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Ulrik Huber on fundamental laws: a European perspective

Gustaaf van Nifterik*

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The aim of this paper is to give the Frisian jurist Ulrik Huber (1636–94) his place in the European history of the notion of fundamental laws and to enhance our understanding of the history of the rule of law, particularly of the role of fundamental laws therein. In order to do so Huber's notion of fundamental laws will be read against the background of a European sketch of this notion. Huber's ideas on fundamental laws are taken here for a door through which some age-old ideas entered a new stage – and with these age-old ideas a core conception of rule of law thinking had knocked on that door.

Keywords: Ulrik Huber; moderated absolutism; fundamental laws; rule of law; freedom of persons and property

1. Introduction

The famous German legal historian Otto von Gierke in his study on Johannes Althusius (1880) included a rather extensive chapter on the idea of the *Rechtsstaat*, from the Middle ages up to his own days. One page of this chapter is on the Frisian jurist Ulrik (Ulric or Ulrich) Huber (1636–1694).¹ The context is the sixteenth- and seventeenth-century doctrine of absolutism moderated by constitutional and tacit laws. No-one, so Gierke said, had expressed the idea of 'naturrechtlicher Konstitutionalismus' before Huber, and no-one did so more sharply. Huber teaches, so Gierke said, that constitutive contracts ('Grundverträge') bind rulers of whatever kind (the binding force being based on natural law) and that there

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¹Otto von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien. Zugleich ein Beitrag zur Geschichte der Rechtssystematik* (Scientia, 5th edn 1958) ch 6, 290. See also Otto von Gierke, *Natural Law and the Theory of Society 1500 to 1800* (Ernest Barker tr, Beacon Press, 1957) 145–46/Otto von Gierke, *Das deutsche Genossenschaftsrecht*, Bd 4: 'Die Staats- und Korporationslehre der Neuzeit' (Weidmannsche Buchhandlung, 1913) 459–61.

are always tacit clauses by which inviolable individual rights ('unantastbare Individualrechte') concerning the person, property, opinion and obedience to divine commands are exempted and reserved, however unrestricted a ruler's power may be. The term that says it all is hidden somewhere in the middle of the page on Huber: *leges fundamentales*.²

Concerning this notion of fundamental laws, modern scholars have pointed out its increasing popularity in Europe at the end of the sixteenth century, together with two other notions, reason of state and sovereignty. Together these three notions are said to express and incorporate the essentials of a new constitutional consciousness.³ Fundamental laws (*leges fundamentales* or *imperii*) functioned both to restrict and to legitimize power as they preserved elements of the past, laying the foundations of absolute monarchy at the same time. Privileges were often taken for fundamental laws, in the sense that they both protect freedom(s) and lay out the contours of power.⁴

Popular as the terms may have been at the end of the sixteenth century, Thomas Hobbes in 1651 still remarked that he 'could never see in any Author, what a Fundamentall Law signifieth' (*Leviathan*, c. 26).⁵ One of the authors who expressly accepted Hobbes's challenge was Huber, who used the concept of fundamental laws in his *De jure civitatis* (1672, hereafter *DJC*), his *Hedendaegse rechtsgeleertheyt* (1686, *HR*) and in his *Institutiones reipublicae* (1698, *IR*).⁶ Drawing a sharp distinction between privileges (based on the Prince's

²Recently on the life of Ulrik Huber: Margaret Hewett, *Ulric Huber (1636–1694): De ratione juris docendi & discendi diatribe per modum dialogi nonnullis aucta paralipomenois* (Gerard Noodt Instituut, 2010) ch 4. Older literature includes: GCJJ van den Bergh, *Die holländische elegante Schule. Ein Beitrag zur Geschichte von Humanismus und Rechtswissenschaft in den Niederlanden 1500–1800* (Vittorio Klostermann, 2002) 184–87; Robert Feenstra, 'Ten Franeker Law Professors and Their Bibliography: Some Results of Recent Research' in *Summa Eloquentia: Essays in Honour of Margaret Hewett* (2002) special edition *Fundamina* 103, 112ff.

³Michael Stolleis, 'Condere leges et interpretari. Gesetzgebungsmacht und Staatsbildung im 17. Jahrhundert' (1984) 100 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (GA) 89, esp 103ff. On the emergence of the term, but with scepticism about the early 'constitutional' meaning, see Hasso Höpfl, 'Fundamental Law and the Constitution in Sixteenth-Century France' in Roman Schnur (ed), *Die Rolle der Juristen bei der Entstehung des modernen Staates* (Duncker & Humblot, 1986) 327–56; Martyn P Thompson, 'The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution' (1986) 91(5) *The American Historical Law Review* 1103.

⁴Thompson (n 3) 1110: 'By the early seventeenth century, [fundamental law] had become the standard term for any laws, rights, privileges, or customs that writers thought of special importance for the well-being of a community.'

⁵On the various understandings of the term, see Höpfl (n 3); Thompson (n 3).

⁶I have used the following editions. *De jure civitatis libri tres ... cum novis adnotationibus ... Auditorii Thomasiani* (Joh Fridericum Zeitlerum, 1708); *Institutiones reipublicae liber singularis*, in *Opera minora et rariora, juris publice et privati*, tomus primus (JH Vonk van Lynden, 1746); *Hedendaegse Rechtsgeleertheyt, soo elders, als in Frieslandt gebruikelijk* (Hero Nauta, 1686); and the translation by Percival Gane, *The Jurisprudence of My Time*

liberty and grace, and only binding the Prince)⁷ and fundamental laws, he preempted some later ideas without pretending to say something revolutionary.

Meanwhile, in the literature on fundamental laws, we do not find much on Huber.⁸ His name is mentioned regularly, but not with the emphasis Gierke's description would have us expect. On the other hand, studies on Huber do not pay much attention to his comments on fundamental laws.⁹

I think Huber's ideas on fundamental laws deserve explicit attention, both to give Huber his place in the European history of the notion of fundamental laws, and at the same time to enhance our understanding of the history of the rule of law, and particularly of the role of fundamental laws therein. In order to do so I will read Huber's theory against the background of a more general, European outline of this notion as sketched by Heinz Mohnhaupt, Martyn Thompson and others.¹⁰ I take Huber's ideas on fundamental laws to be a door through which some age-old ideas entered a new stage – and with these age-old ideas a core conception of future rule of law thinking had knocked on that door. I do not follow

(Butterworth & Co, 1939). In the Dutch 1686 edition, the latter book's numbering starts anew in the second part, whereas the work is not divided into parts in the 1939 English edition – part II, book 1 (II,1) in the 1686 edition is thus book 4 in the 1939 edition.

