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# Political Covenantalism, sovereignty and the obligatory nature of law: Ulrich Huber's Discourse on state authority and democratic universalism\*

## Summary

Ulrich Huber's *De Jure Civitatis*, published in Latin, has never been translated into any other language, making this a relatively unknown source in constitutional law. In this work Huber responds to the state absolutism of Machiavelli and Hobbes. Although Huber objects strongly to Hobbes's enlightened absolutism, his own theory of the double social contract scheme harbours distinct elements of political universalism. The possibilities for political resistance by subjects in the state are very limited. Although Huber's theory of constitutionalism prepared the way for the enlightened individualism in the theories of Locke and Rousseau, his constitutional law theory shows a clear preponderance towards political absolutism.

## Politieke federalisme, soewereiniteit en die dwingende aard van die reg: Ulrich Huber se diskoers oor staatsgesag en demokratiese universalisme

Ulrich Huber se *De Jure Civitatis*, gepubliseer in Latyn, is in geen ander taal vertaal nie, as gevolg waarvan dit relatief onbekend in die staatsreg is. In hierdie werk reageer Huber op die staatsabsolutisme van Machiavelli en Hobbes. Alhoewel Huber sterk op Hobbes se verligte absolutisme antwoord, huisves sy eie teorie van die dubbele sosiale kontrak-skema duidelike trekke van politieke universalisme. Die moontlikhede van politieke verset deur onderdane in die staat is baie beperk. Alhoewel Huber se teorie van konstitusionalisme die weg vir die verligte individualisme in die teorieë van Locke en Rousseau gebaan het, toon sy konstitusionele teorie 'n duidelike oorwig na politieke absolutisme.

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## 1. Introduction

The philosophical, social, political, and spiritual revolution which marked the Renaissance, the rise of the nation state, and the Reformation brought about the collapse of the medieval order.<sup>1</sup> The turn away from medieval political and jurisprudential thought saw the rebirth of interest in the secular culture of ancient Greek and Roman political philosophy.<sup>2</sup> Whereas the medieval political approach was dominated by preoccupations concerning God, the political theorists of the Renaissance were more inclined to focus on man. This resulted in the demise of the medieval order, according to which the individual was seen as a minute element of an organism of universal proportions, and the rise of the idea that man as an individual was an end unto himself. From this circumstance, the new philosophical and cultural movement of the Renaissance derived the name of humanism.<sup>3</sup> A further implication of this new approach to law and politics was the rise of a new scientific attitude, which largely evaded the claims of theology and concentrated rather on observation and experiment.

The Italian Renaissance in political theory began with the work of Machiavelli (1469-1527).<sup>4</sup> His approach to politics represented a complete break with medieval theory — in its place Machiavelli conceived a theory based on total secularism and a disregard of any law or structure above that of the state itself.<sup>5</sup> To Machiavelli, a state that does not expand must decline. The most important aspects of political philosophy are determined by the purpose of the state and its success. Machiavelli points out that although the keeping of faith is praiseworthy, the success of the state demands deceit and hypocrisy when necessary. In Machiavelli's political system, religion is but an instrument of policy.<sup>6</sup>

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1 See generally, V.H.H. Green, *Renaissance and Reformation. A survey of European history between 1450 and 1660* (London: Edward Arnold, 1969), 35ff.

2 See *ibid.*, 37: "The return to the classics gave these Italians something more, a new view of history which stimulated them with the desire to emulate the past virtues of Athens and Rome, and a new sense of liberty characterized by a passionate desire for knowledge and a willingness to experiment. The attempt to establish a natural emotional relationship between the persons whom they were seeking to portray implied a break with the stylized and rigid paintings of the earlier Middle Ages."

3 *Ibid.*, 42: "Nevertheless the Italian Renaissance had proved an effective agent in generating both a new culture and a new attitude to life. In the long run the new scholarship was bound to penetrate to the new schools and the universities."

4 See Leo Strauss, "Niccolo Machiavelli 1469-1527" in Leo Strauss & Joseph Cropsey (eds.), *History of political philosophy* (Chicago: Rand McNally College Publishing Company, 1972) 271-292.

5 See *ibid.*, 272.

6 In *The Prince* XVIII (99) (note: the chapter is followed by the page number) Machiavelli comments on the question of how princes should honour their word as follows: "Everyone realizes how praiseworthy it is for a prince to honour his word and to be straightforward rather than crafty in his dealings; nonetheless contemporary experience shows that princes who have achieved great things have been those who have given their word lightly, who have known how to trick men with their cunning, and who, in the end, have overcome those abiding by honest principles." He adds: "So, as a prince is forced to know how to act like a

The wake of the rise in nation states in Europe reached its culmination in the St. Bartholomew's Night Massacre. In the seven years that followed this tragedy, three books expounding the political theory of pluralism appeared: Francois Hotman's *Franco-Gallia*,<sup>7</sup> Theodore Beza's *De Jure Magistratum*,<sup>8</sup> and the *Vindiciae Contra Tyrannos*, which was probably written by Mornay.<sup>9</sup> These Huguenot authors advanced two main lines of argument in their opposition to absolute royal power: firstly, the constitutional argument based on historical fact; they appeal to the Bible and to secular history to show that the law is above the king, that the king stands under contract with the people for the welfare of the people, and that each "people" or group is subject to its own laws — a theory, in other words, based on sovereignty of law and political pluralism. Secondly, the argument based on the philosophical foundations of political power, namely that absolute monarchy is contrary to universal rules of right, supposed to underlie all government.

In 1576 the French political theorist Bodin (1530-1596) formulated a theory of politics which opposed those of both Machiavelli and the Huguenot monarchomachs. In opposition to Machiavelli, Bodin maintained that instructing the political rulers in injustice could produce nothing but ruin for the state. Commenting upon the views of the Huguenots, Bodin remarked: "Opposed to these, and indeed enemy to them, there are others who are not weaker and are perhaps more dangerous, who under a veil of excuses for making accusations and of popular liberty, make the subjects rebel against their natural prince, opening the gate to licentious anarchy which is worse than the greatest tyranny in the world."<sup>10</sup> Bodin's theory of sovereignty is conceived in a naturalistic way by deriving sovereignty from a group of families who have come together and have the rights of government with sovereign power. Bodin believed that the political order arose after a state of war among men had led them to a condition of equilibrium, which made it possible for families

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beast, he should learn from the fox and the lion; because the lion is defenceless against traps and a fox is defenceless against wolves. Therefore one must be a fox in order to recognize traps, and a lion to frighten off wolves. Those who simply act like lions are stupid. So it follows that a prudent ruler cannot, and should not, honour his word when it places him at a disadvantage and when the reasons for which he made his promise no longer exist. If all men were good, this precept would not be good; but because men are wretched creatures who would not keep their word to you, you need not keep your word to them. And a prince will never lack good excuses to colour his bad faith."

7 Edited by R. Giesy & J.M.M. Salmon (Cambridge, 1972). Hotman (1524-1590) was a French publicist, converted in 1547 to Protestantism and implicated in the conspiracy of Amboise.

8 *Du Droit des magistrats*, edited by R.M. Kingdon (Geneva, 1970). Beza (1519-1605) was a Calvinist theologian of Burgundian origin. In 1588 Beza accepted an offer to teach at the newly formed academy of Geneva.

9 See the edited version by George Garnett (Cambridge, 1994). Note his discussion of the authorship of the work in his introduction (lv-lxxvi). Mornay (1549-1623), a French Protestant born in Normandy, was a diplomat and publicist for the French Protestants, or Huguenots, during the French Wars of Religion (1562-1598).

10 Preface to his *Six livres de la république*.

to come together to establish sovereignty for their common good. Bodin maintained that sovereignty is in accordance with the will of God — the fact that there has been sovereignty for such a long time shows that it is in accordance with the will of God. However, it is not instituted by a special commission of God — the state appears only when a sovereign power is instituted by which a group of families is governed. A state differs from other communities through the presence within it of sovereign power. Sovereignty is not simply superiority: it is the absolute and perpetual power in a state; it institutes the magistrates of the kingdom; it recognises its ultimate locus in the prince; and it has the power of pardon.

When Ulrich Huber wrote his influential Latin work, *De Jure Civitatis* (The Law of the State), shortly after the middle of the seventeenth century, the main paradigms in political and legal theory were well established. Not only are the main lines of argument advanced in the most influential theories well covered in his work, but he also considers the merits of each in the formulation of his own perspectives on the burning issues of his time. However, barely a hundred years previously the Dutch states had been involved in one of the most intense wars in Europe in their struggle for freedom from Spanish oppression.<sup>11</sup> The results of the Dutch wars of independence had a most important influence on Huber's views. Although traces of Bodin's theory of sovereignty are found in his views on constitutionalism, he also accommodates strong elements of political federalism in his views on the origin and functioning of the political community. A novel element in Huber's approach to sovereignty is his accommodation of the idea of republicanism within his constitutional theory. Generally speaking his theory of federal republicanism can, in a certain sense, be seen as the starting point of his constitutional law theory. Finally it has to be observed that Huber strove seriously to develop a theory that could intercept the most important points of criticism against the influential theories of his time. Whether he succeeded is one of the important questions to be answered from his work.

## 2. Ulrich Huber's federal republicanism

### 2.1 The origin of the state: from consent or force?

The first fundamental problem Huber deals with in the context of the nature of the state, is whether the state originated as a result of consent or force.<sup>12</sup> By way of introduction Huber observes that, apart from a desire for association and the dislike of confusion, the state originated from the sinfulness of man.<sup>13</sup>

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11 See Martin van Gelderen, *The political thought of the Dutch Revolt 1555-1590* (Cambridge, 2002).

