The Historical Journal, 53, 1 (2010), pp. 1–19
doi:10.1017/S0018246X09990586

THE JURIDIFICATION OF NATURAL LAW: CHRISTOPH BESOLD'S CLAIM FOR A NATURAL RIGHT TO BELIEVE WHAT ONE WANTS*

ROBERT VON FRIEDEBURG
Erasmus University Rotterdam

ABSTRACT. *Luther's early statements, such as that belief is a 'free work' and must not be coerced, gained crucial relevance in the juridical debates about the meaning of the Augsburg Peace of Religion in the empire. Christoph Besold was among those transforming the reformers' message into a legal claim of subjects against their governments, based on an alleged natural right to believe what one wants. He thus transferred Luther's claim based on the reformer's trust in the work of the divine word into a juridical claim for subjects against their civil and ecclesiastical magistrates. Besold's argument is thus an example of the important changes in political and religious thought developing within the genre of the German politica during the first half of the seventeenth century.*

In 1625 Christoph Besold stated that the law of nature is to have a free conscience and to believe what one wants.[1] This article contextualizes that claim and considers Besold's defence of it. Christoph Besold, a major legal authority of Protestant Germany during the 1620s and 1630s and seven-time rector of the Lutheran university of Tübingen, was well known even beyond the empire. His distinction between real majesty – owned by the state as a legal corporate person – and personal majesty – exercised by magistrates – as well as his taxonomy of the constitutional situation in various European countries, was referred to both inside and outside Germany. While his defence of the mixed constitution and of constitutional constraints binding the prince has thus attracted comment since the seventeenth century,[2] the fact that his constitutional approach came

History Department, Erasmus University Rotterdam, Postbus 1738, 3000 DR Rotterdam, Netherlands vonfriedeburg@fhk.eur.nl

* I thank Michael Stolleis, Mathias Schmöckel, participants at a Sussex Centre for Intellectual History Seminar, in particular Knud Haakonssen and Ian Hunter, the anonymous reviewer for the *Historical Journal* and its editor Julian Hoppit for their critical comments and suggestions on earlier drafts of this article.

[1] *Juris naturalis est, conscientiam liberam habere & credere quicquid velis*, Christoph Besold, *De maiestate in genere* (Strasbourg, 1625), part II: 'De Ecclesiastica maiestate iure', p. 132.

[2] For a concise summary of his argument against Bodin and in favour of the viability of mixed government see Julian H. Franklin, 'Sovereignty and the mixed constitution: Bodin and his critics', in J. H. Burns with M. Goldie, eds., *The Cambridge history of political thought, 1450–1700*, III (Cambridge,

hand in hand with striking claims for freedom of conscience has rarely been noted. Nor has the passage quoted above received detailed treatment.[3]

Since the early Reformation, claims for freedom of conscience for conscience's sake were raised both in England and Germany. They mainly addressed the need not to force consciences because of the nature of Christ's kingdom. None of these, though, were arguing a principled right to be left unmolested in private worship, let alone a natural right for freedom of conscience.[4] Rather, religious minorities

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1991), pp. 298–328, section iii: 'Besold and the mixed constitution', pp. 323–8; for a treatment of Besold's work as part of the genre of the German *politica* see Robert von Friedeburg and Michael Seidler, 'The Holy Roman Empire of the German nation', in Howell Lloyd et al., eds., *European political thought, 1450–1700* (New Haven, CT, 2007), pp. 102–75, 146–8; on the reception of Besold in England see Julian H. Franklin, *John Locke and the theory of sovereignty* (Cambridge, 1978), pp. 66–85; Conal Condren, *George Lawson's Politica and the English Republic* (Cambridge, 1989), pp. 51–7, 87–90; see in particular for the controversy between Franklin and Condren on the relative importance of Althusius or Besold for Lawson's argument Conal Condren 'Resistance and sovereignty in Lawson's Politica: an examination of a part of Professor Franklin, his chimera', *Historical Journal*, 24 (1981), pp. 673–81; on the reception of Besold with respect to an appreciation of the constitution of the kingdom of England see Johann P. Sommerville, 'English and European political ideas in the early seventeenth century: revisionism and the case of absolutism', *Journal of British Studies*, 35 (1996), pp. 168–94, at p. 174. Among readers using his texts more casually as a reservoir of items of their own argument see for instance Marchamont Nedham, *The case of the common-wealth of England stated …* (London, 1650), e.g. p. 71.

[3] Gizela Hoffmann, 'Besold', in *Religion in Geschichte und Gegenwart* (4th edn, Tübingen, 1998), I, p. 1361, claims that Besold denied that heresy was a political crime and that magistrates should thus not prosecute heresy, but does not specifically refer to the above cited passage. Overviews on Besold are given by Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, II (Munich, 1988), pp. 119–22; Horst Dreitzel, 'Politische Philosophie', in Helmut Holzey et al., eds., *Grundriss der Geschichte der Philosophie: Die Philosophie des 17. Jahrhunderts*, IV (Basel 2001), pp. 609–866, see pp. 659–63; most detailed biographical information in Barbara Zeller-Lorenz, *Christoph Besold (1577–1638) und die Klosterfrage* (Tübingen, 1986); Barbara Zeller-Lorenz and Wolfgang Zeller, 'Christoph Besold', in Ferdinand Elsner, ed., *Lebensbilder zur Geschichte der Tübinger Juristenfakultät* (Tübingen, 1977), pp. 9–18.

[4] E.g. Karl Gunther and Ethan H. Shagan, 'Protestant radicalism and political thought in the reign of Henry VIII', *Past and Present*, 194 (2007), pp. 33–74; Martin Brecht, '"Ob ein weltlich Oberkait Recht habe, in des Glaubens Sachen mit dem Schwert zu handeln". Ein unbekanntes Nürnberger Gutachten zur Frage der Toleranz aus dem Jahre 1530', *Archiv für Reformationsgeschichte*, 60 (1969), pp. 65–75, at pp. 66–71; for a concise summary on arguments for toleration based on assessments of the Augsburg Peace of Religion Horst Dreitzel, 'Toleranz und Gewissensfreiheit im konfessionellen Zeitalter', in Dieter Breuer et al., eds., *Religion und Religiosität im Zeitalter des Barock*, I (Wiesbaden, 1995), pp. 115–28; specifically on Calvin and his attitude to tolerating heretics see Christoph Strohm, 'Calvin und die religiöse Toleranz', in Martin Ernst Hirzel et al., eds., *1509 – Johannes Calvin – 2009: Sein Wirken in Kirche und Gesellschaft* (Zurich 2008), pp. 219–36. Arguably one of the most spectacular proposals arguing in favour of freedom of conscience for conscience sake originated from Jacob Lampadius, legal representative and adviser to Brunswick-Luneburg, during the negotiations of the Westphalian peace congress: he suggested restricting civil enforcement to the 'cultus externus' but leaving the 'cultus internus' unregulated, for it belonged entirely to the kingdom of Christ, see Richard Dietrich, 'Landeskirchenrecht und Gewissensfreiheit in den Verhandlungen des Westfälischen Friedenskongresses', *Historische Zeitschrift*, 196 (1963), pp. 563–83, 564–5, 568–71. Lampadius's argument rested entirely on the sacredness of the relation of God to the believer's conscience, he did not claim any 'right' possessed by the individual subject. On the later medieval origins of the argument that consciences must not be forced and that civil and ecclesiastical authorities should limit their jurisdiction to determine the articles of faith and should enforce them only if there are 'external repercussions' in the case of not doing so, see M. S. Kempshall, *The common good in late medieval political*