⁷In the literature on privileges this position is mitigated as privileges should in fact often be taken for objective law: Heinz Mohnhaupt, 'Die Unendlichkeit des Privilegienbegriffs. Zur Einführung in das Tagungsthema' in Barbara Dölemeyer and Heinz Mohnhaupt (eds), *Das Privileg im europäischen Vergleich*, Bd 1 (Klostermann, 1997) 1–11; Catherine Secretan, *Les privilèges, berceau de la liberté. La révolte des Pays-Bas: aux sources de la pensée politique moderne (1566–1619)* (Librairie Philosophique J Vrin, 1990).

⁸As for instance the studies of Heinz Mohnhaupt, 'Die Lehre von der "Lex Fundamentalis" und die Hausgesetzgebung europäischer Dynastien', and 'Von den "leges fundamentales" zur modernen Verfassung in Europa' in Heinz Mohnhaupt, *Historische Vergleichen im Bereich von Staat und Recht. Gesammelte Aufsätze* (Vittorio Klostermann, 2000) 1–33, 35–72. See also Mohnhaupt's 'Der Entwicklungsgang von den wohlervorbenen, konzessionierten Rechten und Privilegien zu den dem Menschen zugehörigen Grundrechten' (2004) 31 *Europäische Grundrechte Zeitschrift* 604. Of course, Huber is not absent altogether in the modern literature on fundamental laws: Mohnhaupt refers to Huber every now and then, as does, for instance, Thompson (n 3) 1117.

⁹I think especially of the studies by EH Kossmann, *Political Thought in the Dutch Republic: Three Studies* (KNAW, 2000), especially the section 'Ulric Huber (1636–1694)' of the chapter 'Politica Novantiqua' in 'Part I: The Course of the Dutch Political Theory in the Seventeenth Century', 85–129, also published in Dutch as 'Huber. Politieke theorie in het zeventiende-eeuwse Nederland' in Frank Ankersmit and Wessel Krul (eds), *Geschiedenis is als een olifant. Een keuze uit het werk van E.H. Kossmann* (Bert Bakker, 2005) 131–53 (also published in EH Kossmann, *Politieke theorie in het zeventiende-eeuwse Nederland* [Noord-Hollandsche uitgevers Mij, 1960]) and the studies by Theo Veen, especially his *Recht en nut. Studiën over en naar aanleiding van Ulrik Huber (1636–1694)* (Tjeenk Willink, 1976). Veen pays a little more attention to Huber's teachings on fundamental laws in his 'Interpretations of Inst. 1,2,6, D. 1,4,1 and D. 1,3,31: Huber's historical, juridical and political-theoretical reflections on the lex Regia' (1985) 53 *Tijdschrift voor Rechtsgeschiedenis* 357, esp 368 and 374.

¹⁰See the literature mentioned above in n 3 and n 8.

Gierke in his interpretation that inviolable individual rights can be discerned in Huber's theory on fundamental laws. Huber's theory is not rights-based; the shield against arbitrary government is institutional, as it is found in an objective law limiting state power rather than in subjective rights.

I start here with the new stage and I can be short on this, since the set is portrayed more often. I then turn to Huber's teachings on fundamental laws. I will finally shed some light on the freedom of persons and property as one of Huber's fundamental laws.

2. Huber and the *juris publice universalis disciplina*

The new stage I mentioned above has two elements that deserve our specific attention. The first is occupied by authors as Bodin, Althusius and above all Hobbes. The second is the work of Huber himself.

In the last quarter of the sixteenth century, Jean Bodin had formulated a strong theory of sovereignty in his *Les six livres de la République* (1576). Reflections on Bodin's theory followed immediately after, elaborating or rejecting his ideas. Whatever someone's views at that time regarding politics and what we would call constitutional law, Bodin's concept of sovereignty had become a point of departure for legal-political theorizing.¹¹ According to the Dutch historian EH Kossmann, of all the Calvinist theorists it was Althusius who in his *Politica methodice digesta* (1603, 3rd edition 1614) had best understood Bodin's concept of sovereignty and had incorporated it into Calvinist constitutional doctrine. Althusius worked out a theory that the people instituting a state in fact never renounce its sovereignty. He thus legally substantiated the theory of popular sovereignty, although in the end sovereignty meant a check on power, rather than power itself.¹²

Halfway through the seventeenth century, Hobbes in his *De Cive* (1642) and *Leviathan* (1651) worked out a forceful political philosophy leading to the conclusion that there is only one way out of the miseries of the state of nature: the

¹¹See Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band 1600–1800* (CH Beck, 1988) 179: 'Bodins Einfluß ist übermächtig. Keiner der deutschen Autoren kann sich der Auseinandersetzung mit ihm entziehen.' Also *ibid*, 185: 'Bodin war für die deutschen Publizisten der ersten Hälfte des 17. Jahrhunderts eine theoretische Herausforderung ersten Ranges'. In his *Acta pacificationis quae (...) Coloniae habitata sunt* (Chr Plantini, 1580, also published in Dutch: *Acten vanden Vredehandel, geschiet te Colen* [Chr. Plantijn, 1580]), the Frisian jurist Aggaeus van Albada listed six books that all politicians ('alle politike personen') should read, among which Bodin's *Les six livres de la République* (*Acten* 161). See also Hugo Grotius, *De iure belli ac pacis* (1625), prol 55.

¹²EH Kossmann, 'Popular Sovereignty at the Beginning of the Dutch Ancien Régime' in *Political Thought* (n 9) 131–66, esp 147–52, translation of 'Volkssouvereiniteit aan het begin van het Nederlandse ancien régime' (published earlier in Idem, *Politieke theorie en geschiedenis. Verspreide opstellen en voordrachten* (Bert Bakker, 1987) 59–92 and in (1980) 95 *Bijdragen en mededelingen betreffende de geschiedenis der Nederlanden* 1, and (in English translation) in (1981) 14 *The Low Countries History Yearbook* 1).

rule of an absolute sovereign powerful enough to implement his law.¹³ Hobbes came to his conclusions by strictly following the new, Cartesian method of logical reasoning, departing from a rather pessimistic view on the human natural condition caught in the famous formula of *bellum omnium contra omnes*. To stop this war men need society, namely an absolute ruler. According to Hobbes it is either absolute power or complete anarchy.¹⁴ Such a strong idea, reached by a stringent methodological deduction from a very specific view of humanity, of course calls for reactions.