12 I, II, I, Summary.

13 "Causam civitatis praeter desiderium societatis odiumque confusionis, fuisse malitiam hominum." In Book IV, chapter 2, paragraph 1[IV, 2,1] of his *The jurisprudence of my time* ([1686] 1768) Huber defines the "state" as "simply a body of citizens under a fixed government." The two component parts of a state, therefore, are citizens and the government. The "body of citizens" is understood to be "a people

The good people could not protect themselves unless many of them were united in such a way that there was unanimity amongst them.<sup>14</sup> Many people were also forced into a state and subjected to the authority of the state by injurious methods.<sup>15</sup> The method by which the powerful forced the weak into subservience is quite improperly called law. Huber therefore divides empires into voluntary and involuntary entities and adds that according to Graswinkel and other authors, state authority acquired from the people by means other than peaceful should be rejected.<sup>16</sup>

In his *De Jure Civitatis* Huber has a more positive view of human nature than Thomas Hobbes does — sanctity and universal justice<sup>17</sup> can be achieved if the people honestly persist.<sup>18</sup> If these qualities should disappear, then ambition, caprice and lust will take over.<sup>19</sup> Natural justice (also called the “dictates of reason” by Huber) provides man with the ability to distinguish between fairness and iniquity — man’s mind is filled with the desire for a society<sup>20</sup> and the choice

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united under a sovereignty for the enjoyment of common rights and a happy existence, while “people” means the “complete collection of a number of households.” In order to make a state the civic body must suffice in numbers and stability for protection against robbers and assassins” [*The Jurisprudence of my time* IV, 2, 3 [J IV, 2, 3]]. Where sovereignty is not found, to Huber, there is no civic body and no republic or state [J IV, 2, 6].

- 14 “Contra quam boni se tueri non poterant, nisi conjunctione multorum: & quidam tali, per quam omnium voluntas una fieret.” In his *Jurisprudence (J)* [IV, 1, 3], Huber states that it is manifest that even before the Deluge, “when man’s wickedness was at its zenith, republics or states and national governments must have been and undoubtedly were established, first by violence, at the hands of those so-called strong and mighty heroes, and later, or perhaps earlier by the union of households or of whole peoples for their common protection.”
- 15 “Plures tamen populos vi armata in civitatem & sub imperium, quâ qua jure injuriâ, fuisse redactos.”
- 16 IV, 2, 1 (28(Summary)): “Facultatem, quâ potentior imbecillioem cogit ad obsequium, improprie dici Jus. Divisio Imperiorum in voluntaria & involuntaria. Graswinkeleii & aliorum sententia, Imperium à populo ne quidem per modum causae secundae derivari statuentis, refellitur.”
- 17 In his *Jurisprudence (J)* [I, 1, 4] Huber relies on the classic definition of justice: “Justice is a virtue displaying itself in a steadfast resolve to give to every man his due.”
- 18 Note, however the remarks in his *J* [IV, 1, 6]: “We see too that in all ages up to the present day the stronger and more powerful were wont to conquer by force the less powerful, so that the state of mankind was and still is nothing but a perpetual state of war, and peace cannot be maintained except by mutual fear; so that it cannot but happen that a nation, which may be attacked without danger, would be subdued without delay by its more powerful neighbours; and no one can doubt that men who live by themselves, without a strong concatenation of armed forces, are a prey to robbers and tyrants. This is a thing so obvious that no proof of it is necessary.”
- 19 Book I, Section II, Chapter I, paragraph 1, page 28 (column 1) [I, II, 1, 1 (28 (1))]. “Sanctitatem illam justitiamque universam si homines integripertitissent, exacte implere potuissent. Sed ubi desciverunt, ambitio, avaritia, libido invasere.”
- 20 See his *J* [IV, 1, 9]: “(M)an is naturally of a gregarious habit, not only from a dislike of solitude, but because such a habit tends to mutual convenience and the provision of necessities, which in a bare union of households cannot be obtained or enjoyed.”

of things necessary for that purpose.<sup>21</sup> Without a fixed order confusion cannot be evaded.<sup>22</sup> This also entails that the wealth belonging to all cannot be bestowed upon everybody.<sup>23</sup>

Because of man's depravity and ferocity, the dictates of reason in particular are ignored.<sup>24</sup> Everybody desires to amount to as much as his strength will allow him. It is clear that there has to be an association of all in order to avoid wars.<sup>25</sup> An agreement not to cause harm to each other is not sufficient to remove the confusion.<sup>26</sup> A motivation and a condition are required whereby the desires of all can be unified,<sup>27</sup> otherwise a joint action to attain the common benefit cannot be reached.<sup>28</sup> To Huber, this union is called a republic<sup>29</sup> and a multitude unified in this way is called a state.<sup>30</sup> The unified desire to live together is nothing other than the state.<sup>31</sup>

Huber distinguishes three aspects of this desire or convention: firstly, that no-one cause harm to others; secondly, that there be one common plan; and thirdly, that the nature of this unity be fixed.<sup>32</sup> These aspects provide peace and determine the nature of the state.<sup>33</sup> There can be no doubt, says Huber, that the scattered people of old or at least some of them were gathered together in a single group.<sup>34</sup>

The Holy Scriptures and human experience indicate that many people were brought under the rule of others by force of arms.<sup>35</sup> This origin of the

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21 I, II, I, 2 (28(1)): "Adhuc quidem leges naturae, id est, dictamina rationis satis aequum ab initio separabant; Ineratque de rebus ad eam necessariis." States also come into existence because of voluntary association (see *J* [IV, 1, 15]).

22 This, to Huber, is the main reason for establishing national government (see *J* [IV, 1, 6]).

23 I, II, I, 3 (28(1)): "Sed quia sine ordine certo non poterat confusio evitari, Nec commoda universorum invicem communicari poterant."

24 I, II, I, 4 (28(1)-(2)).

25 I, II, I, 4 (28(1-2)): "Maxime, cum ob pravitatem feritatemque hominum, dictata rationis negligenterur, tantumque omnes valere vellent, quantum viribus possent; Palam est, opus fuisse ad bella evitanda conjunctione multorum." See also *J* [IV, 1, 11] for examples from Frisian history.

26 I, II, I, 5 (28(2)).

27 I, II, I, 6 (28(2)).

28 I, II, I, 7 (29(1)).

29 In his *Jurisprudence* [IV, 2, 7] he states that the word "republic" is often used for a people which is ruled by many and not by a prince; such peoples are also called "free peoples." He adds that in his *Jurisprudence* he uses the word "republic" in a wide sense, without giving any definition.

30 I, II, I, 8 (29(1)): "Haec est Unio illa, quam vocamus Rempublicam. Et multitudo hoc modo unita Civitas dicitur."

31 I, II, I, 9 (29(1)).

32 "Ergo voluntatis sive conventionis illius tres quasi gradus esse videntur. Primus, ne alii aliis nocent. II. Ut omnium Voluntas una fiat. III. Ut modus istius Unionis constituatur."

33 I, II, I, 11 (29(1)). Huber refers to Pufendorff's refutation of Hobbes's contract theory on this point.

34 I, II, I, 13 (29(1)).

35 I, II, I, 14 (29(1)). This is a second way of state formation (*J* [IV, 1, 15 & 16]).

state, although violent, need not be unjust (as in the case of those who attack others for more devious purposes) so that after the conquest they may be treated with fairness in their state of servitude.<sup>36</sup> They may even be killed if they kill other people first or if they commit some other crime which deserves death.<sup>37</sup> They may be deprived of everything they have because if it is acceptable to kill them they cannot be deprived of their property unfairly.<sup>38</sup> Consequently in terms of the law of conquest they can do with them what they like.<sup>39</sup> It often happens that in these types of government the pacts underlying them assume a different shape so that they become voluntary or at least mixed.<sup>40</sup> If the strong force the weak into servitude, however, this is a natural fact and not just a matter of what Hobbes thought it should be.<sup>41</sup> It is not a rule of the law of nature that those who are unsuited to freedom should be forced into servitude. The only reason for enforcement is that they are reluctant to obey even though they are born to serve.<sup>42</sup> It is not permitted to reason from aptitude to capacity and from probable reason to the perfect law, and neither is it permissible to deprive somebody of something held by him just because it is more suited to one's own needs.<sup>43</sup>

The great distinction between governments is that some of them are voluntary and the other involuntary.<sup>44</sup> The latter governments are imposed on unwilling people by war, or by some or other form of violence. The people are subdued by a greater necessity. These types of action are called "mixed" by the philosophers.<sup>45</sup> It was in this way that the people of Company were driven into extreme conditions by the Samnites: they therefore surrendered themselves, their city, their fields and all divine and human materials into the sway of the Senate and people of Rome.<sup>46</sup> These governments draw their origin from the consent of the multitude. They spring from God immediately, though, "because there is nothing in human affairs which can be called favorable".<sup>47</sup> There is a very obvious reason to the contrary which can be gauged from what has been said above. Not every reason is sufficient and if a nation should elect to retain self-rule they cannot be coerced into one or several groups. Things are stated in the Holy Scriptures and were either distorted in allegory or sought out in the Theocracy of the Hebrew people.

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36 I, II, I, 15 (29(1)): "Et poterat haec origo Civitatis, quanquam violenta, tamen esse non injusta. Nam qui alios hac gratiâ invaserant, si vincerentur, summo merito in servitutem agebantur."

37 I, II, I, 16 (29(1)).

38 I, II, I, 17 (29(1)). The reference here is to Cicero's *De Officiis*, Book 3.

39 I, II, I, 18 (29(1)).

40 I, II, I, 19 (29(1)): "Etsi plerumque fiat, ut ejusmodi Imperia pactionibus deinceps alium modum accipiant adeoque voluntaria vel saltem mixti generis evadant ..."

41 I, II, I, 20 (29(2)).

42 I, II, I, 21 (29(2)). Huber refers to Aristotle's *Politics*, Book 1, chapters 3 & 4. on this point.

43 I, II, I, 22 (29(2)).

44 "Summa igitur Imperiorum differentia est, quod *voluntaria* sint, aut *involuntaria*."