emphasized that neither civil nor ecclesiastical authorities should intervene in the relation of the believer to God in order to protect their diversion from established churches and their rites. To established churches, whether in Geneva or Rome, to civil magistrates, and to most scholars, toleration meant temporarily to restrict the prosecution of impious and unlawful practices, not a right to heresy. Under the specific circumstances of the northern Netherlands, with its critique of the persecution of Protestants under Philip II and its strong Catholic minority, toleration of Catholic and other minorities could take spectacular forms, as in Amsterdam during the seventeenth century, but was continually assailed by members of the reformed church and never established as legal right. Some adherents of Arminius even had to leave the country in the wake of the religious controversies culminating in 1618/19.[5] Religious peace accords in France, Poland, and Germany were justified in terms of prudence and necessity and were meant to give way to the speedy reunification of all subjects into the true church. With the exception of Germany, most of these accords only held for limited periods.[6] In England, the toleration of Protestant dissent by the Act for the Relief of Peaceable People (1650) did emphatically not include Catholics but only Presbyterians, Congregationalists, and other groups still belonging to a Protestant camp broadly defined, and even this limited toleration was fiercely attacked by many Presbyterians. It was entirely revoked with the Restoration.[7] The idea that a group or a person could decide autonomously about their own faith was addressed as *autonomia* and remained highly controversial, for all confessional churches insisted on the enforcement of the one single true faith and its rites as a command of God.[8]

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thought (Oxford, 1999), pp. 358 and 360 on Marsilius of Padua. As Kempshall puts it, Marsilius's reservations against the use of force did rest on 'a Franciscan exposition of the New Testament – "my kingdom is not of this world" (John 18: 6)'. On the debates at Trent, setting the scene for the further debates within the Church of Rome, see Nelson H. Minnich, 'The priesthood of all believers at the council of Trent', in idem, *Councils of the Catholic Reformation* (Aldershot, 2008), XI, pp. 1–21, who reaffirms that the hierarchical nature of the Church of Rome, embedded in the crucial role of a consecrated priesthood for the participation of the laity in the church, made it virtually impossible to grant a right to free conscience against the teachings found by that church. None of that, of course, excluded reasons of prudence and necessity to 'tolerate' heretics for some time.

[5] See Alastair Duke, *Dissident identities in the early modern Low Countries*, ed. Judith Pollmann and Andrew Spicer (Aldershot, 2009); Willem Frijhoff, 'The threshold of toleration: interconfessional conviviality in Holland during the early modern period', in idem, *Embodied belief* (Hilversum, 2002), pp. 39–66.

[6] Eike Wolgast, 'Religionsfrieden als politisches Problem der frühen Neuzeit', *Historische Zeitschrift*, 282 (2006), pp. 59–96; Mark Greengrass, *Governing passions: peace and reform in the French kingdom, 1576–1585* (Oxford, 2007).

[7] Susan Doran and Christopher Durston, *Princes, pastors and people: the church and religion in England, 1500–1700* (2nd edn, London, 2003), pp. 5, 129–30.

[8] William Monter, 'Heresy executions in Reformation Europe, 1520–1565', in Ole Peter Grell and Bob Scribner, eds., *Tolerance and intolerance in the European Reformation* (Cambridge, 1996), pp. 48–64; Arnold Angenendt, *Toleranz und Gewalt: Das Christentum zwischen Bibel und Schwert* (Münster, 2007); Strohm, 'Calvin'.

Civil magistrates also considered the functional need of religious uniformity in any commonwealth. In book VII of his *Politics*, Aristotle had considered what is indispensable for any state to exist. After enumerating food, crafts, arms, and a certain material wealth, he had added as most important the common cult. Aristotle's teaching remained influential right into the seventeenth century.[9] As William Cecil put it in 1563 to a minister complaining about the demands of uniformity, 'I will not argue with you, for my part is much stronger … neither you nor any one born under this kingdom may be permitted to break the bond of obedience.'[10] Right into the later seventeenth century, most clergy, including Puritan clergy, and laity in England held that subjects were bound to matters indifferent once ordered by established magistrates. Arguments denying that human laws bind the conscience in matters concerning worship were rooted in a specific religious preference and the defence of its way of worship against alleged civil interference against God's will, as for instance Samuel Rutherford's *Divine right of church government* (1646).[11] Ultimately, they rested on Acts 5, 29 (obey God more than men), the supreme duty to obey God as supreme lawgiver, not on a right against state and society.

Only from the later seventeenth century onwards did claims for toleration in a new and modern sense, as an outgrowth of a right, gain recognition among some philosophers. A new term for failure to grant this right, 'intolerance', was subsequently coined.[12] But as recent research has emphasized, even the new secular law of nature

> was not deeply individualistic and dominated by the idea of subjective rights … few thinkers embraced, or even understood, the idea that moral agency, or personhood, might consist in asserting claims against the rest of the surrounding world with no other guidance than one's own lights … According to most natural lawyers in the seventeenth and eighteenth century, moral agency consisted in being subject to natural law and carrying out the

[9] Aristotle, *Politics*, VII, 8, 1328, b 2–15; consequently, Martin Honecker, *Cura Religionis Magistratus Christiani: Studien zum Kirchenrecht im Luthertum des 17. Jahrhunderts* (Munich, 1968), pp. 122–3, addressed this commitment to impose unity of religious cult in church and state as one adopting the 'polis religion' approach of most classic authors. For similar examples from England insisting on uniformity see Johann P. Sommerville, 'Conscience, law, and things indifferent: arguments on toleration from the Vestiarian Controversy to Hobbes and Locke', in Harald E. Braun and Edward Vallance, eds., *Contexts of conscience in early modern Europe, 1500–1700* (Basingstoke, 2004), pp. 166–79. In the same volume, see also J. Spurr, '"The strongest bond of conscience": oaths and the limits of toleration in early modern England', pp. 151–65.

[10] Quoted after Norman Jones, *The birth of Elizabethan England: England in the 1560s* (Oxford, 1993), p. 35. See Doran and Durston, *Princes, pastors and people*, p. 71. On the emerging context of the perception of a severe challenge to royal authority by the arrival of Jesuit missions in England and the subsequent persecution of Catholics see Peter Lake and Michael Questier, 'Puritans, papists, and the "public sphere" in early modern England: the Edmund Campion affair in context', *Journal of Modern History*, 72 (2000), pp. 587–627.

[11] Sommerville, 'Conscience, law, and things indifferent', pp. 168–70.

[12] See for example Gianluca Mori, 'Bayle', in Wiep van Bunge et al., eds., *Dictionary of seventeenth- and eighteenth-century Dutch philosophers*, I (Bristol, 2003), pp. 61–4.

duties imposed by such law, whereas rights were derivative, being means to the fulfilment of duties.[13]

Natural law did thus rarely defend individual rights against society.

Against this background, Besold's claims were both highly original and surprising. They need to be understood both against the debate within the Holy Roman Empire as to what the legal specifications of the Peace of Augsburg of 1555 actually granted and against the changing use of references to the law of nature within legal discourse. In what follows, the debate with respect to the Peace of Augsburg is sketched before Besold's claims and contemporary arguments on personal rights are considered.