Huber rejected both ‘Althusianism’ (inalienable ‘sovereignty’ of the people) and ‘Hobbesianism’ (inalienable and absolute sovereignty of the government).¹⁵ In explicit answer to both he worked out an alternative doctrine, based on a complex view of human nature and reached by a logic carried out less stringently than Althusius and Hobbes had done, but with a sharp eye for legal-political realities instead.¹⁶ Huber agreed with Hobbes that human nature leads to a *bellum omnium contra omnes* (*De Jure Civitatis* [DJC], I.1.3: *Quo jus naturae Hobbesianum examinatur*), a fact of life he saw confirmed in the Scripture and (Frisian) history. In the ‘summa’ of DJC I.2.1 we indeed find the *malitia hominum* as the ground for setting up civil communities, so that the good men (*boni*) can protect themselves against their fellow humans. But Hobbes’s picture was one-sided according to Huber, for, so he said, man also has an inborn tendency to live in community.

From this last tendency, Huber concluded that even in the state of nature the desires to violate, subject and rob must have been taken for truly unlawful. We are born for justice, Huber said, quoting Cicero (*De Legibus* 1.10.28) in DJC I.1.3.10, and he held that natural law existed before the Fall of man (*lapsus et corruptio humani generis*) and that the light of (divine) reason was never completely extinguished (citing Romans 1:18, 2:14–15 and Cicero, *De Legibus* I.8.25: *est igitur homini cum Deo similitudo*). Also private property, *dominia rerum*, existed before civil communities (*civitates*) had been established (DJC I.1.3.11, citing Inst 2.1.11–12 and D 41.1), and the same must be said of the dictates of natural reason such as the Golden Rule (*quod tibi non vis fieri ...*), the precepts

¹³For the important philosophical differences between Bodin and Hobbes, see Simone Goyard-Fabre, ‘La souveraineté de Bodin à Hobbes’ (1991) 4 *Hobbes Studies* 3.

¹⁴Inspired by George H Sabine and Thomas L Thorson, *A History of Political Theory* (Dryden Press, 4th edn 1973) 435.

¹⁵Kossmann, ‘Ulric Huber’ (n 9) 117ff.

¹⁶This characterization is by Kossmann, ‘Ulric Huber’ (n 9). See more extensively on Huber v Hobbes: Veen, *Recht en nut* (n 9) chs 5 and 6 (in Dutch, with a summary in German). See Fabrizio Lomonaco, *New Studies on Lex Regia: Right, Philology and Fides Historia in Holland Between the 17th and 18th Centuries* (Peter Lang, 2011) for Huber (and other Dutch scholars) and the Cartesian method (anyone who reads Italian is advised to turn to the 1990 Italian edition of Lomonaco’s book, since the 2011 English edition is problematic: *Lex Regia. Diritto, filologia e fides historica nella cultura politico-filosofica dell’Olanda di fine Seicento* [Guida, 1990]).

to live honestly and not to harm another, and the like. We will instinctually and immediately grasp these rules as necessary to conserve the community, so Huber said. They bind us as laws since they are based on our awareness of the divine will (*DJC* I.1.3.12: *Idem de reliquis naturae rationalis dictatis [...] eaque dictata leges sunt, propter conscientiam voluntatis divinae*). These dictates have the force of law independent of any state or political power, and not only bind us towards God, but also towards our fellow humans.¹⁷ As we shall see below, this picture of the human natural condition results in a constitutional theory in which some ‘goods’ (especially freedom of persons and property) are always protected by fundamental laws.

Huber praised himself, and he is often praised by others, as the scholar who initiated a new academic discipline, that of universal public law (*juris publice universalis disciplina*),¹⁸ aiming at a coherent and systematic picture of the ‘juridical doctrine of political relations’.¹⁹ The urge for this new science seems to have been twofold. First there was in the seventeenth century a crisis of academic jurisprudence on the continent of Europe.²⁰ From the foundation of the discipline in Bologna at the end of the eleventh century, it had been based upon the Roman law as compiled under Emperor Justinian in the sixth century in the *Corpus iuris civilis*. In the sixteenth century, however, the authority of the *Corpus iuris* had been weakened by the critical exegesis of the texts by the legal humanists. In the seventeenth century, rational natural law seriously challenged Roman law as universal law. Meanwhile, the alleged continuity of the Roman empire of antiquity and the Holy Roman Empire of the Middle Ages had lost its credibility and significance. New legal approaches arose and in the Dutch provinces jurisprudence flourished under what became to be known as the *Hollandsche school* (the Dutch school). Huber’s new discipline of *ius publicum universale* is one of its fruits. As for the Dutch provinces, they had been in serious need of a juridical reasoning on its peculiar constitution since long before Huber wrote, and even more so since they were officially cut loose from the Empire in 1648. The Dutch Republic could indeed well use a legal rationalization of its own constitution.²¹ According to Huber, the Dutch revolt against the King of Spain was also in need of a sound reasoning from a legal point of view. For it was improper,

¹⁷Veen, *Recht en nut* (n 9) 189–90.

¹⁸Ulrici Huberi *Oratio [III]* / Ulrik Huber *Redevoering*, (F Akkerman, TJ Veen and AG Westerbrink tr, TJ Veen annotated, intro and appendix, Tjeenk Willink, 1978) and the *prae-fatio* to his *DJC*; Veen, *Recht en nut* (n 9) esp 100ff; Kossmann, ‘Ulric Huber’ (n 9) 114; Stolleis (n 11) 291–92.

¹⁹Lomonaco (n 16) 166.

²⁰For a general overview see, with some focus on the Dutch provinces GCJJ van den Bergh, *Geleerd recht. Een geschiedenis van de Europese rechtswetenschap in vogelvlucht* (Kluwer, 6th edn 2011) esp ch 4. On Huber and the decline in the quality of jurisprudence and on legal education, see Hewett (n 1) chs 1 and 3 et passim.

²¹See the studies of Kossmann mentioned earlier (n 9 and n 12) and Lomonaco (n 16) 135ff, 158ff for the Republic in need of a juridical foundation.

he said, to speak of the King's transgressions against the privileges of the Provinces as a reason for war, since what had actually happened was a breach of fundamental laws.²²

The other background for Huber's new legal discipline was his dissatisfaction with (universal) public law as part of the discipline of political theory.²³ *Politica*, a branch of philosophy, taught what is prudent or useful for rulers; Huber was looking for rights, obligations and competences. The aim of political theory was utility, that of legal theory justice.²⁴ As long as public law was under the heading of *politica*, Huber deemed it impossible to develop a coherent theory of legal 'constitutional' rights and obligations. It was necessary to set public law apart and treat it as a discipline on its own, and so he did. The main criterion Huber used to separate public law from political theory was reducibility of a topic to the legal concept of sovereignty.²⁵

A new stage: a new discipline, that of universal public law, circling around the relatively new concept of sovereignty, developed by Bodin and in Huber's time dominated by the theory of Hobbes's *Leviathan*. Even if we should accept that there may be other candidates to be the very first to separate public law from political theory,²⁶ it is noteworthy that the concept of fundamental laws played a crucial role in universal public law already in Huber's very early account of it.