45 I, II, I, 25 (29(2)).

46 I, II, I, 26 (29(2)).

47 I, II, I, 27 (29(2)). The cause of national government is in God alone (*J*[IV, 1, 18]).

They indicate little more than that which was spoken of by the gentiles: Kings are from God.<sup>48</sup>

With reference to Holy Scripture, Huber observes that clearly nothing can be more certain than that government was instituted by the people<sup>49</sup> as stated by Peter the Apostle.<sup>50</sup> This is to a certain extent contradicted by Paul,<sup>51</sup> where he states that the government of the state is from God.<sup>52</sup> This is confirmed by the history of Saul's election.<sup>53</sup> The Hebrew people were governed directly by God in the time of the judges.<sup>54</sup> These judges were not empowered to rule by the people, but were in fact empowered by God. They later asked for a king, which God interpreted as desertion from Him and his direct rule. The people stated that they had the power to decide who was to rule.<sup>55</sup>

The express wish of the people to stabilise the authority of the state is not always evident. Often it is inferred after a lapse of time as would seem to happen in many aristocracies, such as those which are found in Belgium.<sup>56</sup> Such a grant of power is no less voluntary than that which is actually conferred.<sup>57</sup>

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48 I, II, I, 29 (30(1)). He refers to Pufendorf who refutes this statement with many arguments.

49 In his J [IV, 1, 19] it appears as if he holds the view that sovereignty is from God but the will to establish government from the people.

50 In his second epistle, chapter 2.

51 In his epistle to the Romans, chapter 13.

52 In Samuel, book 1, chapter 8. I, II, I, 39 (30(1)): "Prorsus enim nihil certius est, quam Imperium esse ... ut Petrus Apostolus docet ... cui minime contradicit Paulus ad Rom. XIII. Imperium civitatis à Deo esse docens."

53 I, II, I, 31 (30(1)): "Hoc etiam confirmat historia Saulis electi, apud Samuelem *lib. I. cap.8.*"

54 See J [IV, 1, 20]. Before Saul the Jews had magistrates appointed by God.

55 I, II, I, 32 (30(1)): "Populus Hebraeorum immeditè à Deo gubernatus erat sub Judicibus, qui non à populo imperare jubebantur, sed à Deo inspirati mittebantur, sed à Deo inspirati mittebantur. Postea Regem petierunt, quod erat immediatum, respui; Populumque se regiminis statuendi auctorem ferre declararet *d.I.I.c.8.*"

56 I, II, I, 33 (30(1)). This is made clear by custom.

57 I, II, I, 34 (30(1-2)). Graswinkel finds a divine origin for this law in the orders of Holland. Dirck Graswinckel (1600-1666) occupied the position of Fiscal of Holland. He was a talented statesman whose legal works awarded him an esteemed position amongst the Dutch jurists. He is lesser known as a poet, although his work on the Psalms is regarded as good. He also translated Thomas à Kempis's *Navolging Christi* (The Following of Christ). He was buried in the Groote Kerk at 's Gravenhage. His most influential work was *Nasporinge van het recht van de opperste macht toekomende de Edele Groot Mogende Heeren Staten van Holland en Westvriesland* (Rotterdam: Joannes Naeranus, 1667). This was a huge treatise in defence of the sovereignty of the States of Holland. It is divided into two parts of which the first is a theoretical treatise on the origins and principles of state power in general and its relations with its subjects. In the more interesting second part the author proves the sovereignty of the States of Holland and treats the relations between the provinces and the States-General. Graswinckel (or Graswinkel) was among the most prominent Dutch Lawyers of the seventeenth century and a strong supporter of republican government. He had assisted Grotius in Paris and acquired fame on his own account with many works on public and international law. This work was posthumously published by the author's widow.



It is true, however, that tacit acquisition of authority is often simply accepted as the supreme authority. Laws and exceptions (defences) are introduced by a special dispensation.<sup>58</sup> Finally the words of Hermogenianus<sup>59</sup> cannot be ignored: “The law of nations introduced wars, separate nations, established monarchies, distinct provinces, the boundaries of fields, the erection of buildings, the bringing about of commerce, trade and obligations.”<sup>60</sup> In these words, the origin of states is elegantly described in a historical and philosophical manner. Hermogenianus remarked: “At first in the world man was in a state of war in which nations clashed with each other of necessity, because they were not restrained by any state authority. In order to avoid this situation the people disengaged from the same progenitor decided to separate themselves into distinct nations.”<sup>61</sup>

The fact Huber wishes to emphasise is that, at first, man was in a state of war in which nations clashed with each other of necessity, and because they were not restrained by any state authority. In order to avoid this situation the people disengaged from the same progenitor, deciding to separate themselves into distinct nations.<sup>62</sup> In view of the fact that the people were not competent to avoid the confusion, or to conquer the wickedness of evil men, they established empires and monarchies. Therefore distinct authorities were created for the maintenance of peace. At first, these were established in an inchoate form.<sup>63</sup>

## 2.2 Huber on the nature of states and republics

Huber defines a state as the adequate collection of families associated for the sake of enjoying a life suitable to themselves under some higher authority.<sup>64</sup> The *collection* is described as perfect, not so much because nothing is lacking, but because their numbers and facilities are sufficient for their common defence.<sup>65</sup>

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In 1674 another volume followed, *A Special description of the supreme power of the States of Holland*.

58 I, II, I, 35 (30(2)).

59 He was one of the earliest and most intimate friends of Augustine, and his associate in literary and philosophical matters.

60 I, II, I, 36 (30(2)).

61 I, II, I, 36 & 37 (30(2)).

62 I, II, I, 37 (30(2)).

63 I, II, I, 38 (30(2)).

64 I, II, II, 1 (31(1)). Also see his *Jurisprudence*, IV, 2, 1, where he defines the “people” of the state as “a complete collection of a number of households.” In *J* [IV,1,4] it appears that Huber maintains the view that the earliest forms of government of humankind originated with the fathers of households. Man’s disposition to rule those over whom they have power asserted itself before as well as after the Deluge [IV,1,5]. In the course of time households joined forces. [IV,1,7]. See his *J* [IV, 1, 2], where he states that in order to discover the powers of magistrates and the rights of subjects, we must first see what a state and a government are. Also see his *J* [IV, 2, 1] for his definition of the state.

65 I, II, II, 2 (31(1)). Huber adds: “These ends cannot be achieved by a number of twelve people. Stated as a requisite by Apellius and the former writers including Bodinus as adequate for the establishment of a state according to them a state could consist of three families each comprising of four people.”

Because a state is made up of families, Aristotle calls a state a community of dwellings and families.<sup>66</sup> Following Bodinus, Huber does not feel that it is feasible that states can exist without families.<sup>67</sup>

To Huber the definition of a state includes the enjoyment of justice. This is of especial importance to those who constitute the state — they wish to enjoy their property and lives under the protection of the law, as they would otherwise have been exposed to wars and injuries.<sup>68</sup> *For the sake of a life adequate for them*: this is also from Aristotle, who believes that such a life is not available to anybody living outside a state in the desert.<sup>69</sup> Cicero's view that civic happiness is twofold is described as follows: a state is strong in resources, rich in assets, full of glory and famous in virtue.<sup>70</sup> This does not prevent a state from having despotic rule in which the people are subjected to the rule of a master.<sup>71</sup> Where there is a number of people gathered together to enjoy the protection of the law under the same authority, there is a state.<sup>72</sup> However, the mention of law and authority cannot be confined to the state because these words contain in themselves references to the republic from which the state is derived.<sup>73</sup> Huber quotes classical sources to make the point that the state differs from the republic in the same way that the body differs from the soul.<sup>74</sup> This is tantamount to saying that a state should exist under a specific authority without which it cannot exist.<sup>75</sup>

In Huber's definition there is mention of the supreme power<sup>76</sup> — this can only happen where the state does not exist in itself but forms part of another

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66 I, II, II, 3 (31(1)).

67 I, II, II, 5 (31(1)). See his *J* [IV, 2, 3]. Huber observes: "Bodinus is of the opinion that this is not possible. Clearly this would be difficult. There is no possibility for me to say. I have seen the Roman state before there was an institution like marriage and consequently no families. There are colonies in which generations enjoy no succession. If this was given to their subject peoples they could become states. This is not so absurd to me as the fact that the Roman clerics who have no families may be regarded as a state. A republic is a number of people even if they occupy no territory, which have an order of obedience and command, under one supreme power by means of officials" (I, II, II, 5 (31(1))).

68 I, II, II, 6 (31(2)). Civic bodies combined in order to enjoy rights in common (see *J* [IV, 2, 4]).

69 I, II, II, 7 (31(2)).

70 I, II, II, 8 (31(2)). Huber observes: "From this same: Aristotle arrives at the conclusion that the community of a state is not available to slaves, because the condition of servitude is far from blessed and is more of a condition of punishment" (I, II, II, 9 (31(2))).

71 I, II, II, 10 (31(2)): "Quod tamen non impedit, quominus *despotica imperia*, in quibus herili potestati homines subjiciuntur, rectè Civitates dicantur, ut disputavimus contra Grotium *lib. I. Digress. Cap. 15.*"

72 I, II, II, 13 (32(1)): "Potius, ubicumque multitudo est, *juris fruendi causâ sub eodem imperio sociata*, ibi civitas omnino statuenda est." See *J* [IV, 2, 4 & 5].

73 I, II, II, 14 (32(1)).

74 I, II, II, 15 (32(1)).

75 *Ibid.* Also see *J* [IV, 1, 1ff.].

76 See *J* [IV, 2, 6].

state even if it has a distinct conformity.<sup>77</sup> A republic is defined as consisting of an order of state, the rule of the supreme power and the subjection of others by means of officials.<sup>78</sup> Huber feels that it is clear that “a republic differs from a state like a chorus from the strings or the soul from the body”.<sup>79</sup> Wherever there is such an order a state exists, just as a body exists wherever there is a soul. Where there are several such arrangements several states and republics are understood to exist.<sup>80</sup> Consequently the Swiss, Belgian and German empires consist not of a single state but of several states.<sup>81</sup> These federations have something in common with a council of delegates such as the Belgian States General. It is not one single supreme body, but several supreme bodies. It does not govern all the states yet the laws of each are jointly formed.<sup>82</sup> Consequently it is not feasible to argue that the dignity of assembly of all the states does not exceed the dignity of each single state. This applies specially to Belgium.<sup>83</sup> The delegates can each represent his own state so that the assembly of all the delegates is greater than each individual delegate. The dignity of the assembly must be preferred to the dignity of the individuals: note that it is dignity and not power.<sup>84</sup> The following are important implications from Huber’s perspective:

- The supreme power is vested in one single entity but the subjection of the inferior powers is not the same.
- Consequently the empires of Spain and Great Britain should not be understood as single states but as several.
- The kings, tyrants and emperors may be legitimate, as in the case of Philip II of Belgium.
- Similarly it is possible that an emperor may be free and supreme, yet in another sense subjected to someone else.<sup>85</sup>

### 2.3 The basis and efficacy of authority in a democracy

From the definition of a republic Huber infers that the entire public law consists of the rights of rulers and those of subjects.<sup>86</sup> On the one hand some people would like to extend the power of the rulers infinitely and to subject the entire human race to their whims like slaves or even animals as if this can be done

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77 I, II, II, 16 (32(1)).

