which was calculated to cause the maximum embarrassment to puritans such as Cartwright whom Whitgift accuses of judaizing (*Judaizare*).<sup>5</sup> If the judicial laws were to be accepted the consequences would be nothing less than revolutionary: ‘First, all the laws of this land, that be contrary to these judicial laws of Moses, must be abrogated:

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10. Paulus, 162ff.

1. *Decades*, ii. 217-236.

2. *Ibid.*, 280ff.

3. *Works*, PS., ii. 323-331.

4. Ed. Cardwell, Oxford 1850, 47ff. For background see J. C. Spalding, ‘The *Reformatio* ... and the furthering of discipline in England’, *Church History*, xxxix (1970).

5. *Works*, i. 270-277.

the prince must be abridged of that prerogative which she hath in pardoning such as by the law be condemned to die: the punishments of death for felony must be mitigated according to Moses' law, which doth by other means punish the same, Exod. xxii. To be short, all things must be transformed: lawyers must cast away their huge volumes and multitude of cases, and content themselves with the books of Moses: we of the clergy would be the best judges; and they must require the law at our hands, Deuter. xvii, verse 8'.<sup>1</sup> In 1576, Whitgift had advised an Essex clergyman 'who had to deal with some sectaries, that place abounding [166] with a sort of *pure* brethren, that reckoned themselves absolutely freed from the whole law of Moses, and so consequently from any obligation to the moral law'.<sup>2</sup> 'We have nothing to do with Moses' ceremonial and judicial laws: whereof the one was given for a certain time, the other for a certain nation. But touching the moral law, which is the perfection of the law of nature, and afterwards was written in tables of stone, being the rule of God's justice, that remaineth for ever'.<sup>3</sup>

This distinctive position, differing from Luther's in emphasising the moral law, from Bucer's and Bullinger's in lacking their ambiguity, and apparently closest to Calvin's, although with more of a view to the political implications, was developed by Matthew Hutton, bishop of Durham, in a letter to Whitgift recounting a discussion with Burghley and Walsingham. Of the three sorts of Mosaic law, writes Hutton, 'the *judicial* are made not necessary: but yet may be used or not used, as shal be thought most convenient to the commonwealth'. And 'sith there is no nation or state bound to have that regiment which the people of Israel did live under: yet, sith the Lord hath utterly destroyed it from the earth, to show that it ought not to be eternal; therefore no nation, no state, is bound to punish sin by *judicials* of Moses; but may having alway respect to the law of nature and the weal public, either encrease the punishment, as of theft in this realm, where it is punished with death; or diminish it, as in adultery, which is not punished with death: tho' I wish that a more sharp punishment were by law appointed unto that sin, in this wanton and lascivious time'.<sup>4</sup> But 'as for the *moral law*, it may not be changed; because we cannot so cast away the nature of man, made after the image of God, but that we do owe, and must owe, this duty to God, to love him, and to love our neighbour'.<sup>5</sup>

In his exposition of Article v11 of the Church of England, Thomas Rogers named those who advocated the contrary doctrine. They include Philip Stubs according to whom the

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1. Ibid., 273.

2. Strype, *Life of Whitgift*, Oxford 1822, i. 151.

3. Ibid., 152.

4. Ibid., iii. 225.

5. Ibid.

'law judicial standeth in force to the world's end', the Brownists and Thomas Cartwright.<sup>1</sup> Without mentioning names, Strype cites the platform of the sectaries 'from an authentic paper, entitled, *Proceedings of certain unlawful Ministers, tending to innovation and stirrs...*' drawn up on Whitgift's authority.<sup>2</sup> Besides references to the discipline and synods proposed by the sectaries, the paper charges them with holding 'that the judicial law of Moses, for the very form of punishing sundry crimes, ought of necessity to be observed'. 'Therefore, say they, he that beateth his villain so excessively as that he dieth the next day, may not be punished for it; except he purposely meant to take away his life. [167]