3. Huber on moderated absolutism

3.1. Huber on sovereignty

Concerning the transition from the state of nature towards civil community, Huber was in fact rather imprecise (*DJC* I.2.1 and *HR* II.1.1). Being a legal theorist, Huber was apparently more interested in working out the outcomes of the transition than in the theoretical transition itself. Given the alleged natural human tendencies both to fight each other and to live in society, as discussed above in relation to Huber's reaction to Hobbes's theory, it was necessary that the will of each and every person becomes one societal will, to find a way *per quem omnium voluntas una fuerit* (*DJC* I.2.1.6).²⁷ This can happen in two ways, voluntary or forced by weapons, *consensu* or *vi*; I focus on voluntary societies.

The most natural form of civil society – in the sense of the form most directly related to the state of nature – is that in which the people governs itself and in

²²*DJC* I.3.5.63; *HR* II.1.7.18; *IR* 10.23. For the difference between privileges and fundamental law see below.

²³(The study of) Roman law has never been as important for constitutional law as it has been for private law, see Stolleis (n 11) esp chs 2 and 3. See also 291ff.

²⁴See Huber, *Oratio [III]*, esp 47.

²⁵Veen, *Recht en nut* (n 9) 12ff, esp. 15, and 29, referring to Huber's *Oratio [III]*.

²⁶Kossmann, 'Ulric Huber' (n 9) 114 referring to Ernst Reibstein, *Johannes Althusius als Fortsetzer der Schule von Salamanca. Untersuchungen zur Ideengeschichte des Rechtsstaates und zur altprotestantischen Naturrechtslehre* (Müller, 1955) 20.

which the government is organized community-wise, or communally (*HR* II.1.3: ‘gemeentenswijze’). That is to say democracy (*status democraticus*, *DJC* I.2.3), i. e. government by the majority over itself and over the minority (both the majority and the minority being considered as static entities).

The fact that Huber took democracy as his basic theoretical model for governments had some important consequences. First, it gave room to the idea that there is a unity, the people, which can also act as a legal personality in other forms of government, such as monarchy and aristocracy, especially in its relation to its ruler(s).²⁷ Hobbes had said it was the sovereign who constituted the people as a legal personality and that personifies the unity, and he concluded that the people as such can never hold any right against its sovereign. According to Huber, however, the people can unite and then either rule itself, or agree and decide to be ruled by a monarch or an elite. On the question of why the people should want to be ruled by somebody else rather than by itself (or, more accurately, by its majority), Huber answered that experience has taught that democracy leads to confusion, quarrels and dissensions and that democratic governments will often end in war and finally despotism (*DJC* I.2.5.8; *HR* II.1.4.2).

Second, Huber drew the conclusion that the power of a sovereign ruler can never be more absolute or more comprehensive than the power of the majority over the minority in a democracy (*DJC* I.2.5; *HR* II.1.4.8). This implied that the will of the governed could always function as a criterion to measure any claim of the ruler or ruling elite or class. There must be a benefit for the governed to submit to their government, some (public) good or utility which is eventually beneficial for them also. If each and every person is prepared to act as if there is only one will, there must be some gain for any person who wills differently and still is prepared to conform to the one sovereign will.

Turning to the discussions in *HR* (in particular the first chapters of Part II, book 1) and *DJC* (the first chapters of book I, section 2), we find more on the power of a democratic majority. The point of departure is the definition of *civitas* (*DJC* I.2.1; ‘Burgerschap’, *HR* II.1.2) as a sufficient assembly of many households for the enjoyment of common justice and a satisfactory life under a sovereign power (*summa potestas*, ‘Oppermacht’). Sovereign power is held by him (whether a single person or an elite or a majority) whose acts and decisions cannot be altered by the will of any other person and whose acts are not due to consultation (see *HR* II.1.6: ‘rügge sprake met hare *committenten*’, ‘conferences with their constituents’). Tacking between the Scylla and Charybdis of Althusianism and Hobbesianism, Huber in *HR* II.1.3 depicts the democratic sovereign power as one

²⁷In general, and surely in relation to Huber, I think Gierke, *Natural Law* (n 2) II.17 (= *Das deutsche Genossenschaftsrecht*, IV.17) is still a valuable introduction to natural law theories of the state; Gierke discusses Huber on 145–46 (459–61).

²⁸Kossmann, ‘Ulric Huber’ (n 9) 119. See for instance *DJC* I.3.4.12: *cum inter populum ac imperantes foedus intercedere pactionesque speciales inire posse demonstravimus*.

without restrictions of time and topic,²⁹ a power that binds the minority irrespective of right or wrong (see also explicitly *HR* II.1.5.16ff), even if it is disadvantageous to the minority, and even if it demands the sacrifice of life and property. The decision of the majority (that is, the sovereign ruler) must be taken for the decision of each and all. True sovereign power, therefore, is absolute: *legibus solutus* (*DJC* I.3.5.1–10).

However, sovereign power is never unrestricted, unlimited power (*HR* II.1.3.16ff; *DJC* I.2.3.39ff). In the first place it only concerns physical, external aspects of one's life; the natural freedom to feel and to think as one wills on things natural and supernatural is taken for granted, Huber noting thoughts and inner motives being matters between man and God. Further, he held that nobody is bound by any pact to do what God forbade, or to keep from doing what God clearly commanded. Next, the people (i.e. the subjects, in a democracy: the minority) is not bound by its prior consent to follow a vicious ruler (in a democracy: the majority) into a situation which is worse than the war of all against all in the state of nature. And finally, given the general imminent fear of death, nobody can ever be supposed to have consented to suffer unlawful attacks – that is, by sheer violence and public injustice – on body or goods; nobody may be deprived of life and property ‘without any legal ... form [of law/legal bounds]’ (‘buiten *forme* [ordere] van recht’, *HR* II.1.3.20 and II.1.7.2 [and 4]), that is *sine ordine suffragiarum & iudicii* (*DJC*, I.2.3.39–44). I will return to this the last restriction particularly in the last section. Therefore, neither Althusius (who argued that Kings and Princes are never more than ministers of the people) nor Hobbes (who defended the power of the sovereign as unrestricted) is right (see especially *HR* II.1.5 and *DJC* I.2.3). Sovereignty is mastery over the people, but it is never unbounded mastery. And the boundaries are drawn sharply by Huber: he called the boundaries fundamental laws.