78 I, II, II, 17 (32(1)). Also see *J* [IV,2,7 & 8].

79 I, II, II, 18 (32(1)): “Unde liquet, Rempubl. differre à Civitate; vel ut concentum à chordis, vel ut animam à corpore. ....” See *J* [IV,2,9].

80 I, II, II, 19 (32(1)): “Ubicunque igitur talis ordo, ibi civitas existit; aequae ac corpus, ubicunque anima est. Ubi plures ejusmodi ordines, ibi & plures civitates ac Respublicae intelliguntur.” See *J* [IV, 2,10].

81 I, II, II, 20 (32(1-2)). See *J* [IV,2,11].

82 I, II, II, 21 (32(2)). See also *J* [IV,2,12].

83 I, II, II, 22 (32(2)).

84 I, II, II, 23 (32(2)).

85 I, II, II, 24-28 (29(2)-30(1)).

86 I, II, III, 2 (33(1)). Note his definition of a state at *J* [IV,2,1].

lawfully.<sup>87</sup> Similarly Hobbes wants the people to be disposed towards their rulers as flocks of sheep and herds of cattle are disposed towards their herdsmen.<sup>88</sup> Others regard the rulers as nothing more than the servants of the people.<sup>89</sup> Yet others go to the trouble of finding a way, somewhere between harsh civic brutality and unbridled licentiousness of the rulers, which would be safer or less harmful.<sup>90</sup>

Huber observes that the constitution of a state is nothing other than a retreat from the natural state.<sup>91</sup> Consequently, when a people find themselves under the authority of a power (or non-violent authority) the condition should be stated according to which they desire to retreat from nature.<sup>92</sup> Only as many powers are transferred to those in authority as the people are willing to transfer to them.<sup>93</sup> According to other authors the people never transfer their rights to their rulers: they only transfer a single right or several rights for the exercising thereof.<sup>94</sup> According to Huber, Hobbes decides on the same principle that citizens who transfer authority unconditionally only transfer such powers to their rulers as they are able to without making an exception.<sup>95</sup> They are not in a position to withhold anything because the union of authority and single wish is created. There can be no clash or discrepancy in their wishes.<sup>96</sup> Because the people have transferred their authority to a single individual or to a council, they cease to be a unity or a body. They are individuals and the multitude is dissolved. Consequently men cannot transfer any right which is the attribute of a competent person. This cannot be ascribed to the people

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87 I, II, III, 3 (33(1)): "Dum alii potestatem imperantium in infinitum extendentes, genus humanum libidini paucorum, ut mancipia, imò ut bruta animalia, tanquam jure, subjiciunt." See *J* [IV,2,1].

88 I, II, III, 4 (33(1)). He refers to Zenophon who said: "The flocks go to where their herdsmen lead them. They abstain from which they are turned away. The herdsmen allow them to participate of the fruit proceeding from themselves to the extent that they wish them to do" (I, II, II, 3 (33(1))).

89 I, II, III, 9 (33(2)-34(1)). Note *J* [IV,3,1].

90 I, II, III, 10 (34(1)).

91 I, II, III, 17 (34(2)). See *J* [IV,3,6]. At [I, II, II, 11] Huber says: "The greatest difference is to be found between governments by violence and by consent." He adds: "According to the law of nations, the vanquished together with their property fall under the power of the victor. This is also the position in terms of the law of nature. As long as the war had a just cause." At [I, II, II, 12] he continues: "As long as the victor control the vanquished with lures and terror both of them remain in a state of war and everything is permissible for both of them. Where, however, the vanquished accept the rule of the victors, as frequently happens and they are received into their confidence. Then pacts have been entered into which doubtlessly have to be observed."

92 I, II, III, 18 (34(2)): "Unde liquere videtur, in cujusque populi potestate fuisse (loquimur, si hoc opus est repeti, de imperiis non violentis) modum statuere, quatenus à Naturalibus recedere vellent." According to *J* [IV,3,5] the only possibility besides the three forms of government is the state of nature.

93 I, II, III, 19 (43(2)): "Tantumque juris in Imperantes fuisse translatum, quantum populus in eos transferre voluit." See *J* [IV, II, 6].

94 I, II, III, 20 (34(2)).

95 I, II, III, 21 (34(2)).

96 I, II, III, 22 (34(2)).

once the authority has been transferred.<sup>97</sup> Diametrically opposed to this is the view, Althusius states, that sovereignty is an attribute of a universal association, that people cannot transfer or alienate it even if they want to do so, no more than they can share the lives they enjoy with somebody else.<sup>98</sup> Huber, however, in order to reveal clearly the nature of this matter, looks at the state of government which least departs from nature: this is the democracy, where the right to govern rests on the people as a whole.<sup>99</sup> Huber calls this the closest to nature not because it was founded by man in his departure from the natural state prior to monarchy (which is denied by the historians), but because in a democracy there is a lesser departure from liberty and the natural equality than in the other forms of government.<sup>100</sup> Its form is an agreement of everybody with everybody which, in short, consists of the following: that which is decided by the majority is binding on everybody.<sup>101</sup> This is in perpetuity, because they knew that when they departed from the common authority nobody could be sure of his own safety.<sup>102</sup> Everything would go from bad to worse, and this was clearly not acceptable to them.<sup>103</sup> Many people should have the right to vote, or the measures taken for the community will be purposeless.<sup>104</sup> That which many people desire should be approved of by all. Therefore, it should be nothing less than the wish of the entire nation.<sup>105</sup> To Huber this indicated very clearly that once the majority has voted it is not necessary to wait until the minority has made known its opinion.<sup>106</sup> In such a consensus of the people who wish to preserve liberty, says Huber, it is easy to infer that in a democracy the conditions of all are the same, as are their hopes and considerations. Nobody will be outvoted any more than he can outvote.<sup>107</sup> There can be no doubt, says Huber, that those separated will make known their consent in all matters pertaining to the safety and welfare of the community which might adversely affect the interests of the few. But the interests of the community cannot progress unless they can supercede the interests of the individual.<sup>108</sup> This goes so far that neither the life nor the property of an individual may be spared if the interests of the community are at stake.<sup>109</sup> The consent of the human race is beautifully illustrated in the following quote: "A citizen is judged according to his willingness to expose his life and property in the interests of the fatherland."<sup>110</sup> Consequently if such an event occurs then the visitation of fate suffers no injury because he

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97 I, II, III, 23 (35(1)).

98 He refers to Althusius on this point. I, II, II< 24 (35(1)).

99 I, II, III, 25 (35(1)). Note *J* [IV,3,6].

100 I, II, III, 26 (35(1)).

101 See *J* [IV,3,6 & 7]. Such an undertaking is without limitation of time.

102 See *J* [IV,3,7 & 8].

103 I, II, III, 27 (35(1)).

104 I, II, III, 28 (35(1)).

105 I, II, III, 28 (35(1-2)). Note *J* [IV,3,9].

106 I, II, III, 30 (35(2)). He refers to Dionysius of Halicarnassus.

107 I, II, III, 31 (35(2)). See *J* [IV,3,10].

108 I, II, III, 32 (35(2)). See also *J* [IV,3,16-20] for the exceptions.

109 I, II, III, 33 (35(2)). Compare *J* [IV,3,15].

110 He refers to Grotius for support.

suffers something adverse without having deserved it. He gave his approval with all the others, so consequently, he is not allowed to resist the majority of the people.<sup>111</sup> To Huber it makes no difference whether the people were right or wrong in their decision when it comes to its enforcement.<sup>112</sup> A judicial dispute regarding this matter must of necessity result in confusion which is an evil which the citizens desire to evade most of all.<sup>113</sup> If anybody, therefore, consents to what has to be done in principle, he cannot later disapprove thereof. On this basis Huber considers that banishment in the old Roman Republic may be defended.<sup>114</sup> Huber explains the implications of this principle in more detail. The basis of this rule provides that a judgment which has been given is considered correct. Even if a magistrate gives a wrong decision he still passes a valid judgement. All citizens must abide by such judgements, whether right or wrong, as there is no appeal against them. Otherwise, says Huber, there will be no end to litigation. The same applies to all measures taken by government.<sup>115</sup> However, there is one exception to this rule: "If the majority openly acts in a way which would persistently subdue the minority and deprive them of their property, they obviously by law are allowed to resist the majority."<sup>116</sup> Neither did they consent to that which, once a state has been established, they unanimously sought to evade and which would have destroyed the people of that state forever.<sup>117</sup> This is no different from somebody who, under public protection, enjoys his life and property in safety. He asks that nothing more should be taken away from him than that which is necessary for the continued existence of the community.<sup>118</sup> What is more, says Huber, anybody can on the strength of that agreement be called upon to suffer death or open injury through violence without a vote being taken and without judgment.<sup>119</sup> But seeing that people are scared of death, it cannot be said, when the state was first established by a common agreement whereby a smaller part of the community is bound to the desires of the majority, that this agreement extends to death without any cause and without any due process of law.<sup>120</sup> The general rule formulated by Huber is that the founders of the state never desired that an injury caused to the property of anybody individually presented a reason for breaching the covenant and a proliferation of war.<sup>121</sup> Huber, therefore,

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111 I, II, III, 34 (35(2)).

112 See J [IV,3,12-15].

113 I, II, III, 35 (36(1)). He adds: "Neither should a different approach be taken. Even malice can be detected on the part of the majority against certain individuals. This often happens in the case of particular democracies. Before this happens to anybody it should be decided whether it is better to dissolve the empire rather than allow this to happen." Huber also warns against hesitation because in that event a reason to dissolve the association will be lacking.