I

The Peace of Augsburg stipulated the civil estates recognizing no lord in jurisdiction and over their fiefs but the emperor could effectively choose between adherence to the Augsburg confession and allegiance to the Church of Rome. Continually attacked by the Lutherans, but seen as valid law by the Catholic estates and the emperor, ecclesiastical princes were meant to lose their titles, lands, and subjects in case of a conversion to Protestantism. Conversely, the *declaratio ferdinandei* that had granted that citizens and lower nobility of any Catholic prince could adhere to Lutheranism was never accepted by the Catholic estates.[14] Despite the fact that at least since the conversion of the Cologne Archbishop Gebhard Truchsess von Waldburg in 1582 these fundamental disagreements had sparked military strife within the empire, the Peace of Augsburg remained the commonly accepted basis for both Protestants and Catholics to deal with the problem of two different confessional churches and thus became the battleground for competing interpretations. In particular the *ius emigrandi*, whereby subjects could migrate to the jurisdiction of a neighbouring prince, with the religious allegiance as their own, became a beacon of Lutheran attempts to turn this provision into a right to private worship. This provision had originally been included into the treaty to allow territorial princes to get rid of heretic religious groups that might pose a threat to internal order or might

[13] Knud Haakonssen, *Natural law and moral philosophy: from Grotius to the Scottish Enlightenment* (Cambridge 1996), pp. 5–6. A special problem are justifications of resistance against legally established magistrates by way of referring to a natural right to defend oneself and one's family, see Haakonssen, *Natural law*, p. 5; Robert von Friedeburg, 'From collective representation to the right of individual defence: James Steuart's *Ius populi vindicatum* and the use of Johannes Althusius' *Politica* in Restoration Scotland', *History of European Ideas*, 24 (1998), pp. 19–42.

[14] See Heinz Schilling and Heribert Smolinsky, eds., *Der Augsburger Religionsfrieden* (Münster 2007), in particular Christoph Strohm, 'Konfessionsspezifische Zugänge zum Augsburger Religionsfrieden', pp. 127–56. For overviews Friedeburg and Seidler, 'Holy Roman Empire', pp. 102–72, 126–8; Robert von Friedeburg, 'Church and state in Lutheran lands, 1550–1675', in Robert Kolb, ed., *Lutheran ecclesiastical culture, 1550–1675* (Leiden, 2008), pp. 361–410, at pp. 378–81.

encourage further heresy.[15] But until the 1620s, the substantial Lutheran groups among citizens and nobility in the Austrian Habsburg lands in particular defended their 'right' to Lutheran worship not least with respect to such interpretations.[16] In Brandenburg, the elector Sigismund von Hohenzollern had converted to the reformed faith in 1613, thereby weakening his constitutional position, while the Lutheran church and estates there even secured their confessional privileges as laws of the land.[17] Right into the 1620s, to Lutherans, legal and constitutional argument based on their interpretation of the Augsburg peace accord appeared a high-road to securing their faith.

By the 1580s, however, Emperor Rudolf II (1576–1611) had abandoned the more conciliatory approach of his predecessor Maximilian II. More than that, in particular Wilhelm II duke of Bavaria, educated by the Jesuits, pursued arguably the most active Counter-Reformation politics in the empire. He secured for his brother Ernst the Cologne archbishopric after the conversion of Truchsess von Waldburg. A major signal of this change of religious climate toward Counter-Reformation politics was the publication of Andreas Ernstberger's *De autonomia* in 1580.[18] It provided on 1,400 pages, reprinted in 1593 and 1602, one of the most uncompromising attacks against any interpretation of the Augsburg peace accord as favouring an extension of Protestant worship. Ernstberger attacked heretics by identifying their argument for toleration with the idea of *autonomia*. His publication heralded Catholic attempts at least to confine the toleration of heretics to as narrow an interpretation of what had been granted in 1555 as possible.[19]

Ernstberger's treatise was an example of the Catholic *politica*, arguing that the church was a *civitas*, a political body of its own, with, as its members, civil magistrates obligated to obey its regulations.[20] Furthermore, the philosophical core of Lutheran heresy focused upon the *ius emigrandi*, with a view to granting private or even public Lutheran worship within Catholic jurisdictions. But to Ernstberger, what they promoted was *libertas* or *licentia credendi*, where individual subjects chose what to believe, independent of their civil states.[21] Ernstberger attacked in particular *libertas est potestas vivendi ut velis*, that liberty was the power to

[15] Axel Gotthardt, 'Der Religionsfrieden und das politische System des Reiches', in Schilling and Smolinsky, eds., *Religionsfrieden*, pp. 43–58; Strohm, 'Konfessionsspezifische Zugänge'; on the general lines of Lutheran argument in favour of toleration see Dreitzel, 'Toleranz', pp. 115–28.

[16] Arno Strohmeyer, *Konfessionskonflikt und Herrschaftsordnung: Widerstandsrecht bei den österreichischen Ständen (1550–1650)* (Mainz, 2006); Regina Pörtner, *The Counter-Reformation in central Europe: Styria, 1580–1630* (Oxford, 2001).

[17] Bodo Nischan, *Prince, people, and confession: the Second Reformation in Brandenburg* (Philadelphia, PA, 1994).

[18] Andreas Ernstberger, *De autonomia, das ist von Freystellung mehrerlay Religion und Glauben* (Munich, 1586).

[19] Martin Heckel, 'Autonomia und Pacis Composito: Der Augsburger Religionsfrieden in der Deutung der Gegenreformation' (1959), in idem, *Gesammelte Schriften: Staat-Kirche-Recht-Geschichte*, ed. Klaus Schlaich (4 vols., Tübingen, 1989), I, pp. 1–82, at p. 8; Strohm, 'Konfessionsspezifische Zugänge', on Ernstberger, pp. 136–9.

[20] Friedeburg and Seidler, 'Holy Roman Empire', pp. 141–6.

[21] Ernstberger, *De autonomia*, p. 1.

live as one wants, for liberty was only to be found in faith in God. That faith, however, was only to be found within the church and its teachings. Conscience had to be understood in relation to the ability of fallen men to produce rational and moral judgement. But most men were incapable of doing so on their own. Consciences had to be raised, shaped, and formed by the appropriate institutions of the church. Any *respublica*, *imperium*, or indeed any polity, in particular among Christians, could thus only exist within a church providing Christians with such good doctrine.[22] The toleration of heretics, though to be accepted for reasons of prudence and necessity for a time, always endangered both other believers and the polity as a whole. Along this argument, the Catholic estates in France fought off any royal attempt at religious compromise from the 1560s to 1580s.[23] For polemical reasons, Ernstberger had charged the Lutheran heresy as a whole with relieving men from the proper bounds of instruction. But in fact, most Lutheran churchmen broadly agreed with this line of reasoning, too.

In terms of their insistence on unity of state and church, Lutherans in general hardly differed from their Catholic counterparts. But they had to deal with the theological foundation of their church embedded in scripture and the early statements made by Luther on the issue of consciences. It remained undisputed that civil magistrates were under divine obligation to present the true gospel to their subjects. But right into 1523, responding to the pressure of Rome to prosecute him and his followers, Luther had insisted that force must not be used to implement any faith. His insistence on freedom of conscience and on the true nature of the Christian church, incompatible with such outward force, had rested on his persuasion that God will give faith independent of any human performance. Thus, in his 1523 *On civil authority* Luther had stated that belief is a 'free work' that should not be enforced, and that civil magistrates should leave subjects to believe as they 'can and will'. The limits of what any hierarchy, civil or ecclesiastical, could or should enforce with regard to faith was the central point of this treatise.[24]

Martin Heckel and Martin Honecker demonstrated how Lutheran theologians until the 1620s managed to combine their Lutheran tenets with the enforcement of ecclesiastical conformity.[25] Major Lutheran theologians like Johann Gerhard understood the church as a visible and an invisible one. To the visible church within each territory the need to give it some tangible structure applied, and here two further means came at hand. One was the major role of the prince, in terms

[22] Ibid., part 20, pp. 20, 33, 58.

[23] See now Greengrass, *Governing passions*.