3.2. Huber on fundamental laws

Huber dealt with fundamental laws (*leges fundamentales*, ‘fundamentele wetten’) both in his *De Jure Civitatis* and his *Hedendaegse rechtsgeleertheyt*. Whereas the *DJC* aims at an exposition of truly universal public law, in the *HR* we find a discussion on the law of Friesland. In the *HR* ‘constitutional’ law is dealt with after a rather lengthy discussion of Frisian private law, and as introduction to criminal and procedural law. The exposé on constitutional law in the *HR* is in fact essentially a concise translation in Dutch of his theory set out in *DJC*, with some excursions to the law of Friesland. I take both books into account.³⁰

²⁹Time limits set on the *exercise* of this power is explicitly said not to diminish or otherwise change the character of the power itself, *HR* II.1.6.9.

³⁰In Huber's *Institutiones reipublicae liber singularis* a synopsis can be found in caput I.10: ‘De Legibus Fundamentalibus’.

The critical point is that Huber bound the sovereign³¹ both to general restrictions on power as such, and to specific arrangements such as can be found in the *foedus* (as it is called in *DJC* 1.2.4) between him and the people on which his power rests. In his chapter ‘Of the limitations of sovereignty by fundamental laws’ (*HR* II.1.7, ‘Van de bepalinge der Oppermacht door Fundamentele Wetten’; see also *DJC* I.3.5: *De legibus fundamentalibus*), Huber gathered the limitations mentioned above at the end of the preceding section in an unwritten (tacit) fundamental law, formulated as ‘the freedom of persons and property’ (*HR* II.1.7.4). Three other general unwritten, tacit fundamental laws are mentioned: governors cannot transfer their sovereignty to another (unless their *imperium* is part of their patrimony);³² they cannot divide or alienate the territory, nor make it part of another government; in kingdoms and principalities men are summoned and appointed before women, and the first-born before those born afterwards. These last three fundamental laws were rather commonly recognized as such on the European continent, and often depicted as the foundation of states in Huber’s times;³³ particularly rules concerning succession to the throne were often labelled thus.³⁴ Huber’s freedom of persons and property as a fundamental law, however, has a more English outlook as it is closely related to personal freedom and private property as (fundamental) rights; in England the common law was taken for a fundamental law aimed at protecting precisely these rights.³⁵ Note, however, that Huber only thought of fundamental laws protecting freedom(s), not of fundamental (individual) rights.

Along with these four general, tacit fundamental laws, Huber acknowledged that there may be other, more specific fundamental laws (either written or not) which affect a specific political order. Examples of such laws are the Salic law

³¹It may be easiest to think of a monarch, although as said above, Huber takes the ‘democratic’ majority as starting point of his discussions; see chs *HR* II.1.3, esp II.1.3.16–20, and *DJC* I.2.3, esp I.2.3.39–44

³²In *DJC* I.3.1 and 2, and *HR* II.1.6 Huber discusses various types of rulership, including patrimonial imperium. He stresses that these various types do not further entail any differences in supreme power.

³³Huber did so too, *DJC* I.3.5.21: ‘*Leges igitur fundamentales erunt proprie, contitutiones, quae in fundando imperio, ante plenam ejus translationem stabiliuntur, ut juxta eas respublica exerceatur*’; *HR* II.1.7.21: ‘dat zij als grondwetten van de Regeeringe sullen worden gehouden’ – ‘that they are to be considered as basic laws (*grond-wetten*) of the government’; *IR* I.10.5: ‘*Ut sciamus quae sint, praemittemus, fundamenti verbum id significare, quo tota structura nititur, & quod primo omnium ponitur, ut cuius suopte planum est*’; in *ibid*, I.10.6 the *DJC*-definition is repeated.

³⁴Mohnhaupt, ‘Die Lehre’ (n 8) and ‘Von den “leges fundamentales”’ (n 8); on the metaphor of the fundament of a building (including a reference to Huber) see Mohnhaupt, ‘Von den “leges fundamentales”’ 39ff; on English fundamental laws *ibid* 64–65 and n 45 below.

³⁵See on the role of fundamental laws in the common law Howard Nenner, ‘Liberty, Law, and Property: The Constitution in Retrospect from 1689’ in JR Jones (ed), *Liberty Secured? Britain Before and After 1688* (Stanford University Press, 1992) 88–121; Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, 2004).

in France and the rule (as in England) that no taxes can be introduced and assessed on the people without the consent of parliament. Such fundamental laws could either have been enacted at the time of instituting the government or afterwards by agreement, provided that it had been clear that what was agreed upon was indeed to be taken for ‘basic laws’ (*HR II.1.7.21* ‘grondwetten’; *DJC I.3.5.21 constitutiones*). Also other rules from time immemorial publicly held to be basic laws and orders of state can have the force of fundamental laws, that is to bind the sovereign, who is otherwise *legibus solutus*.

Reconciliation of power restricted by fundamental laws with the idea of the sovereign being *legibus solutus* was achieved by pointing out that tacit fundamental laws are actually only called laws by way of analogy (*DJC I.3.5.14: analogice*). Proper laws must be ‘given’ and ‘announced’.³⁶ Tacit laws obviously are not subject to such requirements: they are implicit in the idea of political power. Regarding express fundamental laws, Huber emphasized that they too antedate the state and the ruler, since they lay the fundament thereof; fundamental laws are the *constitutiones* (*DJC I.3.5.21*) or ‘grondwetten’ (*HR II.1.7.21*). They thus cannot logically bind the ruler as laws, since the ruler and law are two institutes produced by the state.³⁷ Their obligatory force is based in natural law since the obligations arising from express fundamental laws are contractual (*DJC I.3.5.70ff*). Here, again, Huber stands in a European legal tradition on fundamental laws, a tradition that at this point seems to have a history going back to Aristotle.³⁸ The conclusion must be that the ruler is in fact not *as a ruler* liable for breaking fundamental laws: if he violates them, he is simply not acting as a ruler.³⁹ Acts in

³⁶*DJC I.3.5.13: ‘Legem oportet [oportet? GvN] esse latam & lectam, ut vere pro lege possit haberi.’*

³⁷*DJC I.3.5.20: ‘premittimus, fundamenti verbum id significare, quo tota structura nititur’; DJC I.3.5.21: ‘Leges igitur fundamentales erunt proprie, constitutiones, quae in fundando imperio, ante plenam ejus translationem stabiliuntur, ut juxta eas republica exerceatur.’*

³⁸Mohnhaupt, ‘Die Lehre’ (n 8) and ‘Von den “leges fundamentales”’ (n 8). I thank my colleague L Huppel-Cluysenaer for the reference to Aristotle’s *Politeia*, where we find the idea that also an absolute ruler is bound to ‘customary law’, or ‘constitution’ (1287b5), whereby discussion is open whether this customary law must be taken for natural or positive law or maybe both. On this question, see CA Bates, ‘Law and the Rule of Law and Its Place Relative to *Politeia* in Aristotle’s Politics’ in L Huppel-Cluysenaer and NMMS Coelho (eds), *Aristotle and The Philosophy of Law: Theory, Practice and Justice* (Springer, 2013) 59–75, 62–64. To rule ‘lawfully’, so Aristotle says, is to rule according to the will of the subjects (1285a28), and where laws do not rule, there is no constitution (1292a30–35). See Bates, ‘Law and the Rule of Law’, 63: ‘Thus the political community holds that what it holds as law truly encompasses what nature holds to be true about the justice of the matter in question.’