114 I, II, III, 37 (36(1)).

115 I, II, III, 38 (36(1)).

116 I, II, III, 39 (36(1)).

117 I, II, III, 40 (36(1)-(2)).

118 I, II, III, 41 (36(2)).

119 I, II, III, 42 (36(2)).

120 I, II, III, 44 (36(2)).

121 I, II, III, 45 (36(2)).

concludes that in a democracy or a rule by consent, individuals are required to bear the injuries caused to the entire people.<sup>122</sup>

One might argue and raise the objection that a minority can always plead one of the exceptions mentioned and under that pretext destroy the value of that covenant.<sup>123</sup> Huber replies: "It is useless to dwell on all these opinions as Livy said. I do this to provide bounds for sane judgment and not to exclude all malicious distortions which can in no way be accomplished."<sup>124</sup> These two exceptions have a bearing on matters and conduct which alone have a bearing on the law, as mentioned by Cicero: "The legislature only takes notice of such matters as may be touched by hand."<sup>125</sup> Obviously this does not apply to opinions of the mind or the authority of the state and majority consent.<sup>126</sup> Much less does it apply to that which God expressly commits or writes in our hearts with His own Hand, or which He wrote in the Holy Scriptures.<sup>127</sup> Citizens are allowed to withdraw if they regret having formed the existing society. They can go somewhere else.<sup>128</sup> Finally, Huber feels that it should be noted that up to now only a covenant entered into unconditionally has been dealt with. If conditions were added, they would be valid.<sup>129</sup>

## 2.4 The covenant between the rulers and the subjects

In opposition to the philosophy of Hobbes, Huber distinguishes a covenant between the rulers and the subjects, which he explains in terms of the nature of the democratic state.<sup>130</sup> Hobbes denies that it is possible for rulers to cause injury to or betray their subjects, on the basis that they are not bound by any covenant in that the state consists of an agreement of individuals with individuals and not with the majority or with the rulers. This Huber refutes by quoting the covenant whereby democracies are constituted in which all are bound as a group and individually. This, to Huber, is particularly the position where the contracting parties belong to the majority and consequently to the rulers. Huber concludes that in a democracy there is an obligation in a twofold respect: one amongst individual citizens and the other by those who are in the majority with their inferiors. The majority are not bound in any respect, except by that which has tacitly been excluded or expressly formulated in the agreement as stipulations.<sup>131</sup> Huber states that it follows from these principles that a state, which represents the majority part of the population, may be guilty of causing an injury to individuals for natural reasons: he who without valid reason oppresses and robs somebody commits an offence in terms of

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122 In his *J* [IV,16-20] Huber allows for certain exceptions to this rule.

123 I, II, III, 47 (36(2)).

124 I, II, III, 48 (36(2)-37(1)).

125 I, II, III, 49 (37(1)).

126 I, II, III, 50 (37(1)).

127 I, II, III, 51 (37(1)-(2)).

128 I, II, III, 52 (37(2)).

129 I, II, III, 53 (37(2)). He explains this later.

130 The rulers are the servants of the people. See *J* [IV,4,13 & 14]. Also compare [IV,5,1].

131 I, II, IV, Summary.

the dictates of right reason. These dictates, while they are law and binding on people, cannot be anything other than an injury.<sup>132</sup> The majority may be liable to the minority not only for an injury but also for treason.<sup>133</sup> That which transgresses the intention and good faith of an agreement, cannot but be called treason — a republic is after all, constituted for the lives and property of all. This convention can be either violated or upheld,<sup>134</sup> so that it has the following character: as far as conscience is concerned, insofar as anybody deals maliciously he does not act in accordance with good faith. This is true in respect of unjust conduct of whatever nature.<sup>135</sup> When they go beyond the boundaries of the powers received from others it is a nullity<sup>136</sup> When somebody decides upon some wicked conduct it is a nullity according to the law.<sup>137</sup> Hobbes maintains that there is no agreement between a few and many if together they constitute a body. It is an agreement of individuals with individuals. However, many people, seeing that they are not regarded as individuals have acquired the right of all to vote therefore they are not held liable in terms of the agreement.<sup>138</sup> In fact nothing can be attributed to the wishes of a single individual after an agreement to save many has been entered into.<sup>139</sup>

To Huber a democratic covenant is of the following nature: individual citizens contract with each other in the following way: “Do you promise to obey that which the greater part of the population decides upon?” “I promise. And do you in turn promise?” He likewise promises. In this way the entire population is joined together, and from the time of the fusion there is no longer a majority.<sup>140</sup> Whatever the decision of the majority entails is a matter which everyone has to decide for himself. Whatever the majority decides, everyone is considered to have decided himself. Consequently if something very harsh has been decided everybody has to impute it to himself, as much against himself as against others. Of course, an agreement entered into by a majority which was not valid at the time it was entered into, cannot be violated by the majority.<sup>141</sup> To this Huber replies that an agreement of individuals entered into with individuals has in mind the defence of the community, which the contracting parties have in mind for themselves. This is valid and no one should deny it. This condition, no less than the agreement itself, must be upheld by individuals. To that extent the public welfare, which is often against the interests of an individual, provides the motivation.<sup>142</sup> There can be no doubt, says Huber, that the reciprocal obligations entered into are made with a view to the purpose for which the stipulations are made, namely that the vote concerns

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132 I, II, IV, 1 (37(1)).

133 I, II, IV, 2 (37(2)).

134 I, II, IV, 3 (37(2)).

135 I, II, IV, 4 (37(2)-38(1)).

136 I, II, IV, 5 (38(1)). He adds: “This is understood in those matters which form the basis of the exceptions dealt with.”

137 Ibid.

138 I, II, IV, 6 (38(1)). Note *J* [IV,5,13ff.].

139 I, II, IV, 7 (38(1)).

140 I, II, IV, 8 (38(1)).

141 I, II, IV, 9 (38(1)). See *J* [IV,4,10].

142 I, II, IV, 10 (38(1)-(2)).



matters of common interest for which the people were called together.<sup>143</sup> When it comes to voting, nobody is in the majority who does not, in terms of the contract, bind the rest to himself.<sup>144</sup> This is particularly the position where he himself happens to be part of a superiority of numbers.<sup>145</sup> Where nobody is free from the contract, where everybody ought to be bound, no legal rule will allow anybody to evade the bond of personal faith whereby everybody is bound for the sake of the totality.<sup>146</sup> There is no doubt that where the people debate the common safety every individual binds himself to the other individuals to lend support to the common welfare to the utmost of his ability.<sup>147</sup> Seeing that nobody is free from this agreement it follows of necessity that the entire association is bound thereby, which will include those who were superior in numbers when the vote was taken.<sup>148</sup> One might argue that those in the majority are liable to the others in the case of deceit, or whenever they act wickedly, and consequently the consent of the majority can always be nullified under the pretext of deceit. But this must be understood which is in the science of law well known: law is something external, which requires people to be obedient. Those in a superior position are under an obligation:<sup>149</sup> “They are connected ... like the power which a father has over his children or an official over the citizens.” This originates from a previous consent as Huber has pointed out in the chapter dealing with the covenant.<sup>150</sup>

To Huber a twofold treachery is committed whenever the majority who are evilly disposed towards the others, cause injury to them. Perfidy does not have the effect of breaking the covenant.<sup>151</sup> But when evil is done in breach of those exceptions a right to resist is granted.<sup>152</sup> This does not have the effect of breaking of the covenant. When evil is done in breach of the exceptions already mentioned, the right to resist is granted.<sup>153</sup> If there is no concern for the covenant between the consenting majority and the rest, says Huber, then it is a good question as to what prevents the majority from dissolving the state should they wish to do so. Hobbes says they have no such power and he quotes the force of an original covenant.<sup>154</sup> From this it is clear that in any contract there are two parties. This is clear in the exercising of the democracy, a majority which harbours the same sentiments (even if the majority was not liable previously) and the rest called the minority.<sup>155</sup> If those who are superior in numbers commit brigandry they can justifiably be called deceitful and criminal. Consequently not one of those belonging to the minority

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143 I, II, IV, 11 (38(2)).

144 I, II, IV, 12 (38(2)).

145 *Ibid.*

146 I, II, IV, 13 (38(2)).

147 I, II, IV, 14 (38(2)).

148 I, II, IV, 15 (38(2)).

149 I, II, IV, 16 (38(2)).

150 *Ibid.*

151 I, II, IV, 17 (38(2)).

152 I, II, IV, 17 (38(2)).

153 I, II, IV, 17 (38(2)-39(1)).

154 I, II, IV, 18 (39(1)). The reference is to Hobbes chapter 6, paragraph 20.

155 I, II, IV, 19 (39(1)).

is liable in terms of the original promise.<sup>156</sup> Apart from the examples mentioned above, there is no other instance in which the minority may oppose the majority. If this is allowed it will allow the people to recede into that confusion which they sought to avoid by bringing about the state.<sup>157</sup>

### 3. Democratic government and the sovereignty of the people

#### 3.1 The powers enjoyed by the majority in a democratic state

By way of introduction Huber observes that the powers enjoyed by the majority in a democracy are also enjoyed by the aristocracy in an oligarchy, as well as by the emperors. The hypothesis is postulated that the people governed by a democracy may be transferred to a single ruler or to a few rulers once the people grow tired of the confusion. So if the people no longer want to come together and wish to transfer the capacity to rule, the capacity to rule remains the same as it was in the hands of the transferors. The surrogated has the same powers as the surrogators. Once the rights have been transferred the change concerns only the locality and the people in whom those rights are vested. Consequently, where nothing is said, from which one man understands something, the people have merely changed the services of those which they wanted to use in certain minor tasks. In this sense then, what is changed is not the right to rule, but the way of going about it. Consequently where sovereignty has been transferred, a single ruler or a small group have no greater powers than does the entire populace, and which are enjoyed by the majority in a democracy. This view is supported by many, says Huber. The fact that the people delivered themselves into the slavery of a single individual or of a few, cannot be assured where there is doubt. The subjection of the ruler and the subjects to one another is refuted. Popular sovereignty, has throughout the ages been full of confusion and turmoil.<sup>158</sup> In order to avoid this many authors preferred to transfer the right to rule to certain people.<sup>159</sup> This is the origin of aristocracy and monarchies.<sup>160</sup> Although Huber states that it is not the place or occasion to determine which system is the best, he refers to “that great theologian Calvin” who in his treatise on theology<sup>161</sup> praises all forms of government, “but he considered those people blessed who are

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156 I, II, IV, 20 (39(1)).