[24] Harro Höpfl, ed., *Luther and Calvin on secular authority* (Cambridge, 1991), pp. 25–6; see also in Martin Luther, *Ausgewählte Schriften*, ed. Karin Bornkamm and Gerhard Ebeling (Frankfurt, 1982), IV, pp. 36–84, at pp. 63, 38–9. Martin Brecht, *Martin Luther* (Stuttgart, 1986), II, p. 121: 'In ihrer Wirkungsgeschichte waren diese Gedanken ['Von Weltlicher Obrigkeit'] ein wichtiger Beitrag zur Gewissensfreiheit'. See most recently John Witte, *Law and Protestantism: the legal teachings of the Lutheran Reformation* (Cambridge, 2002); Strohm, 'Calvin', pp. 223–4.

[25] Martin Heckel, 'Staat und Kirche nach den Lehren der evangelischen Juristen Deutschlands in der ersten Hälfte des 17. Jahrhunderts', *Zeitschrift für Rechtsgeschichte*, 73 Kan. Abteilung 42 (1956), pp. 117–247, and 74 Kan. Abteilung 43 (1957), pp. 202–308; the *locus classicus* on this development and on Johann Gerhard remains Honecker, *Cura Religionis*.

of legal and material resources. Second, the idea that the church was made up of three estates: clergy, magistrates (i.e. princes), and laity. In descriptions of their relation to each other, the role of the laity was reduced to almost only listening; the clergy reserved successfully their role of defining the faith; and the princes had to defend the true church. In actual practice, the consistory courts of the Lutheran church were run by the leading clergymen and princely lawyers of the respective territory, in close association with professors of theology of Lutheran universities. A case in point is Johann Gerhard, the 'father' of Lutheran orthodoxy during the 1610s and 1620s. He advised princes to take responsibility for the faith of their subjects and to eject heretical subjects. The honour of God, the divine office of the prince, the salvation of men, the welfare of the country, and the unity of the church all demanded the prosecution of heretics. Gerhard clearly understood it to be the duty of the prince to promote the true faith among his subjects, due to the 'officium magistratus in promovenda subditorum pietate'. Examples from the Old Testament, from Moses and Joshua, characterize his argument and show how important the idea of the unity of faith and state remained.[26] Given this state of debate, how did Besold, the leading jurist of the Lutheran university of Tübingen, seek to defend his claim?

II

Born 1577 as a lawyer's son, Besold graduated in 1591 from the philosophy faculty at Tübingen university. While there, he came in contact with Johannes Kepler and they came to write to one another actively. In 1599, Besold took his doctorate in both laws (Roman and Canon), became advocate to the Württemberg *Hofgericht* – the main territorial court of law – and was elected professor of Roman law, primarily *Pandecten*, in 1610. From 1614 to 1635, he served as rector of the university seven times. By the mid-1620s he had become the towering legal authority of Lutheran Germany.[27] His standing in the profession was not diminished by the fact that he was challenged twice by the Tübingen Lutheran ecclesiastical authorities, in 1622 for chiliastic interests and in 1626 for alleged Catholic leanings. By then, he had published his *Prae-cognita philosophiae* (preliminary thoughts on philosophy) in which he had praised the spiritual experience of Christ and had cited authors suspected by Lutheran orthodoxy for their heterodox spiritualism, among them Johannes Arndt (1555–1621), Master Eckhard (c. 1260 – c. 1328), and Valentin Weigel (1533–88).[28] Also in his letters to Kepler,

[26] Johann Gerhard, *Loci theologici*, ed. F. Frank (Leipzig, 1885), no. 210, p. 372; no. 212, p. 373. Honecker, *Cura Religionis*, pp. 122–3, on the argument in favour of unity of church and state inspired by the classical *polis*. For a similar reasoning see Hermann Conring's defence of the rights of civil magistrates over the church in his additions to his 1671 edition of Jacob Lampadius's arguments, where Conring argued that God had given authority over the church to civil magistrates, that the kings of the Jews had enforced the Mosaic Law, and all the Christian kings and emperors had been responsible for the enforcement of the apostolic belief, see Dietrich, 'Landeskirchenrecht', p. 566.

[27] See Zeller-Lorenz, *Klosterfrage*, on his biography.

[28] In Christoph Besold, *Opera politicorum*... (Strasbourg, 1626), pp. 7, 8, 3, 4.

he began to praise the simplicity of the early church and to ridicule confessional strife.[29] Besold survived both investigations and swore on the Lutheran book of Concord again in 1628. But in 1629, he spectacularly supported the Catholic point of view that the Württemberg church lands had been illegally alienated from the Church of Rome after 1552 in violation of the accords of Passau (1552) and Augsburg. In 1630, Besold secretly converted to Catholicism. In 1635, the conversion became public and he accepted a call to the Jesuit university of Ingolstadt. He also became an Imperial councillor and a councillor to the Catholic house of Wittelsbach.[30] His 1625 argument was neither consistent with his earlier 1614 criticism against using reason of state arguments with respect to issues of the church, nor with his later publications, revised according to a Catholic point of view after 1635.[31] Besold defended entirely different principles at different points in time. What we can discern from his publications is what seemed to be the best strategy to defend any one of them at any time toward the reading public of the empire.

Besold's treatise on the rights of majesty of civil magistrates over the church was the second part of his larger 'On the rights of majesty in general'. Part one provided an overview of rights of majesty; part two concentrated on the rights over the church; part three focused on the rights within the polity; and part four considered mixed polities. The whole work contained 250 pages and was primarily a textbook for students looking for authoritative oversight from a major legal authority. Looking at the eight chapters in part two these considered the legal basis of the rights over the church as part of any right to govern: that atheists had to be prosecuted as part of the responsibilities of civil magistrates (I); the nature of the rights of civil magistrates (II and III); the relation of prince and clergy (IV); the issue of councils and synods (V); whether to fight heresy (VI) – here we find the argument in question; the administration of the goods and lands of the church (VII); finally, what estates and subjects should do in case of a change of confession of the prince (VIII).

[29] See for instance Johannes Kepler, *Gesammelte Werke*, ed. Walther von Dyck and Max Caspar (20 vols., Munich, 1937–90), XVII, no. 809, p. 283; XVIII, no. 940. See also Robert von Friedeburg, 'Between Scylla and Charybdis? Evidence on the conversion of Christoph Besold from his letters and his legal and political thought', in Henk van Nellen et al., eds., *Tussen Scylla en Charybdis: Geleerde Briefschrijvers op het Raakvlat vanWetenschap, Politiek en Religie (1500–1700)*, forthcoming.

[30] See for these biographical details Zeller-Lorenz, *Klosterfrage*; in particular on his conversion Matthias Pohlig, 'Gelehrter Frömmigkeitsstil und das Problem der Konfessionswahl: Christoph Besold (1577–1638) und seine Konversion zum Katholizismus', in Ute Lotz-Heumann, Jan-Friedrich Mißfelder, and Matthias Pohlig, eds., *Konversion und Konfession in der Frühen Neuzeit* (Gütersloh, 2007), pp. 323–52.

[31] On his critique of 'ratio status' arguments in his inaugural address when becoming rector, inconsistent with his 1625 use of ratio status arguments to support his defence of toleration, see Martin Brecht, 'Christoph Besold: Versuche und Ansätze einer Deutung', *Pietismus und Neuzeit*, 26 (2000), pp. 11–28, at p. 18; for the later revision see in particular Christoph Besold, *Synopsis politicae doctrinae* (Amsterdam, 1643), now referring to and supporting Bellarmine. This book has been edited by Laetitia Boehm, *Christoph Besold: Synopse der Politik* (Frankfurt, 2000).