³⁹I disagree with Thompson (n 3), who reads Huber as distinguishing ‘between “tacit” fundamental law (universal moral constraints on sovereigns), and “express” fundamental laws (positive law constraints)’ (1117). Tacit fundamental laws imply legal, not moral, constraints, whereas express fundamental laws in fact differ significantly from positive law,

defiance of these laws are therefore according to Huber null and void, an idea quite common in European legal theory.⁴⁰ This reveals once more that the legitimate power of the sovereign does not reach beyond the fundamental laws. Huber explicitly remarked (*HR* II.1.7.14; *DJC* I.3.5.45ff) that power being narrowed in such ways does not cease to be supreme and sovereign, as long as its holder otherwise retains free disposition of the common affairs, without being subjected to anyone else and without his acts being liable to be altered by anyone else.

Huber's next move was that he pointed out the difference between fundamental laws and privileges (*HR* II.1.7.17ff; *DJC* I.3.5.61ff). Fundamental laws, said Huber, are based on agreement between the governor and the governed, whereas privileges are bestowed by Princes out of generosity (*ex gratia principum*, 'uit liberaelheit der *Fursten*'). Privileges are not laws, but releases from laws and as such may be revoked by the power which bestowed them. Fundamental laws on the other hand either cannot be abolished at all in the case of unwritten (tacit) general fundamental laws, or may not be altered by the sovereign alone, being part of the *foedus* ('verbont') between him and the people.

As for the sanctions against a ruler who does not respect these limits on his otherwise sovereign power, we find rather general sayings in the *HR* (concerning democratic government): actions of the sovereign against fundamental laws are null and void (*HR* II.1.7.23); subjects could secede if oppressed by some ill conspiracy of the rulers; in other situations the subjects are bound to exercise patience (*HR* II.1.5.19). Not much of a constitutionally guaranteed rule of law here, not really much of a legal theory. Huber is more explicit on sanctions in the *DJC*, of which chapter I.10.6 is called '*De sanctione legum fundamentalium*'. Sanctions can either be *expressa* or *tacita*. Express sanctions are of the kind which the people or the nobility (*proceres*) stipulate no longer to be bound by if the King ceases to serve these laws or the pact, resulting in a *jus opponendi se* or *resistendi* of a single citizen or of the magistrates. Tacit (implied) sanctions are a nullity of all acts (because beyond the limits of his power the sovereign acts as a private person), and a *jus opponendi se* and *resistendi* on the part of those who have been party to the pact (or of the majority). As a rule, private citizens are obliged to passive obedience, but in case of excessive transgression of the laws and violence a few citizens may collectively revolt if they are positively sure that those who have the *jus pacti* would revolt if they were in a position to do so. It is taken for granted that a tyrant – he who has become an enemy of his people – may be removed.⁴¹

since they precede the institution(s) of the state, including law. I therefore do not see the chop of logic in Huber's work mentioned by Thompson (1112), where he questions 'what fundamental law could achieve that could not be achieved by recourse to more traditional limits of divine law, natural law, prescriptive rights, or *salus populi*'. Huber uses the notion of fundamental laws precisely to give the 'more traditional limits' substantial, legal significance; this is what his whole idea of universal public law was about.

⁴⁰Mohnhaupt, 'Die Lehre' (n 8) 13.

⁴¹On tyranny, see also *DJC* I.9.1–4. See also Veen, 'Interpretations' (n 9) 368, 374.

All in all I would say that Huber's fundamental laws have a rule of law outlook much stronger than the more common, dualist approach to such laws in common European legal theory at the time. Huber's theory is not about fixing the relationship between ruler and estates, as was the common European idea on fundamental laws.⁴² Explicitly separating the fundamental laws from privileges was a deviation from the more widespread approach of fundamental laws in Huber's day.⁴³ I think this is important to notice, since what we find in Huber's theory on fundamental laws is in fact the rule of law idea of a personal sphere of right which cannot be diminished or otherwise altered by a sovereign power of whatever kind, without consent of those who are involved in it and/or without legal procedure. Besides some essentials of the state itself (its territory and the basis of its political structure, conventional elements in the European notion of fundamental laws), we find basic, natural goods of the individual in Huber's theory protected by objective, fundamental laws: the person itself (including his life), his mind and consciousness, and his private property. His theory, especially as concerns the tacit fundamental laws, is on defining the concept of sovereignty as such. Tacit fundamental laws set essential limits on state power; beyond these limits some interests are preserved, especially persons and goods, which appear as abstract legal notions protected by law.⁴⁴ Seen thus, Huber's theory on fundamental laws is an early account on the continent of ideas which were already quite common in England at that time.⁴⁵

⁴²Mohnhaupt, 'Die Lehre' (n 8) 7 and 'Von den "leges fundamentales"' (n 8) 38.

⁴³See especially Thompson (n 3) 1110 on privileges as fundamental laws. The link between privileges as 'fundamentele wetten' used by the Dutch States General in their struggle against King Philip II and Huber's theory on fundamental laws made by Mohnhaupt, 'Von den "leges fundamentales"' (n 8) 62 is unfortunate.

⁴⁴In this sense one could say that Huber's theory was close to the famous redefinition of the notion of fundamental laws by Montesquieu (*De l'esprit des lois*, II.1) as 'lois qui dérivent directement de la nature du gouvernement'. However, Montesquieu discerned different fundamental laws for each of the three types of government. On Montesquieu, see Thompson (n 3) 1125; Jean Erhard, 'La notion de "loi(s) fondamentale(s)" dans l'oeuvre et la pensée de Montesquieu' in Catherine Volpillac-Auger (ed), *Montesquieu en 2005* (Voltaire Foundation, 2005) 267–86; Gabrielle Radica, 'Trois interprétations de la notion de "lois fondamentales" au XVIIIe siècle' in Isabelle Moreau (ed), *Les Lumières en mouvement. La circulation des idées au XVIIIe siècle* (Ens éditions, 2009) 229–53.