That *lex talionis, an eye for an eye etc* ought to be used in every commonwealth. No prince or law may pardon or save the lives of wilful offenders: as, blasphemers of God's name, breakers of his sabbaths, conjurers, sooth sayers, persons possessed, heretics perjured, neglecters of the sacraments, disobedient to parents, or that curseth them, incestuous, adulterers; a daughter committing fornication in her father's house, any incontinent persons, (saving offenders in single fornication,) and those that conspire against a man's life'.<sup>3</sup> This material was later used in preparing the charges against Cartwright.<sup>4</sup> In accordance with the puritan principle of 'letting Christ rule by the sceptre of his word'<sup>5</sup> Cartwright held the judicial law to be, in substance, valid positive law, although not binding in circumstantial details. Like Bucer, he cannot bring himself to say with Luther, This word is not for us. 'And as for the judicial law, forasmuch as there are some of them made in regard of the region where they were given, and of the people to whom they were given, the prince and the magistrate, keeping the substance and equity of them (as it were the marrow), may change the circumstances of them, as the times and places and manners of the people shall require. But to say that any magistrate can save the life of blasphemers, contemptuous and stubborn idolaters, incestuous persons, and such like, which God by his judicial law hath commanded to be put to death, I do utterly deny, and am ready to prove'.<sup>6</sup> Pointing out that this whole programme was purely hypothetical and fruitless because no clerical interpretation of Mosaic law could possibly have influenced the English courts, and that, even supposing Cartwright's legal revolution to have been implemented, custom and use would soon have become the arbiter of rival interpretations of

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1. Rogers, *The Catholic Doctrine of the Church of England: an Exposition of the XXXIX Articles*, PS., 90, cf. 350.

2. Strype, ii. 13.

3. Ibid., 17.

4. Cf. *ibid.*, 20, 71; iii. 237.

5. See *An Admonition to the Parliament, 1572*, ed. Frere and Douglas, *Puritan Manifestos*, London 1954, 15, 113 and ad lib.

Scripture, C. H. and K. George conclude: ‘A science of jurisprudence based on the Two Tables was one of Cartwright’s wildest anachronisms’.<sup>1</sup>

A similar inconsistency is to be found in William Perkins’s doctrine: The judicial laws should be neither abolished, nor totally binding: ‘the safest course is to keepe the meane betweene both’.<sup>2</sup> Such laws apply where they qualify as ‘laws of common equity’ by the judgement of [168] ‘natural reason’ and ‘if it serve directly to...confirme any of the ten precepts of the Decalogue: if it serve to maintaine the family, the commonwealth, the church’.<sup>3</sup> That this is not the pragmatism of Luther, Calvin or Whitgift is evident from the fact that Perkins has to resort to what C. H. and K. George describe as ‘rather shocking casuistry’ to defend the common law death penalty for theft, on the grounds that, the English being so much poorer than the ancient Hebrews, theft was a more serious offence.<sup>4</sup> In *A Discourse of the Damned Art of Witchcraft*, Perkins accepts the Mosaic law at its face value. In the sixth chapter, ‘Of the punishment of witches’, he invokes Exodus xxii.18: ‘Thou shalt not suffer a witch to live’. ‘In the judicial laws of Moses (whereof this is one) the Lord appointed sundry penalties which in qualities and degrees differed from one another, so as according to the nature of the offence was the proportion and measure of the punishment ordained. And of all sins, as those were the most heinous in account which tended directly to the dishonour of God, so as to them was assigned death, the greatest and highest degree of punishment...though the witch were in many respects profitable and did no hurt but procured much good, yet because he hath renounced God, his king and governor, and hath bound himself by other laws to the service of the enemy of God, death is his portion justly assigned him by God. He may not live’.<sup>5</sup> Perkins also claimed Old Testament authority for applying the death penalty to adulterers and ‘false prophets’ (i.e. recusant priests).<sup>6</sup> The same severity towards witchcraft was inculcated in

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6. Cited Whitgift, i. 270. See also: A. F. Scott-Pearson, *Thomas Cartwright and Eliza-bethan Puritanism*, Cambridge 1925, 89f; Lecler, ii. 390. Cartwright would not allow any priority to the New over the Old Testament in establishing Christian doctrine: ‘Now the Bible being continually to be studied, it may be doubted whether the Old or New Testament is principally to be laboured in. That for being the foundation of the other, and of greater capacity of doctrine to the deviding (mg. deciding) of all manner of controversies, This for the plainnesse or light of those points which are of greater strife in Christian Religion: For me, I think that an aequal study of them both is commended unto us ... they are the two Breasts alike melch.. .’: *Cartwrightiana*, ed. Peel and Carlson, London 1951, 110f.