Besold attempted to bridge the discrepancy between his ideas and the legal and practical realities of ecclesiastical government in Germany from three vantage points. Theologically he quoted the early Luther that faith must not be forced by any government, civil or ecclesiastical. The arguments developed in the meantime on the distinction of the invisible and visible church and on the distribution of offices and responsibilities within the visible particular church were ignored. Legally he distinguished public and private worship. While the civil magistrate remained under obligation to enforce public worship according to the regulations of the Augsburg accords, private worship had to be left alone. In terms of political prudence he cited the example of Moscow and of the Dutch Republic that allegedly had good experiences of letting heretics pursue their faith unmolested. These arguments can be explored a little.

Besold stressed that civil magistrates did have responsibility for the church, as the early Luther had insisted. However, he was then quick to point out the allegedly abstruse nature of divergences of opinion among the confessional churches. Their clergy quarrelled among each other about 'my pope, your pope, my Luther, your Luther'.[32] Indeed, in his letters to Kepler, he had ridiculed the debates among the confessional clergy in Germany and had insisted on the simplicity of the early church.[33] In his 1625 argument he proceeded to state that the office to preach was not an office to rule ('ministerium non imperium constitutum'). The responsibility of the civil magistrate as a Christian member of the community was to promote faith by promoting the gospel, including provisions for church buildings, the clergy, and so forth. It did not mean to force consciences. For this, Besold fell back on the early Luther. He quoted in length from Luther's *Against the papists*, where Luther insisted that while Christian magistrates should promote the true faith, they must not enforce anything with the sword, for this was contrary to the spirit of Christ.[34]

This qualification of the duties of magistrates with regard to the church – promotion of the gospel, not enforcement of consciences – was adapted by Besold to legal procedure by distinguishing public and private worship. Public heresy had to be prosecuted.[35] The quiet heretic had to be left alone. Already during the second half of the sixteenth century, the distinction between public and private worship had been used to negotiate the fact of two confessions within the empire, with their mutually exclusive claims and the need of unity and uniformity. An

[32] Besold, 'De Ecclesiastica maiestate iure', p. 128.

[33] See above and also Kepler, *Gesammelte Werke*, XVIII, no. 1030, with Besold's warning to Kepler to be careful with making public any detail of his religious persuasions; see also Brecht, 'Besold', p. 22, on his ambivalent attitude.

[34] Besold, 'De Ecclesiastica maiestate iure', p. 130: 'Es sollen sich alle Christen umb das Reich Christi und sein Gerechtigkeit annehmen, deshalb niemand mit Wahrheit sagen kann, dass die Obrigkeit, sofern sie Christen genannt und sein will, sich des Christlichen thuns nicht sole unterfahren...Doch soll kein Oberer seine Untertanen weder zu seinem Gottesdienst noch christlichen Glauben mit Gewalt zwingen oder mit dem Schwert und Blutvergiessen/auch die/ so nicht seins Glaubens/weder vertreiben noch tödten/wie im Papstthum geschieht/ denn solches dem Sanftmütigen und freywilligen Geist Christi entgegen und zuwider ist.' [35] Besold, 'Ecclesiastica maiestate iure', p. 130.

example for the strategic use of this distinction is provided by the negotiations about the Hungarian coronation ceremony of Maximilian, the eldest son of Emperor Ferdinand I. Maximilian had serious reservations about taking the Eucharist under the Catholic rite. In March 1561, the negotiations with the Hungarian estates to arrange for Maximilian's coronation as king of Hungary had collapsed over his demand to receive the Eucharist according to his Lutheran leanings *sub utraque species*. Emissaries from Vienna were sent to Pope Pius IV to gain Maximilian a dispensation. But Pope Pius wanted both to prevent Maximilian from converting entirely to Lutheranism and to support his German allies in their struggle to root out any compromise with the heretics. A public dispensation sat uneasily with those aims. Eventually, Pius resolved to grant Ferdinand papal authority to administer the Eucharist *sub utraque specie* to his son privately and secretly, with Maximilian required explicitly to admit the validity of the Catholic rite *sub una specie*.[36] What could not be granted publicly could be granted privately. Another example is the interpretation of the *ius emigrandi* by the Lutherans as allegedly granting at least private worship. There was, however, little willingness to grant Catholics in Protestant territories the same privilege.[37] In both examples, the distinction between private and public worship helped to negotiate the contradiction between the need to compromise with political partners whose faith one had to condemn as heretical and the principle of defence of the one true faith.

Besold also mentioned the *ius emigrandi*, but went much further with his claim of a natural right to free conscience. What had been a tool to negotiate such problems in exceptional circumstances was now turned into a provision that was going to provide a space of free choice to believe what one wanted protected by natural law. The two stepping stones toward his claim of a natural right, his reference to Luther and his distinction between private and public worship, were not new, but were turned into an entirely different context by using them as explanation and as providing a legal space for the exercise of a natural right.[38] Besold then attacked Ernstberger and argued that territorial estates could hire their own preachers.[39] Here, he remained in line with Lutheran claims, particularly as developed in Austrian lands where sizeable Lutheran groups had considerable influence on the territorial estates.[40] He finally concluded by citing the Dutch Republic and Moscow and their political success in tolerating all sorts of heretics, not only Christians.[41] In making this point, he plainly contradicted most contemporary political advice on this issue.

[36] Jochen Birkenmeier, *Via regia: Religiöse Haltung und Konfessionspolitik Kaiser Maximilians II. (1572–1576)* (Berlin, 2008), pp. 92–6.

[37] Dietrich, 'Landeskirchenrecht', p. 579, on the Lutheran position visible right into the 1640s to extend the possibility for Lutheran worship in Catholic jurisdiction beyond private to public worship without granting reciprocal rights to the Catholics or denying the need to suppress heresy.

[38] Besold, 'De Ecclesiastica maiestate iure', p. 132.

[39] Ibid., p. 134.

[40] Strohmeyer, *Widerstandsrecht*, pp. 319–22.

[41] Besold, 'De Ecclesiastica maiestate iure', pp. 134–5.

Besold combined theological, legal, and political points of view. Theologically, there was nothing that any civil or ecclesiastical magistrate should do concerning religion other than making the true gospel publicly available. Magistrates must not intervene in the relation of God and man's conscience. The early Luther provided Besold with ample material in support of this point. In making this argument, it was crucial to ignore the developments of the preceding century distinguishing between the visible and invisible church in order to transfer Luther's faith in the power of the divine word into the early seventeenth century. Second, Besold's distinction of private and public worship allowed submitting to the public responsibilities of all magistrates in the empire, while magistrates left private worship unmolested. Far beyond the almost conventional Lutheran claim to allow private worship as allegedly granted by the *ius emigrandi* of the Augsburg peace accord, he insisted on a right by law of nature. His conclusion from the early Luther's insistence on the limits of the use of the magistrate's sword to such a right provided arguably the most drastic reception of Luther's thoughts at that time. In effect, he transferred Luther's claim based on the reformer's trust in the work of the divine word into a juridical claim for subjects against their civil and ecclesiastical magistrates. Since there was no positive stipulation anywhere on which such a claim could be based, Besold chose to cover his argument with the claim that the law of nature provided such freedom. Third and finally, examples from prudence suggest that magistrates serve their own interest and that of the polity best by not prosecuting heretics.

In the other parts of his treatise, Besold's main strategy rested on limiting the room for manoeuvre of the prince by constitutional constraints embedded in the laws of the empire and territories. For example, in chapter VIII on a prince changing his confession Besold argued in favour of the legitimate defence of the laws of a territory against that prince.[42] The Augsburg treaty had allegedly guaranteed the influence of the estates.[43] Any prince owed his rights over the church to his role as its prime member ('praecipuum ecclesiae membrum') rather than lord over the church. He had thus to administer with the consensus of the church ('ac ecclesiae consensu'). He could thus only use those means given to Christ and the apostles, persuasion and faith, not force ('debent adhibere media, quae Christu et Apostoli praescripserunt').[44]

[42] Ibid., p. 141. The issue of a right to resist unlawful orders of a prince was treated in conjunction with his general deliberation on the constitutional constraints of any lawful government, see below.