157 I, II, IV, 21 (39(2)). Huber states: “Add thereto: unless at the constitution of the Republic other matters were expressly stated which will not be subjected to the vote.” This should rarely happen in the democratic state, because apart from the people there is no other order against which this multitude should arm itself (I, II, IV, 24). However, no single order of a people should be changed or violated by the officials. In a government by consent this should be expressly provided for (I, II, IV, 25).

158 For Huber’s definition of sovereignty, see *J* [IV,6,1 & 7,1; 7,21].

159 Note *J* [IV,4,1 & 2 & 3].

160 I, II, V, 1 (40(1)).

161 I.e. his *Institutes*.

allowed to enjoy an aristocracy.” That is no infringement of the monarchical powers which have their origin in the principate, however.<sup>162</sup> He adds: “I should like to request the reader to reserve his judgment a little until such time as I have dealt with all these questions for him to see. Then he will be in a position to compare the last with the first. Then he will realise that he should not adore rulers or to oppose the free people who have in mind to conduct their own affairs in the best way possible.”<sup>163</sup> The people in a democracy transfer their rights to a few people unconditionally. Their sovereignty rests on the consent of many.<sup>164</sup> In a democracy the aristocratic rulers are unconditionally established and accepted by the people.<sup>165</sup> The essence of popular government is vested in the desires and consent of the majority to which the minority is subject.<sup>166</sup> Some might argue that the total populace is stronger than the majority. Sovereignty in a popular state can only be found in the prerogatives of the majority expressed in their wishes.<sup>167</sup> The people, though, being tired of all the discourse which levels the democracy, stop fighting at the ballot box. They unconditionally transfer their sovereignty to other people and reserve nothing for themselves.<sup>168</sup> They never discuss the republic; and furthermore, they or appointed officials never convene for that purpose.<sup>169</sup> They have therefore resigned their sovereignty. They have lost the one simple basic reason they had for exercising their rights. A power which is never exercised is not a capacity.<sup>170</sup> Consequently it can never be said that the people have forfeited the exercising of their rights to the aristocracy, because they are free to remove or curtail this mandate.<sup>171</sup> Huber adds: “It is customary in democracies for the people to reserve their sovereignty, but to entrust insignificant and daily tasks to officials. The people reserve their sovereignty in their own assemblies.”<sup>172</sup> An example of the unconditional transfer of sovereignty into the hands of the nobility can be found in the Republic of Venice where the highest authority is vested in the aristocracy or Great Senate, while originally it had belonged to the entire populace.<sup>173</sup> Huber adds the following example: The population never convene for matters pertaining to the republic. In Holland, the Senate of the cities has all the power. The ordinary people never deal with public affairs unless it is by way of sedition.<sup>174</sup> When this power is lost or abdicated

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162 I, II, V, 2 (40(1)).

163 I, II, V, 3 (40(1)-(2)).

164 I, II, V, 4 (40(2)).

165 I, II, V, 5 (40(2)).

166 I, II, V, 6 (41(1)).

167 I, II, V, 7 (40(1)).

168 I, II, V, 8 (41(1)).

169 *Ibid.*

170 I, II, V, 9 (41(1)).

171 I, II, V, 10 (41(1)).

172 I, II, V, 11 (41(1)).

173 I, II, V, 12 (41(1)). Compare *J* [IV,4,16].

174 I, II, V, 13 (41(1)). At I, II, V, 14 Huber adds one more example from Friesland where sovereignty vests in a few owners of certain tracts of land: “They may be numerous, but they are still a minute part of the people. This was achieved with the tacit consent of the people. They were never counselled in any way. In the entire republic the people never convened to discuss public matters.”

it can never be elsewhere than in the hands of others to whom the people have assigned it, whether expressly or tacitly, but which may be seen and experienced.<sup>175</sup> This person or persons can never have less or more powers than what was decreed by the people by way of a vote on sovereignty.<sup>176</sup> The people enjoy the power to limit the powers of the aristocracy in whatever way they decide.<sup>177</sup> Consequently in this regard two measures for limiting these powers should not be ignored:<sup>178</sup> “Firstly, that which I have said already. That transfer of authority by consent is not always as clear cut and crisp as they might think. It often happens that sufferance and protracted silence are accepted silence.”<sup>179</sup> Huber continues: “Thereupon the legal argument which leads from the democracy to the aristocracy is under discussion. As often as I deal with the transfer of sovereignty, I shall briefly state whether it can be done at all and subject to what condition this takes place.”<sup>180</sup> This applies to the oligarchic states. There is no controversy about the fact that whatever the leaders do, is considered done by the people as a whole. This also applies to the people tacitly or expressly abdicating their rights.<sup>181</sup> But the law provides equally that the people may surrender themselves to the ruler and transfer all their rights to the king. This happens where the king is appointed unconditionally, for example the Romans in terms of the *Lex Regia* and more recently the Danes, who failed to negotiate rights for themselves and had no intention to convene.<sup>182</sup> The alienation and transfer of rights to an individual or several people can have no other outcome.<sup>183</sup> From this it could be inferred that it is false to say that the people as a whole are more powerful than the ruler or that the king has greater power than individuals<sup>184</sup> yet is subject to the people as a whole.<sup>185</sup> With these arguments Huber tries to refute the statement that the populace as a whole is greater than the majority. These remarks apply, however, to governments founded by consent and not governments founded on violence or the right of warfare.<sup>186</sup> This is not only absolute rule but also extends to the property and bodies of the citizens.

Huber observes that the great majority of people do not find it strange or unusual that the nobility should have the rights of the entire nation. Consequently they can endure being deprived of that facility in monarchies.<sup>187</sup> The same consideration applies to the few and to individuals, namely that supreme power is transferred to them unconditionally.<sup>188</sup> Huber makes the following

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175 I, II, V, 15 (41(2)).

176 I, II, V, 16 (41(2)).

177 I, II, V, 17 (41(2)).

178 See I, II, V, 18 (41(2)).

179 I, II, V, 19 (41(2)).

180 I, II, V, 20 (41(2)).

181 I, II, V, 21 (41(2)).

182 I, II, V, 22 (41(2)-42(1)).

183 I, II, V, 23 (42(1)).

184 See J [IV,5,13ff.].

185 I, II, V, 24 (42(1)). See J [IV,4,10].

186 I, II, V, 21 (41(2)).

187 I, II, V, 28 (42(1)). Compare J [IV, 4, 10ff.].

188 I, II, V, 29 (42(1)).

important observation: “If anybody should think that sovereignty is a commodity of such a nature that it cannot be alienated, he should consider that an entire nation may surrender itself to public servitude, committing everything, their bodies and their possessions, to the ruler. History records instances where entire nations in fact did this.”<sup>189</sup> According to Hebrew and Roman law, individuals have this power and the entire nation consists of a number of individuals. As Huber comments:<sup>190</sup> “In fact we learn from these examples that there are nations who cannot have nor wish to have a more gentle rule.”<sup>191</sup> However, Huber freely concedes that taken generally, it is safe to assume that a free people would not wish to enslave themselves to harsh servitude.<sup>192</sup> To Huber there can be no doubt that people would like to have their personal integrity and safety of their property free from governmental control except where it is in the interest of the public welfare.<sup>193</sup> To serve those interests they are prepared to support the government, and it is hardly credible that they would sacrifice these interests in order to have a government.<sup>194</sup> Huber observes that it seems to be firm law that government must be conceded to one or to a few people with supreme or absolute authority, excepting for personal freedom and the ownership of property, not only over individuals but over entire nations. He qualifies thus: “(S)ubject to the limitation I have mentioned.”<sup>195</sup> Huber accepts that this form of authority, whereby individuals and whole populations are bound, applies to the minority in a democracy, “and I say that it also applies to oligarchic where there are great numbers of rulers as obtains today in Venice and Friesland.”<sup>196</sup> Huber states that there is no doubt that the Venetian patrician Senate enjoys the same powers as those enjoyed by the majority when the state was governed democratically.<sup>197</sup> In Friesland the authority of the entire population is vested in the owners of the ancient estates. That which the owners of the estates decide concerning the public interests, has the same validity as the decisions taken by the majority once the vote has been taken. This is the custom in all states where the authority is vested in a great multitude, even if they are called aristocracies.<sup>198</sup> This controversy arises whether the supreme power is held by one individual or by a few. The argument is that people are jealous and not used to obedience; therefore they are often driven in the opposite direction.<sup>199</sup> To Huber the nature of the obligation remains the same in all the various types of state which have been established unconditionally.<sup>200</sup>

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189 I, II, V, 30 (42(1)). He cites Grotius for support of this principle.