1. George, 232.

2. Ibid.

3. Ibid., 233, citing *Works*, ii. 520.

4. Ibid., 229f., citing *Works*, i. 64; ii. 251f

5. *William Perkins*, ed. I. Breward, Appleford 1970, 599f (= *Works*, iii. 639).

king James's *Daemonology* of 1597. It 'is the highest point of Idolatrie wherein no exception is admitted by the law of God'.<sup>1</sup>

It followed from John Knox's rigorous application of the 'regulative principle' of Scripture that he accepted the validity of the judicial law. The authority of Scripture is not to be understood 'of the Decalogue and Law Morall onlie, but of statutis, rytis, and ceremonyis; for equall obedience of all his Lawis requyreth God'.<sup>2</sup> In *On Predestination* Knox supports the burning of Servetus and Joan of Kent by the example of Moses putting the idolaters to death in Leviticus xxiii. Should it be objected, says Knox, that this is incompatible with the Kingdom of Christ, 'himself wil answer, that he is not come to break nor destroy the law of his heavenlie Father'. Again: 'That God hath appointed death by his law, without mercie, to be executed upon the blasphemers, is evident by that which is written, Leviticus xxiv'.<sup>3</sup>

As far as England was concerned, the most extreme advocates of the judicial law were the separatists, particularly as represented by Henry [169] Barrow. He was quite emphatic that the ceremonial law (he was thinking of tithes) was abrogated, but he held the judicial law in all its details to be moral, natural and irreformable. This was regarded as one of the most seditious of his errors, and at his fifth examination he was asked whether it were lawful to hang a thief. 'I said that God in the law had ordeyned an other kinde of punishment for such'. Asked further 'whether it be lawful for the prince to alter the judicial lawe of Moses according to the state of her cuntrye and policy, or no?', Barrow expressed his sense of the difficulty of the question, and said: 'but for my part I can not see that any more of the judicial law was or can be abrogated by any mortal man or cuntrye, upon what occasion soever, than belonged to the ceremonial law and worship of the temple, for which we have received other lawes and worship in Christe's Testament: but that the judgements due and set downe by God for the transgression of the moral law cannot be changed and altered, without injury to the moral law and God himself'.<sup>4</sup> He takes the 'regulative principle' to its logical conclusion: 'He that maketh any new lawes taketh unto him the office of God, who is the onlie lawmaker'.<sup>5</sup> The doctrine of Scripture as a book of laws

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6.Lang, *Puritanismus*, 110f.; Burr, 203ff.

1. Ibid., 206. Through puritan influence, Mosaic law was written into the constitutions of the New World, *ibid.*, (n. 41).

2. *Works*, ed. Lang, Edinburgh 1846, iii. 37f.

3. *Ibid.*, v. 229ff., 224.

4. *The Writings of Henry Barrow, 1587-1590*, ed. L. H. Carlson, London 1962, 199; Lecler, ii. 392ff.

5. Barrow, 602.



and precedents is at the root of Barrow's ecclesiology and polity. If the New Testament is not held to be binding in matters of Church order, he declares, the next step will be to claim that the judicial laws of the Old Testament are not binding either! But God does not leave his people to legislate for themselves. The bishops 'both abrogate all God's judicial lawes and cut them off at one blow, as made and belonging to the common welth of the Jewes onlie (as though God [had] no regard of the conversation of other Christians his servantes also) or els had left some other peculiar lawes for the manners of the Gentiles, or had left them in greater libertie to be and to make lawes and customes unto themselves'.<sup>1</sup> Barrow laments that under English law 'so manie capital mischiefes as God punished by death, as blaspheming the name of God, open idolatrie, disobedience to parents are not by law punished at al; incest, adulterie, either passed over or punished by some lighter trifling chastisement...'.<sup>2</sup> He deplores the fact that the Church of England makes no provision for the saints to execute vengeance on the ungodly: 'Also of the people of the Church it is written, "lette the highe accts of God be in ther mouthes and a towe edged sword in ther hands, to execut vengance upon the heathen and corrections among the people; such honour have all his saynts." But in ther church ther is no such autorytye; nor any such honour unto the saynts that they should execut vengance and corections upon the wicked...'.<sup>3</sup>