[43] Ibid., p. 142.

[44] On Besold's position on the *ius reformandi* see Bernd Christian Schneider, *Ius reformandi: Die Entwicklung eines Staatskirchenrechts von seinen Anfängen bis zum Ende des Alten Reiches* (Tübingen, 2001), pp. 317–18: Besold argued that most of the rights of majesty over the church now exercised by civil magistrates (in Protestant territories) had 'devolved' from episcopal rights (theory of 'devolution') that themselves had been ursurped by bishops in medieval times. But neither he nor others could possibly argue that bishops, Catholic or Lutheran, had ever had the option to choose between different confessions, one of which had necessarily to be heretical. Thus he could not but assume that the *ius reformandi* was a right of civil magistrates over the church that had not 'devolved' to them together with other hitherto episcopal rights.

These arguments were embedded in his treatise on the *Rights of majesty*. There he insisted on the scattered nature of these rights and the subsequent limitations on princely rule. Besold distinguished between real majesty – owed by the state as a legal person itself – and personal majesty, handled by the prince and then again between his ordinary and his extraordinary powers.[45] He stressed the need for any law or measure to be in accordance with the law of nature.[46] Magistrates were thus obliged to leave consciences unmolested. Besold also insisted on the limitations of princely rule by the Imperial laws.[47] Within the empire, the territories also had specific fundamental laws.[48] Any *respublica* was a 'coetus', a bond of men, based on the consensus of the political community.[49] The community of the empire rested on its fundamental laws and the agreements at the Imperial diet.[50] His praise for the dukes of Württemberg did not qualify this approach to limited princely rule.[51] Princely power had to be exercised within strict legal confines.[52] The description of royal rule in 1 Samuel 8, the basis of claims to absolutism as made by James VI and I of Scotland and England in his *True law of free monarchies*,[53] was understood by Besold to be plain tyranny. Besold referred to other Lutheran legal scholars who had claimed, arguing from a feudal basis, that territorial estates had a right to defend the value of their holdings against a prince threatening them with measures beyond his legitimate authority. In defence of these holdings, vassals could resist their prince. During the 1620s, the estates in Württemberg and Hesse-Cassel did just that.[54] Also in other publications, the diverse nature of lordship was emphasized and the scattered nature of territorial rule analysed.[55] The failed second reformation in Brandenburg is only one

[45] Besold, *De maiestate*, c. I, p. 5; and pp. 45–55. See Franklin, 'Sovereignty and the mixed constitution', pp. 323–8.

[46] Besold, *De maiestate*, p. 67: 'ergo naturae jus, hoc est rationem rectam observate tenetur', 'lex imperatorem non est supra legem dei'. Besold distinguished as others the *ius naturae primaevum* (self-defence, procreation) and the *ius naturae secundarium* as rational law of the people, both known to men independent of revelation. For a debate on this distinction see Annabel Brett, *Liberty, right and nature: individual rights in later scholastic thought* (Cambridge, 1997), p. 181.

[47] Besold, *De maiestate*, c. I, p. 6. [48] Ibid. [49] Ibid. [50] Ibid., p. 9.

[51] Ibid. [52] See in particular chapters II and IV.

[53] See King James VI and I, *Selected writings*, ed. Neil Rhodes et al. (Ashgate, 2003), pp. 259–79, 262–6.

[54] Besold, *De maiestate*, ch. VIII, p. 76. The issue of resistance against tyranny is treated in chapter VII in conjunction with an exploration of the laws of the land, see ibid., p. 60. Besold also cites works on the laws of fiefs allowing vassals to defend their fiefs against illegal infringements of their lords, in particular Heinrich Rosenthal, *Tractatus et synopsis totius iuris feudalis* (Cologne, 1610), ch. X, concl. 20, pp. 58–60, concl. 33, pp. 125–8. On the remarkable support of Lutheran legal scholars for territorial estates see Friedeburg, 'Church and state', pp. 398–405, on Rosenthal p. 404. On the issue of estate resistance to princes within the empire during the 1620s to 1660s see Robert von Friedeburg, 'The making of patriots: love of fatherland and negotiating monarchy in seventeenth-century Germany', *Journal of Modern History*, 77 (2005), pp. 881–916. It is important to stress that none of these arguments were intrinsically anti-monarchical; Rosenthal for instance defended the princes' right to taxation, see Rainer Walz, *Stände und frühmoderner Staat* (Neustadt an der Aisch, 1982), p. 116.

[55] For example Christoph Besold, *Discursus de aerario publico* (Tübingen, 1619), question II on the nature of the *jus superioritatis*, p. 89.

example of this state of relations among princes and estates in Lutheran Germany that made Besold's account feasible as a basic introduction for students to become servants and advisers to princes in their later career. What about his claim on the law of nature?

III

During the later middle ages, there was an academic debate about the right to self-defence by law of nature against illegal actions of servants of a court of law. Such a possibility was rarely perceived to be an option in conflicts between a lord and his subjects.[56] The law of nature that Aquinas had introduced as part of his introduction of Aristotle into theology and philosophy addressed the presence of divine law in the limited reason of men. It was not a clear-cut system of norms to be applied in practice.[57] Only in some respects, for instance on the validity of an unwritten contract as natural obligation (*obligatio naturalis*), it provided clear guidelines.[58] But although the view remained agreed that all laws and all government must submit to divine law and the law of nature, jurists remained highly sceptical about any direct recourse to natural law, because it did not provide a clear cut and consistent summary of applicable rules.[59]

The discourse of the Protestant Reformation in the empire did not only include the idiom of the law of nature, but, by beginning to distinguish between the divine law of nature and human natural law, began to work toward a more systematic applicability of natural law.[60] For Melanchthon and for many Lutheran jurists, as we know from the recent work of Christoph Strohm, the idiom of natural law became a term to summarize their search for guiding ethical principles necessary to understand, teach, and apply Roman and any other law. The teachings of the Stoics became a guideline to formulate these ethical principles.[61] As Roman law became historicized, the search for such ethical golden rules intensified. Lutheran and reformed jurisprudence increasingly referred to the law of nature, citing Roman law for a definition of natural law.[62] By the early seventeenth century, the deliberations of Spanish scholars such as Fernando Vasquez and Luis Molina

[56] Robert von Friedeburg, *Self defence and religious strife in early modern Europe: England and Germany, 1530–1680* (Ashgate, 2002), pp. 61–3, and the literature cited there.

[57] Karl Heinz Ilting, 'Naturrecht', in Otto Brunner, Werner Conze, and Reinhart Koselleck, eds., *Geschichtliche Grundbegriffe* (Stuttgart, 1978), IV, pp. 245–313, 264–5: 'Gegenwart des göttlichen Gesetzes in der endlichen Vernunft'.

[58] See Gerald Hartung, 'Althusius' Verträglichkeit im Kontext spätmittelalterlicher Jurisprudenz und Scholastik', in Frederick S. Carney et al., eds., *Jurisprudenz, Politische Theorie und Politische Theologie* (Berlin, 2003), pp. 287–304, at p. 290.

[59] Mathias Schmöckel, *Auf der Suche nach der Verlorenen Ordnung* (Bonn, 2005), p. 218; Kempshall, *Common good*, pp. 124, 251.

[60] Ilting, 'Naturrecht', pp. 264–5, 275.