⁴⁵Mohnhaupt, 'Von den "leges fundamentales"' (n 8) 64: 'Der entscheidende Unterschied zur rechtlichen Bewertung auf dem Kontinent bestand jedoch darin, daß die englischen "fundamental laws" auch Individualrechte im Sinne von subjectiven Rechten der Engländer mitumfaßten, was in Frankreich – und Deutschland – vor der Französischen Revolution in der Rechtspraxis und im Zusammenhang mit den "leges fundamentales" nicht nachweisbar ist'; see also Gerald Stourzh, 'Naturrechtslehre, leges fundamentales und die Anfänge des Vorrangs der Verfassung' in C Starck, *Rangordnung der Gesetze. 7. Symposium der Kommission 'Die Funktion des Gesetzes in Geschichte und Gegenwart' am 22. und 23. April 1994* (Vandenhoeck & Ruprecht, 1995) 18–20. On 65 Mohnhaupt points to Claude Mey, who in his *Maximes* (1775 – about a hundred years after Huber) raises protection of private property and 'liberté légitime des sujets' up to the rank of 'loix fondamentales'.

Imprecise as the sanctions may be, seen from a legal point of view, I do not think it is proper to say that (tacit) fundamental laws are for Huber no more than ‘universal moral restraints on sovereigns’, as Martyn Thompson claims.⁴⁶ Huber was interested in law, and fundamental laws set legal limits. I am inclined to step over the impreciseness of the theory on the issue of sanctions and focus on the forward looking ‘rule of law’ elements.⁴⁷ I will do so in the next paragraph.

4. Freedom of persons and property protected by fundamental laws

I want to make a few observations on Huber’s tacit fundamental law protecting freedom of persons and property.⁴⁸ My aim is to show that a basic rule of law idea can be discerned in Huber’s theory on fundamental laws, even if his theory on the sanctions for violating these laws may still be rather imprecise. On another occasion I hope to dwell more thoroughly on the subject of private property protected by fundamental laws.⁴⁹

Huber’s line of thought is as follows. When people set up a civil community they do so in the hope of living a peaceful life. Whatever the form of government they choose, they are prepared to give up the freedom and rights which they enjoy in the natural state. One of the consequences of their choice to live in a civil community is that the ruler can demand the sacrifice of their life and goods. The citizen, said Huber referring to Hugo Grotius,⁵⁰ ‘is bound to stake his life and property for the fatherland, and the law is said to be master of our property in a stronger and higher sense than we ourselves are’ (*HR* II.1.3.15). The sovereign has *dominium eminens*, that is, in Huber’s words, overriding ownership (‘uitmuntende eygendom’, *HR* II.1.8.25–27).⁵¹

However, even though the power of Huber’s sovereign is absolute, without restrictions of time and topic, and regardless of right or wrong, it is not boundless.⁵² In his exposé on the origin of civil community (described in its

⁴⁶Thompson (n 3) 1117.

⁴⁷Compare Diethelm Klippel, *Politische Freiheit und Freiheitsrechte im deutschen Naturrecht des 18. Jahrhunderts* (Ferdinand Schöningh, 1976) 88–90 considering the work of Ephraim Gerhard (1682–1718).

⁴⁸The tacit fundamental law on protection of personal freedom and property can be found in *DJC* I.3.5.16 and *HR* II.1.7.2 and 4; the theoretical background in *DJC* I.2.3.(39ff) and *HR* II.1.3.(16ff). Huber in this context refers to Grotius, *De jure belli ac pacis* (1625), I.4.7.

⁴⁹Work in progress under the title ‘Property Beyond Princely Authority: The Intellectual and Legal Roots of Ulrik Huber’s Fundamental Law’ *Tijdschrift voor Rechtsgeschiedenis* (forthcoming 2016).

⁵⁰Hugo Grotius, *De jure belli ac pacis*, I.1.6, also I.3.6.2 and I.4.2. Huber in this context repeatedly refers to chapter I.4.2 of Grotius’s book. See also Grotius’s *Inleidinge tot de Hollandsche rechts-geleerdheid* (1631), II.3.2 (‘hoogher recht’ for *dominium eminens*) and III.1.21 (‘meerder macht’).

⁵¹See also *HR* I.2.2.8, II.1.3.14; *DJC* I.2.3.25ff, I.3.6.38ff.

⁵²Compare Grotius, *De jure belli ac pacis* I.4.8ff where he too adds several restrictions to his absolutist conclusion reached in I.4.7.

form closest to the natural society, that is democracy), Huber had listed several limitations on absolute power, or rather on (civil) power as such, however absolute it may be. As I argued above, what is listed there is simply outside the scope of the very idea of (civil) power, beyond its essence. The boundaries Huber labelled as (tacit) fundamental laws.

The first of these tacit fundamental laws is on the freedom of persons and property, formulated by Huber as ‘the principle that the freedom of persons and the ownership of their property was not given over to the power and will of their governors without legal bonds’.⁵³ The state acquires a stronger right over the lives and goods than the citizens themselves have, a right being based on the pact (‘verbont’, *consensio*) by which the people voluntarily submitted themselves to this power. We cannot suppose, however, that any person would voluntarily entrust his life and goods completely and unrestrictedly to anyone else. Given our strong fear of death, nobody would want to take on him an obligation to suffer without cause and without legal protection or democratic safeguards. Or, in Huber’s words: *sine ordine suffragiarum & iudicii* (DJC I.2.3.42), *sine ulla causa & ordine iudicii* (DJC, I.2.3.44), without a legal voting, without any legal cause and form, or without some ruling framed by the community (‘sonder rechtelijke stemming ... sonder eenige oorsaek ende forme van recht ofte overstemminge by de gemeente beraemt’, HR II.1.3.20), without form of law (‘buiten forme van recht’ HR, II.1.7.2), without legal bounds (‘buiten ordere van Recht’, HR, II.1.7.4).

A careful reading of Huber’s text on the freedom of persons and property reveals that it was not the ruler and the estates coming to terms on their legal relationship in the contract whereby the ruler was given the power to govern.⁵⁴ The said freedoms are tacitly implied in the pact or contract and linked to the very idea of political power itself. More than anything else they express what I called above the idea of personal sphere protected by law.⁵⁵ Indeed, Huber’s law protecting freedom of persons and property and forbidding unlawful attacks on a person or his property has a strong individualistic impact. For we can conclude from the texts that the individual should have access to the law and its courts in case of unlawful use of the *ius eminence* over his person and goods by

⁵³HR II.1.7.4: ‘dat de vryheit der persoonen ende d’eygendom der goederen niet en is gegeven in de macht ende wille van de Regenten, buiten ordere van Recht.’