The sixteenth century ended with Hooker's magisterial treatment of law from first principles. None of the writers discussed above had gone to [170] the root of the matter in a systematic way. Hooker made a fundamental distinction between natural law ('things natural') and positive law. As far as the former is concerned, 'of the perpetuity of those things no man doubteth'. But the latter had been partly abolished by Christ (circumcision and sacrifice), and partly rendered indifferent (things offered to idols, blood meats). He went on to differentiate between the first Christians who had observed the judicial and ceremonial laws through 'scrupulous simplicity', and others 'as heretics, holding the same no less even after the contrary determination set down by consent of the Church at Jerusalem'.<sup>4</sup> Further, one must have regard not only to the author of a law but also to its end and matter. 'Notwithstanding the authority of their Maker, the mutability of that end for which they are made doth also make them changeable'. The moral law, however, cannot be altered because both end and matter remain. The end of the ceremonial law was fulfilled in Christ. The end of the judicial law remains, but the matter or circumstances have

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1. *Ibid.*, 599.

2. *Ibid.*, 599f.

3. *Ibid.*, 75.

4. *Works*, ed. Keble, Oxford 1845, IV, xi.

changed. Hooker cited the Old Testament law of fourfold restitution (Exodus xxii. 1) with the remark that no one could guarantee that this would always be a sufficient deterrent: 'Albeit the end continue, as in that law of theft specified and in a great part of those ancient judicials it doth; yet forasmuch as there is not in all respects the same subject or matter remaining for which they were first instituted, even this is sufficient cause of change; and therefore laws, though both ordained of God himself, and the end for which they were ordained continuing, may notwithstanding cease, if by alteration of persons or times they be found insufficient to attain unto that end. In which respect why may we not presume that God doth even call for such change or alteration as the very condition of things doth make necessary?'.<sup>1</sup>

As so often, Hooker's argument was unanswerable, and, as far as we are here concerned, may serve to lay the dust of this controversy. Hooker and Luther emerge from this rather protracted survey as those who gave the most clear-sighted answers to the question of the authority of the Mosaic judicial law which so agitated the minds of sixteenth-century men. They did so from different points of view. Luther's passionate concern for the integrity of the Gospel led him to oppose every incursion of the Law. Hooker's Thomistic vantage-point enabled him to survey, in the perspective of the eternal law of God's being, the whole structure of law [171] human and divine. It is, I think, significant that they can be seen to have occupied in the end the same ground on this issue, for the discussion has more than once suggested some unlikely theological cross-currents: Aquinas and Luther, Luther and Hooker, Calvin and Whitgift. And there have also been those—Melanchthon, Zwingli, Bucer, Perkins—who seemed to be caught where two seas meet and uncertain which shore to make for. It was the concessions to legalism in post-Martinian Protestant theology which helped to prepare the way for the theocratic Puritanism of the seventeenth century. [172]

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1. Ibid., III, x., 1-4. For a summary of Hooker's hierarchy of law, see F. J. Shirley, *Richard Hooker and Contemporary Political Ideas*, London 1949, 71-92. For Hooker and Aquinas, see P. Munz, *The Place of Hooker in the History of Thought*, London 1952, 49-59, 175-193. See also W. D. J. Cargill Thompson, 'The Philosopher of the "Politick Society": Richard Hooker as a Political Thinker', in *Studies in Richard Hooker*, ed. W. Speed Hill, Cleveland and London 1972. The present study confirms his view that 'the sixteenth-century Reformers did not, as one school of modern historians has maintained, either reject or even substantially modify the traditional medieval concept of natural law' (29). But it also documents why I cannot accept that Hooker's claim that the reformists would like to replace civil with Biblical law (Pref. viii., 4) was made 'without a shred of evidence' (15).