[61] Christoph Strohm, *Calvinismus und Recht: Weltanschaulich-konfessionelle Aspekte im Werk reformierter Juristen in der Frühen Neuzeit* (Tübingen, 2008); idem, 'Die Voraussetzungen reformatorischer Naturrechtslehre in der humanistischen Jurisprudenz', *Zeitschrift der Savigny Stiftung für Rechtsgeschichte, kanonistische Abteilung*, 86 (2000), pp. 398–413.

[62] *Corpus iuris civilis, institutiones, liber I, tit. II*: *ius naturale est quod natura omnia animalia docuit.*

were quoted by legal scholars in the empire such as Althusius and Besold. Vasquez, for example, attempted to define 'each man's dominium' as 'a free faculty *in suo*' for the sake of keeping justice among all.[63]

Against this background, the reformed jurist Hugo Donellus had started to speak of specific rights inseparable from any person, including life, body, liberty, and reputation.[64] He defined the rights of persons as those they could legitimately claim.[65] In his legal encyclopaedia, the *Dicaeologica*, Johannes Althusius referred to these developments. In book I, part II, he defined liberty as a right to dominate, consisting of a right to rule and a need to obey or be ruled ('dominatio cum iure imperandi & necessitate obtemperandi'). Our control over our own body and soul is exercised within the framework of what is just (ch. 25) and is thus described as right and authority to do according to one's will what is licit ('est jus & auctoritas licita faciendi pro arbitrio', book I, ch. 25, n. 5). Althusius then addressed the right of liberty in one's own person and its rights ('jus libertatis in ipsam personam liberam et res ipsius', n. 9). He defined it as the right of liberty on one's own person concerning the right to have oneself and to release oneself ('jus libertatis personam concernens est jus habendi & dimittendi sui ipsius', ch. 25, n. 10).[66] The exercise of this liberty, however, hinges on what is just. While body, life, limbs, and reputation are described as protected under normal circumstances,[67] the end of government remains the enforcement of justice in the commonwealth, including the enforcement of true religion. Both Althusius and Donellus advocated the duty and right of civil magistrates to enforce the true faith. Both took it for granted that the community has as its prime rationale the enforcement of a life following certain precepts, and that subjective rights come second to these.[68]

[63] Quotation Brett, *Liberty*, pp. 175, 180. Both Ferdinando Vasquez, *Controversiae illustres* (1564), and Luis Molina, *De justitia et jure*, were quoted by contemporary jurists such as Althusius and Besold, in Besold for instance in his *De maiestate*, p. 47. On Althusius's references to Vasquez see the still controversial Ernst Reibstein, *Johannes Althusius als Fortsetzer der Schule von Salamanca* (Karlsruhe, 1955); the most recent evaluation, insisting on the similarity of all sixteenth-century conceptions of the law of nature is Merio Scattola, 'Johannes Althusius und das Naturrecht des 16. Jahrhunderts', in Carney et al., eds., *Jurisprudenz*, pp. 371–98, 388–9. On the Spanish scholars themselves see Anthony Pagden, 'Dispossessing the barbarians: the language of Spanish Thomism and the debate over the property rights of the American Indians', in idem, ed., *The languages of political theory in early modern Europe* (Cambridge, 1987), pp. 79–98; Harald E. Braun, *Juan Mariana and early modern Spanish political thought* (Aldershot, 2007), and Brett, *Liberty*. In 1625, Besold could not yet have known Grotius's major work.

[64] Hugo Donellus, *Commentarii de iure civili libri viginti octo* (Frankfurt, 1595), here used Antwerp 1642, lib. I, ch. I, p. 4: 'vita, corporis incolumitas, libertas, existimatio'; Manfred Herrmann, *Der Schutz der Persönlichkeit in der Rechtslehre des 16.- 18. Jahrhunderts* (Berlin, 1968), pp. 20–1.

[65] Donellus, *Commentarii*, lib. I ch. III, pp. 18, 19; see also ibid., lib. II, ch. VII, p. 225: 'Ad privatorum utilitatem recta pertinere ius intelligitur, quod privatis et singulis, quae suum est, tribuit.' See Herrmann, *Schutz*, pp. 22–3.

[66] Johannes Althusius, *Dicaeologica* (Herborn, 1617), lib. I, pars altera, ch. XXV, pp. 95–9.

[67] Herrmann, *Schutz*, p. 25, stresses that Donellus, *Commentarii*, lib. XV, ch. XXV, 'De iniuriis', insists on the protection of these rights but in no way specifies how this protection is going to be implemented.

[68] Insofar, we cannot address these rights as modern fundamental rights. See Christoph Link, 'Naturrechtliche Grundlagen des Grundrechtsdenkens in der deutschen Staatsrechtslehre des 17. und

Hence civil magistrates had a right to censure consciences.[69] The concept of liberty as *dominium*, and of certain liberties as inalienable *dominium*, did in no way preclude the enforcement of the true faith and the prosecution of heresy. Besold did know Althusius's works, but he could not have taken his claim for a natural right to a free conscience from either Donellus or Althusius.

IV

In general, there were three reasons not to prosecute heretics, despite the arguments from classic reason of state and the demands from the confessional churches. One, plain necessity and expediency could suggest allowing the toleration of heretics for as long as necessary. That was essentially the argument of the Augsburg Peace. Second, one could attempt to deny the fact of the divisions within the Christian faith by either arguing adiaphora or irenic points of view, in any case emphasizing common points of Christianity.[70] Third, one could argue that the state had really nothing to do with the churches and could and should protect various religious communities as long as public peace was not endangered.

This latter position developed arguably from the time of Pufendorf, though within the confines of what the territorial princes were obliged to do according to the treaties of Augsburg (1555) and Westphalia (1648). Both obliged them to privilege certain confessions. Only from the disestablishment of the empire onwards in 1806 could the now sovereign princes treat the churches as private associations that had no specific claim to public privileges over each other. Before the later eighteenth century and the intellectual breakthrough of the claim that 'society [should be] denied the right to subordinate a natural entelechy to a social objective',[71] what was perceived to be the common good, in particular as defined by divine and natural law, had to break private selfishness and private concerns. This was to be found in later medieval debate just as in most accounts of seventeenth- and eighteenth-century natural law. Thus, natural law hardly delivered rights against the rest of society or against accepted views of what the divine law was. Even to Locke, the alleged threat from the Church of Rome severely limited the room for manoeuvre he was willing to grant Roman Catholics. Luther's early insistence that consciences must not be forced did have forerunners in late medieval debate, all emphasizing, like Luther himself, that Christ's kingdom was

18. Jahrhunderts', in Günter Birtsch, ed., *Grund- und Freiheitsrechte von der ständischen zur spätbürgerlichen Gesellschaft* (Göttingen, 1987), pp. 215–33, at p. 217.

[69] See on Althusius Lucia Bianchi, *Dove non arriva la legge: dottrina della censura nella prima eta moderna* (Bologna, 2005), pp. 243–92.

[70] For example, on England and the Great Tew Group around Falkland see Doran and Durston, *Princes, pastors and people*, p. 33.

[71] Anthony J. La Vopa, *Grace, talent and merit: poor students, clerical careers, and professional ideology in eighteenth-century Germany* (Cambridge, 1988), pp. 266–7.

not of this world.[72] This attitude, however, did not in any principled way deny the right of civil or ecclesiastical authorities to prevent heresy spreading and to enforce God's word among subjects. No matter how carefully the issue of consciences was considered, this care did not translate into any principled claim that subjects had a right to believe what they want. Later, Christian Thomasius, who wished to protect himself and other subjects from the demands of the confessional churches, did thus submit the church as fully as possible to princely control and argued in favour of a state church everyone had to attend, no matter what consciences demanded.[73]

Given this state of affairs, Besold faced two challenges. First, he had to formulate his claim about the law of nature as a subjective right unaffected by society's perception of the common good and true belief. Second, he had to couch this formulation in terms acceptable to his readers among civil and ecclesiastical magistrates, who, as he had already experienced in Tübingen, had no hesitation in using their administrative and legal authority to check whether he was still fit for his office.