⁵⁴Mohnhaupt, ‘Die Lehre’ (n 8) 7. What is said here relates especially to these two freedoms as protected by fundamental laws. As we have seen, Huber’s general view on fundamental laws better fits Mohnhaupt’s characteristic. It is also important to note that Mohnhaupt points out the enormous conceptual and terminological wealth of forms of fundamental laws. On fundamental laws as a result of the mentioned dualism, see also Mohnhaupt, *Die Lehre* (n 8).

⁵⁵Compare Stourzh (n 44) esp 23. As such, this fundamental law does not fit in the picture of fundamental laws as laying the fundament of the state and government, see Mohnhaupt, ‘Von den “leges fundamentales”’ (n 8) 39ff.

the ruler. On the other hand, it is clearly not the individual who acquires a right of opposition or resistance, but the (group of) people that voluntarily agreed to submit to the sovereign will (in a democracy, the minority, *DJC* I.2.3.39, 44; *HR* II.1.3.19, 20). So what we find is access to the law for the individual in a specific situation, and a collective *ius opponendi se* or *resistendi*, a relief from the original bond and the option to separate if the oppression has a more general and enduring character. As said earlier, in cases of excessive transgressions of the laws and dominating violence, even a few could collectively revolt, but only if they are positively sure that they who have the *jus pacti* would revolt if they actually were in a position to do so.

One final remark. I think that what Huber says on the freedom of property is in fact a continuation of age-old legal thinking in new terminology. There is abundant proof that many medieval jurists thought of a citizen's dominium over private property as being outside the reach of the ruler (sovereign) and thus as 'exempt from princely authority'.⁵⁶ Jean Bodin too in his *Six livres de la République* (1576) thought of private property as based in natural law, and he approvingly noted that the medieval jurists had concluded that a ruler could not arbitrarily expropriate the goods of the citizens.⁵⁷ The limits Bodin set on monarchy, among which was respect for the right of property, made Goyard-Fabre conclude that Bodin's thoughts had an inefaceable imprint of medieval theories.⁵⁸ It may suffice here to say that Huber stood in a long legal tradition concerning legally-protected private property. The general idea within this tradition is that private

⁵⁶Kenneth Pennington, *The Prince and the Law 1200–1600. Sovereignty and Rights in the Western Legal Tradition* (University of California Press, 1993) 24 (on the jurists of the mid-thirteenth century); see more generally passim, esp 281 (Bodin, concurring with 'most jurists' among whom Cinus, Panormitanus, Baldus and Bartolus). Pennington leans heavily on Ennio Cortese, *La norma giuridica. Spunti teorici nel diritto comune classic* (Giuffrè, 1995), I, 131–36. Cf also André Lemaire, *Les lois fondamentales de la monarchie Française d'après les théoriciens de l'ancien régime* (Slatkine Megatiotis Reprints, 1975; reprint Paris 1907) iv and 33/4. Berthold Sutter, 'Der Schutz der Persönlichkeit in mittelalterlichen Rechten. Zur historischen Genese der moderner Grund- und Freiheitsrechte' in Günter Birtsch (ed), *Grund- und Freiheitsrechte von der ständischen zur spätbürgerlichen Gesellschaft* (Vandenhoeck & Ruprecht, 1987) 17–41 underlines that the protection of persons and property often took form by means of privileges. See of course JW Gough, *Fundamental Law in English Constitutional History* (Clarendon Press, 1955) and the articles by Gerald Stourzh as collected in *Wege zur Grundrechtsdemokratie. Studien zur Begriffs- und Institutionengeschichte des liberalen Verfassungsstaates* (Böhlau Verlag, 1989), such as 'Vom aristotelischen zum liberalen Verfassungsbegriff. Staatsformenlehre und Fundamentalgesetze in England und Nordamerika im 17. und 18. Jahrhundert' 1–35; 'Grundrechte zwischen Common Law und Verfassung. Zur Entwicklung in England und den nordamerikanischen Kolonien im 17. Jahrhundert' 75–89 for English fundamental laws.

⁵⁷Pennington (n 55) 24, 281.

⁵⁸Simone Goyard-Fabre, *Jean Bodin et la droit de la République* (Presses Universitaires de France, 1989) 160. See also Ralph E Giesey, 'Medieval Jurisprudence in Bodin's Concept of Sovereignty' in Horst Denzer (ed), *Jean Bodin* (Verlag CH Beck, 1973) 167–86.

property existed already before and independent from the state and that we cannot assume that anybody would have been willing to grant to the state a stronger right over his property without at least some (legal) safeguards.

5. Huber and the European doctrine of fundamental laws

In many ways Huber's theory on fundamental laws reflects the general outlook of this notion as had on the European continent. Fundamental laws are laws of a special kind (in fact not laws at all and only called laws by way of analogy), which bind the ruler (who is otherwise not bound to the laws, *legibus solutus*), their binding force being based on the contract or pact between the ruler and the ruled. They bind because natural law teaches that *pacta sunt servanda*. Fundamental laws deal with the fundamentals of the state and government, as well as with specific arrangements concerning the exercise of power in a specific state. Transgression of such laws leads to nullity of the act.

In two important aspects Huber's theory of fundamental laws deviates from the larger, European picture. First, he expressly denies privileges the character of fundamental laws. Privileges, according to Huber, are not laws in the sense of binding legal rules, but exemptions from laws. Privileges originate in the ruler's generosity and thus do not strictly bind the ruler. Fundamental laws do. And, second, he included some very important tacit fundamental laws which he depicted as being essential to the idea of sovereignty or state power as such. These tacit fundamental laws exempt motives and opinions of the mind from the ruler's power, and include the rule that nobody can be obliged to act against the commands of God Almighty. Another tacit fundamental law was the general rule that nobody may be deprived of life and private property without a legal procedure; the stronger right over our persons and goods that the state (ruler) acquires may only be used by form of law.

Huber's ideas concerning the freedom of persons and goods may not have been altogether original; in fact I think the ideas were age-old. What Huber did was to give these older ideas their place in the new legal science of public law using the notion of fundamental law. In Huber's theory the protection against arbitrary government was effected by posing legal limits on the institution, a genuine rule of law thought. About a century later the ideas would make a reappearance as fundamental rights – by then they had a strong revolutionary connotation.

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