190 I, II, V, 31 (42(2)).

191 I, II, V, 32 (42(2)). He quotes Justinian, Tacitus and Grotius.

192 I, II, V, 33 (42(2)).

193 I, II, V, 34 (42(2)).

194 *Ibid.*

195 I, II, V, 35 (42(2)).

196 I, II, V, 36 (42(2)).

197 I, II, V, 37 (42(2)).

198 I, II, V, 38 (42(2)-43(1)).

199 I, II, V, 39 (43(1)).

200 I, II, V, 40 (43(1)).

The point that sovereignty may be surrendered by a people is strongly brought home by Huber — if anybody should think that sovereignty is a commodity of such a nature that it cannot be alienated, he should consider that an entire nation may surrender itself to public servitude, committing everything, their bodies and their possessions to the ruler. The covenant entered into by individuals in a democracy where they promise to obey the majority, applies in a different form to the decrees of the Emperor and the Aristocracy, yet still applies, though tacitly.<sup>201</sup> People cannot otherwise achieve their desires unless the wishes of all, as far as matters of public interest are concerned, are unified. In his *De Jure Civitatis*, Huber considers that the wish of the ruler originates from the people as a single unit and the wish of the entire populace.<sup>202</sup> Whether the promise to obey is made to many, few or a single individual cannot add to or detract from the obligation.<sup>203</sup> Furthermore, if someone tacitly transfers his rights he clearly deprives himself thereof. Those rights are excluded which the people either tacitly or expressly refuse to transfer.<sup>204</sup> Those who feel differently, who wish the people always to be superior to their rulers, where authority has been created unconditionally, give power to the rulers, not only by prescribing new laws, but by calling the rulers to task, removing and punishing them as if they were their servants.<sup>205</sup> A ruler may exercise his power well or badly but he is always within his rights, unless he has an evil intent, and causes harm to somebody or meddles in someone's affairs without his consent.<sup>206</sup> In this way the revolt of the tribunes in Rome was part of the external law. Had this happened in any other nation not equal to the Romans in gravity, everything would have been in turmoil. With the republic in their power and subject to their discretion, the rulers are servants of the people and do nothing more than exercise their own powers even if it is bad.<sup>207</sup> On the same basis the opinion of those who wish to have a reciprocal subjection between the people and the rulers is rejected. Therefore the people as a whole should show obedience to those rulers governing correctly and those governing badly should be subject to the people.<sup>208</sup> These matters, however, cannot take place other than by a violent upheaval. Consequently the same authors state that the people have a right to resist their leaders and that a revolt initiated by the majority of the people is lawful even if it has unlawful results.<sup>209</sup>

In the limitation of authority there can be no conditions which stir up confusion. Those controversies concerning the future, whether the matters of the state have been conducted well or badly, will not be decided otherwise than by the sword.<sup>210</sup> The authority over the tumultuous camp at Troy which

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201 I, II, V, 41 (43(1)). Compare *J* [IV,4,13-15].

202 I, II, V, 42 (43(1)).

203 I, II, V, 43 (43(1)). See *J* [IV,4,18].

204 I, II, V, 44 (43(1)).

205 I, II, V, 45 (43(1)-(2)). See *J* [IV,5,1ff.].

206 I, II, V, 47 (43(2)).

207 I, II, V, 48 (43(2)).

208 I, II, V, 49 (43(2)).

209 I, II, V, 46 (43(2)).

210 I, II, V, 51 ((43(2)).

was attended by Ajax, Achilles and the other heroes was addressed by Achilles in the following terms when speaking about the rule of Agamemnon: "If you command well we will be obedient if you don't we will disobey."<sup>211</sup>

### 3.2 The considerations against the supreme authority

Huber mentions the different theories pertaining to this matter. Amongst other things, the constituent is of necessity above the constitution, and because the kings exist by reason of the subjects they are therefore inferior to them.<sup>212</sup> This Huber refutes by relying on the informed intention of the people, and the nature of the mandate. In his discussion of this issue Huber considers various arguments derived from, amongst others, Althusius, Iunius Brutus and the Holy Scriptures, where the covenant between God and the Hebrew people is discussed.<sup>213</sup> He states that it does not follow that the people are subject to Divine Judgement because of the crimes committed by the kings even though they are punished at the correct time for them. To Huber the statement of Tertulianus<sup>214</sup> is acceptable: "The Emperor is a human being second only to God Himself and Optatus Milevitamnus: "Only God is higher than the Emperor. He created the Emperor."<sup>215</sup> The consent of the Roman people who transferred all their powers to the Roman emperor cannot be excluded as a contribution to the imperial authority.<sup>216</sup> Huber adds: "This does not prevent the Empire from being a human creation (as I have proved from Peter earlier)."<sup>217</sup> If alienation ceases to be the most important factor, so that God becomes superior to the Emperor as he was superior to the people.<sup>218</sup> Those who hold a different point of view, remark that the people enjoy to the fullest the divine authority and power. By His divine bestowal, ownership and enjoyment belong to the associated body, namely the entire populace.<sup>219</sup> The Emperor does not have the power to match that of the people. His power is much less and inferior by nature. It is dependent upon sovereignty which is at the people's discretion and precept as the mandators. These are the words of Althusius.<sup>220</sup> The arguments they use are varied in nature: the first and most excellent argument, that a person who creates something should be greater than that which he brought about, is by no means universally accepted.<sup>221</sup> In the light of the observation that something which is a matter of free choice subsequently becomes a matter of necessity, as in the case of somebody who of his own free volition, subjects himself to a

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211 I, II, V, 52 (43(2)-(44(2)).

212 See *J* [IV,5,2ff.].

213 I, II, VI, Introduction (44). For these arguments, see *J* [IV,5,5-7]. For his refutation of these arguments, see *J* [IV,5,2-7].

214 I, II, VI, 1 (44(1)).

215 I, II, VI, 2 (44(1)).

216 I, II, VI, 3 (44(1)).

217 *Ibid.*

218 I, II, VI, 4 (44(1)-(2)).

219 I, II, VI, 4 (44(1)-(2)).

220 *Ibid.*

221 I, II, VI, 5 (44(2)). Also see *J* [IV,5,4].

master. We notice that daily in the case of marriage where a woman elects a husband and never ceases to be inferior to him. The same applies to minors who select curators for themselves.<sup>222</sup> The kings are there for their subjects therefore they are his superiors. In the light of the example of the minors and tutors, this argument appears to be of the nature which is often, but not always, valid.<sup>223</sup> The Apostle uses the same argument to prove the wife's subjection to her husband<sup>224</sup> but this does not automatically prove any other matter which is subject to doubt. It impresses on the wives the understanding to be able to bear the burden that God has imposed, with equanimity. It is opposed by nature and divine arrangement.<sup>225</sup> The third argument is to the effect that the power of the ruler depends and originates from the wishes of the people, which cannot be presumed to exist, so that the total population is subjected to the rule of one individual. This question about the consent should not be entertained once there is certainty about the fact. The people which transfers its sovereignty abdicates all its rights. The people gives sovereignty to the nobility or to the king in such a way that it is binding on all. Consequently we cannot ask whether they did it and then see that it is already done.<sup>226</sup> Consent should be inferred from the words used and when these words are indeterminate, we should also understand a universal consent.<sup>227</sup> Provided it can be proved, a stronger argument is advanced and even flaunted as follows: sovereignty is sometimes inalienable. But freedom itself which is par excellence a natural state, and in which the ownership of property can be alienated, why not then sovereignty while retaining freedom and ownership of property?<sup>228</sup> Fourthly some people maintain that there is a contract of mandate between the people and the rulers. According to this the rulers, as mandatories, are bound to render account of their mandate to the people the mandators. This is argued by Althusius, my wife's grandfather.<sup>229</sup> Whether this is different depends on what the people have done. There is no doubt that they can give a mandate, which brings about a democracy, which is a popular rule and merely a variation of administrations.<sup>230</sup> But if the people give and transfer their sovereignty, and if they fail to retain any activity concerning that which they gave, it is clearly an alienation. An aristocracy or a principate cannot be established in any other way.<sup>231</sup> Wherever the election and voluntary establishment of a guardian is contracted, a contract of mandate is present. Marital and curatorial power afford ample evidence.<sup>232</sup> However, often where sovereignty is transferred unconditionally, no agreement is entered into between the rulers and the subjects. Consequently there is no mandate, but the covenant by which the

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222 I, II, VI, 6 (44(2)).

223 I, II, VI, 7 (44(2)).

224 Corinthians chapter 9.

225 I, II, VI, 8 (44(2))-45(1)).

226 I, II, VI, 9 (45(1)).

227 I, II, VI, 10 (45(1)).

228 I, II, VI, 11 (45(1)).

229 I, II, VI, 12 (45(1)).

230 I, II, VI, 13 (45(1)-(2)).

231 I, II, VI, 14 (45(2)).

232 I, II, VI, 15 (45(2)).



subjects are bound to obedience is a mutual agreement between individuals and not between them and the rulers.<sup>233</sup> Huber addresses another argument often used: he who represents somebody else is inferior to that person. The nobility and the kings represent the people. First of all one must determine what is meant by representation. The lawyers provide us with the example of assuming the place and rights of another. It often happens that he who stands in the place of another and represents him, transfers the rights of the first person to himself. In this way an heir represents the deceased and the buyer somebody who authorises him.<sup>234</sup> In this way the Roman Emperor represents the people who have transferred every right that they had to him. It is thus true that the mandatories and legates represent those people who authorised them.<sup>235</sup> It depends on the nature of the transaction: sovereignty transferred simply is not a mandate but an alienation.<sup>236</sup>

Justice, says Huber, is destroyed by absolute power. Once that is taken away, monarchies arise. They remove the barriers which hedge in human society, as mentioned by Althusius.<sup>237</sup> In the first place this should be understood to mean that absolute power is necessary in democracies such as Rome and Athens and the less rigid aristocracies as in the case of Venice and Belgium where it is not found to be inconvenient. Neither were they found to be inconvenient in all the monarchies with absolute power such as those under Augustus, Vespasian, Titus, Trajan, Hadrian and the Antonines, which were absolute monarchies and abused other rights which they had.<sup>238</sup> Moreover this objection has a bearing on prudence which is something completely different from law. It is one thing to ask what is the best form of state, but quite another to ask what is the power of the Emperor. Huber observes that he applauds those people who do not transfer all their powers to the ruler. Once this transfer has been made we cannot reserve some of these rights for ourselves. We have surrendered them voluntarily.<sup>239</sup> According to Althusius such absolute power is not concerned with the interests and safety of the subjects but with personal pleasure.<sup>240</sup> These rights are denied once absolute power has been assumed. There are those in favour of absolute power as the remedy for civil warfare and bad administration. Such was the case with the Hebrews who became weary of the insolence of Samuel's sons, the Romans with the *Lex Regia*, and the Danes who were completely free to make their own choices.<sup>241</sup> Whether they were wise in their choice is yet another question.

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233 I, II, VI, 16 (45(2)). This can be gathered from what he said in chapter 3, paragraph 4.