Besold combined a threefold strategy. As with Luther, he argued that consciences must never be forced, marginalizing here Protestant ecclesiastical authority developed over the previous century. Under cover of protection from Luther, he emphasized the specific nature of consciences and belief. His distinction between public and private worship allowed him to suggest to civil magistrates that they could be fully dutiful to the church by concentrating entirely on the provision of public worship and the defence of public peace, but leaving private subjects alone in their private worship. Here, he added his extra proviso on the natural right to believe what one wants, carefully embedded in more conventional claims, though turning them into an entirely new context. Thus, he exploited the idiom of natural law in order to transfer Luther's vision, based on the reformer's trust in the work of the divine word, into a juridical claim for subjects against their civil and ecclesiastical magistrates. Finally, Besold replaced the classic argument about the functional need for unity of church and state with the pragmatic advantages of toleration as shown by the Netherlands and Moscow.

Three points can be made to help explain Besold's position. One, surely, is his erratic character or the development of his ideas. As has been mentioned, Besold argued very different points at different times. Second, though there were medieval roots to arguments for freedom of consciences, Luther not only reinforced these but did so with such force that they were taken up by Protestant minorities across Europe. Besold was not the only writer who sought support for unconventional views on the nature of the church from citations of the early Luther.

[72] Kempshall, *Common good*, p. 124; Haakonssen, *Natural law*, pp. 5–7.

[73] Ian Hunter, *The secularisation of the confessional state: the political thought of Christian Thomasius* (Cambridge, 2007); Heinrich de Wall, 'Staat und Staatskirche als Garanten der Toleranz', in Heiner Lück, ed., *Christian Thomasius (1655–1728): Wegbereiter moderner Rechtskultur und Juristenausbildung* (Hildesheim, 2006), pp. 117–33; Christoph Link, *Die Grundlagen der Kirchenverfassung im lutherischen Konfessionalismus des 19. Jahrhunderts* (Munich, 1966), pp. 32–4.

Some English separatists and puritans did the same. Indeed, some of Luther's statements were occasionally even understood to be problematic with respect to the unity of the church. Walter Travers (1548–1635), one of the opponents of Whitgift in the admonition debate and the author of 'that most radical of Presbyterian texts, the Book of Discipline',[74] put Luther beside Calvin as a 'new apostle'.[75] William Ames praised Luther along with Zwingli and Wycliffe as among 'the first restorers of the Gospel'.[76] The separatist Henry Jacob quoted not only Luther alongside Cyprian, Cartwright, and Calvin, but referred also to the Lutheran theologian Chemnitz to bolster his argument that true ecclesiastical government flows from the people's 'free consent'.[77] The Puritan Paul Baynes critically remarked in his *Diocesans trall* (1621) that the

> ordinary power of the execution thereof was *not* [my italics] given to the community of the church, or to the whole multitude of the faithful, so that they were the immediate and first receptacle, receiving it from Christ, and virtually deriving it to others. This I set down *against* [my italics] the Divines of Constance and our prime Divines, Luther and Melanchthon.[78]

It is not surprising that those fearing prosecution from the officially established churches, like Besold himself, made an effort to hide their aims behind the celebrated reformer's words, though Luther later amended his views in favour of ecclesiastical government.

Third, in conjunction with Luther's influence, sophisticated juridical debate developed within the empire to solve the problem of two different religious confessions within a single polity. Though doubts had increased as to the nature of this unity since the 1640s,[79] the peace accords of 1555 and 1648 to regulate the relation between the two (and later de facto three) confessional churches were drawn by contemporaries who remained entirely convinced of the necessity of unity of church and state.[80] But as they attempted to find a compromise by technical formulae and regulations, they provided an environment where the Lutherans in particular attempted to argue in favour of legal spaces to exercise their faith within Catholic jurisdiction. Thus, the scene was set for attempts to provide toleration by way of providing technical legal provision. This kind of debate was specifically encouraged by the attempt to find legal compromise to

[74] Felicity Heal, *Reformation in Britain and Ireland* (Oxford, 2003), p. 398.

[75] Walter Travers, *A harmony of confessions of the Christian and reformed churches* (London, 1643), p. 254, quoted after Stephen Brachlow, *The communion of the saints* (Oxford, 1988), p. 81.

[76] William Ames, *The marrow of sacred divinity* (London, 1643), p. 147. See on this Brachlow, *Communion*, p. 89.

[77] Henry Jacob, *An attestation of many learned, godly and famous divines* (Middelburg, 1619), pp. 47, 52; for the reference on Luther, see Brachlow, *Communion*, p. 186.

[78] Paul Baynes, *The diocesans triall* (London, 1621), p. 83.

[79] See for instance Constantin Fasolt, 'Author and authenticity in Conring's "New discourse on the Roman-German emperor": a seventeenth century case study', *Renaissance Quarterly*, 54 (2001), pp. 188–220.

[80] Martin Heckel, 'Politischer Friede und geistliche Freiheit im Ringen um die Wahrheit', *Historische Zeitschrift*, 282 (2006), pp. 391–425, at pp. 401–4, on the insistence on that unity.

solve the fact of religious diversity in the wake of the Augsburg peace accord. The preceding argument stressed how far-reaching the consequences of this debate could be. Although inadequate as an appreciation of the point of view of Lutheran orthodox clergy, it is thus understandable that Catholics such as Ernstberger argued that what lurked behind some of these suggestions was really not a limited toleration but full-scale 'autonomy'.[81]

It has long been argued that since the later seventeenth century, legal scholars and philosophers increasingly attempted to infuse the existing peace regulations with new philosophical meanings. With Besold in mind, we need to place the beginnings of this process earlier than hitherto thought. His claim for a natural right of free conscience is an important example of how far, and how early, Lutheran jurisprudence in the empire sought to infuse the existing treaties with novel visions of the relation of civil and ecclesiastical authority to ordinary believers. Besold, however, is also important for another reason. The positive evaluation of princely territorial absolutism, characteristic of later Protestant political thought in the empire, stressed by Leonard Krieger in formulating the 'German idea of freedom', was precisely not part of Besold's agenda.[82] In contrast to men like Thomasius or Pufendorf, his prince was squeezed between mighty imperial institutions, such as the Aulic and Imperial chamber courts, the fundamental laws of the empire, and the estates of their own lands. The German *politica* from the hands of Arnisaeus or Besold of the first half of the seventeenth century was clearly recognized by scholars and politicians in England and France. Besold's arguments were, indeed, more influential than is generally recognized.

[81] For Besold's own reversal of his earlier views see Besold, *Synopsis politicae doctrinae*, pp. 7–29.

[82] Leonard Krieger, *The German idea of freedom: history of a political tradition* (New Haven, CT, 1957); see for more detail on the strong German connection of enlightenment, territorial absolutism, and the uses of the new secular natural law: Ernst Reibstein, 'Deutsche Grotius Kommentare bis zu Christian Wolff', *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht*, 15 (1953/4), pp. 76–102; Ian Hunter, 'The love of a sage or the command of a superior: the natural law doctrines of Leibniz and Pufendorf', in T. J. Hochstrasser and P. Schröder, eds., *Early modern natural law theories* (Dordrecht, 2003), pp. 169–94; Thomas Ahnert, 'The prince and the church in the thought of Christian Thomasius', in Ian Hunter and David Saunders, eds., *Natural law and civil sovereignty in early modern political thought* (Basingstoke, 2002), pp. 91–106.