234 I, II, VI, 18 (45(2)).

235 I, II, VI, 19 (45(1)-45(1)).

236 *Ibid.*

237 I, II, VI, 20 (46(1)). In his *Politics*, chapter XIX, Althusius observes that absolute power, "or what is called the plenitude of power, cannot be given to the supreme magistrate. For first, he who employs a plenitude of power breaks through the restraints by which human society has been contained. Secondly, by absolute power justice is destroyed, and when justice is taken away, realms become bands of robbers."

238 *Ibid.*

239 I, II, VI, 21 (46(1)).

240 I, II, VI, 22 (46(1)).

241 *Ibid.*

Absolute power does not detract from the office of the pious and correct ruler: "But I must admit that there is an inclination towards tyranny just as in a confused and bad government there is the danger of dissent and civil war".<sup>242</sup> They go on to state that there never was a monarchy or a state established and founded, without a reciprocally binding contract. There have to be agreements between the subjects and their future ruler, establishing a reciprocal obligation. This must be observed carefully, because if it is breached it evaporates and disappears.<sup>243</sup> The response is a denial of the facts. In the first place there are many aristocracies to which the same rules apply as to the monarchies which were constituted without such a reciprocal and special agreement. No such agreements are available in the modern Venetian and Belgian states which are governed by aristocracies. Neither are there any agreements in the monarchies which are established unconditionally, as for instance in the case of the Romans, who transferred all their powers to Augustus. Huber points out that the Danes followed this example recently, without any conditions or special conditions, making a transfer of all their rights.<sup>244</sup> When such agreements are made in Germany, England or elsewhere they should not be considered worthless, according to Huber. Althusius<sup>245</sup> goes on to state that if a people or a state transfers all their rights and sovereignty to a supreme magistrate or the supreme power without any reservation, exception or condition, then we must accept the general wording in accordance with the material available.<sup>246</sup> This means that whatever the nature of the empire or principate, so must be the interpretation of these general words. The nature of the magistrate<sup>247</sup> or the emperor must be to look after the interests of the subjects and not the welfare of the rulers. He should serve the republic according to correct reasoning and justice.<sup>248</sup> There is no reason for concern for the authors of this opinion regarding the interpretation of sovereignty transferred unconditionally. Only a hypothesis of a mandate unconditionally given with the powers of a free people, subjacent to every imperial constitution, is sufficient to restrain the rulers, render them dependent on the people and compel them to render account.<sup>249</sup> If it is conceded that there is an alienation, nobody denies that the rulers are liable to look after the interests of the subjects and to exercise properly the powers given to them. If somebody has alienated his rights, however, and made someone else his master, we cannot compel him to render account or deprive him of the right, if the master acts badly against him.<sup>250</sup> There is great strength in the argument derived from the Holy Scriptures: "It concerns a covenant between the people and the kings which is very different from the one into which we entered."<sup>251</sup> It is a covenant (this

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242 I, II, VI, 23 (46(1)).

243 I, II, VI, 24 (46(2)).

244 I, II, VI, 25 (46(2)).

245 Althusius (1557-1638), born in Diedenhausen in Westphalia, a sixteenth century jurist, produced the influential work *Politica Methodice Digesta*.

246 For magistrates see J [IV, 8, 14].

247 For Huber's answer to the question as to who are magistrates, see J [IV,8,14].

248 I, II, VI, 26 (46(2)).

249 I, II, VI, 21 (46(1)).

250 I, II, VI, 28 (47(1)).

251 I, II, VI, 29 (47(1)).

was stated by Junius Brutus)<sup>252</sup> between God, the people and the king that they will be God's people. The sanction imposed is as follows: if you persevere in wickedness both you and your king will perish.<sup>253</sup> There are two debtors making a promise which binds them jointly.<sup>254</sup> The king is liable to make good his promise should the people violate the law of God, in order to compel the people to honour the promise. They have to be punished if they venture to be unfaithful.<sup>255</sup> If the king should omit to punish them the law is that the entire Israel is guilty. Those are the dictates of the law between the guilty people namely that the commission of one is also harmful to the other.<sup>256</sup> In the same way, the people should, so to speak, bring a king back from flight.<sup>257</sup> If they fail to do so the people will have to pay for the misdeeds of the king. This happened with Saul in the case of the Gideonites and David after he ordered a census of the people, and other similar instances.<sup>258</sup> He who is required to promise is also required to perform. This is the purpose for which we have the law. It would be absurd if the people were held liable and required to pay for the misdeeds of the king if they cannot prevent his conduct. Nobody is required to do more than that which he is able to perform.<sup>259</sup> To this Huber adds that it is remarkable that Samuel never urged the people to invoke the covenant entered into with God against Saul. They should have done this if the people were held liable under the same penalties. David's stupidity is remarkable because he was in a position to remove the sinful king but was afraid to do so.<sup>260</sup> Of course, it is true, a people bound by a covenant entered into with God owes no allegiance to the kings which lead to their transgression of His laws. But nothing is said to substantiate that statement that the people are jointly liable.<sup>261</sup> Of course where crimes are committed in terms of the laws, the liability for punishment does not go beyond the persons of the transgressors. It is a principle well known to divine, natural and civil law.<sup>262</sup> It is unheard of in the legal discipline that two people are made liable for transgressions by an expressed agreement. It might happen that many people are held jointly liable for one and the same crime, but each for what he himself has done. Nobody can, by contracting or promising, bring about that which Brutus, who was skilled in law, could not escape.<sup>263</sup> Similarly, joint debtors who wish to be jointly liable are each responsible for the observance of his part of the contract and cannot compel the other debtor to observe his part of the contract. This infringes the legal principle because the joint debtors are jointly and severally liable, taking into account the negligence or lack of faith of any one

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252 Question 2 of his *Vindiciae Contra Tyrannos*. There he deals with the right to resistance in the event of the king breaking his covenant.

253 I, II, VI, 30 (47(1)).

254 I, II, VI, 31 (47(1)).

255 I, II, VI, 32 (47(1)). See *J* [IV,5,8ff.].

256 I, II, VI, 33 (47(1)).

257 I, II, VI, 34 (47(1)-(2)).

258 2 Samuel 8: 36.

259 I, II, VI, 35 & 36 (47(2)). See *J* [IV,5,10].

260 I, II, VI, 37 (47(2)).

261 I, II, VI, 38 (47(2)).

262 I, II, VI, 39 (47(2)).

263 I, II, VI, 40 (47(2)).

of them.<sup>264</sup> However it would be unjust to hold a people liable for a crime committed by the king, if nothing can be imputed to their own negligence. Therefore can the people be held responsible if they have failed to compel the king to abide by the agreement? What is more, if the people are jointly liable, they are directly responsible without taking into account their negligence in not compelling the king.<sup>265</sup> This a well-known tenet of the law: co-debtors are jointly and severally liable without any reference to their conduct or omission. This is the argument, and a consideration derived from the liability of joint debtors finds no application in this matter.<sup>266</sup>

The dictates of equity require that if a contract is entered into by several people, no action is available apart from an equal share against each debtor, unless each one expressly indicates the desire to be jointly liable. We do not read that this was agreed upon in the covenant of God with Israel.<sup>267</sup> Of course an obligation is not only binding on a person himself, but also on those whom he has in his paternal power insofar as negligence may be imputed to any one of those.<sup>268</sup> In this way parents are liable for their children, masters for their slaves, kings and officials for their subjects, even if not in every instance, and even if they restrain their impiety with his authority and power.<sup>269</sup> He is held liable not for the crimes committed by them, but for his own transgression and destructive connivances, which are contrary to all considerations of his office.<sup>270</sup> The same reason does not exist to render children liable for their parents, slaves for their owners and subjects for those who have power over them. The reason is that they are not in a position to use armed force against those who have power over them. It goes without saying that diverse considerations apply in this instance. Besides, it is true that an innocent people can never be punished for the transgressions of the kings. It is hardly possible that in the examples quoted and other crimes committed against the public administration, that these crimes cannot be expiated by the people who did not participate in the commission thereof,<sup>271</sup> although if the public transgressions of those people who have established themselves as rulers cause temporary hardship to the people they can hardly think that this is unfair.<sup>272</sup> This takes place every day according to the *Ius Gentium* so that the conduct of the rulers benefits the state.<sup>273</sup> Nobody, however, can be prevented from saying that pestilence and famine were plagues whereby God punished His people for other transgressions for which examples are abundant.<sup>274</sup> It is hardly necessary to say that the people of Israel paid for the transgressions of

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264 I, II, VI, 41 (47(2)-48(1)).

265 I, II, VI, 42 (48(1)).

266 *Ibid.*

267 I, II, VI, 43 (48(1)).

268 I, II, VI, 44 (48(1)).

269 I, II, VI, 45 (48(1)).

270 I, II, VI, 46 (48(1)).

271 Here he relies on Grotius.

272 I, II, VI, 49 (49(2)).

273 *Ibid.*

274 See *J* [IV,5,11].

the kings which they brought upon themselves by their personal wrongdoings.<sup>275</sup> Considering that the affliction of the people caused great harm to the rulers the punishment of the people on the occasion of a transgression committed by the king should be regarded as a part of the penalty intended for the king. This is just the same as bad things befalling the children after the death of their parents should be regarded as punishment in respect of the deceased. Moreover Aristotle states that it would seem that the fate of the children is connected to the adversity or prosperity of the deceased parent.<sup>276</sup> What then is the conclusion? On account of the bad decisions of the kings and the aristocracy, the people are afflicted by wars. Are they to invade the public councils so that nothing bad should happen should they intervene? Should they intervene with force and armed violence?<sup>277</sup> Surely David denied that he was liable to the people for adultery and murder when he stated that he had sinned against God alone.<sup>278</sup> This is denied by Cocceius who was surprised that learned men derived this meaning from mere words. He provides a reason for David saying that he had transgressed against God but he fails to explain why David repeatedly lamented: "Against you, against you alone."<sup>279</sup> Certainly with these words he indicates that he enjoys no privileged position with God on account of his regal dignity, nor does he say that to extol his royalty; therefore Cocceius is correct in maintaining that David said: "No man may judge me. I am the supreme judge myself, subject to none." This is in no way in keeping with his humble disposition. It should be understood in this way: "I have sinned against you. What benefit do I derive from being the king? My transgression is so much more serious. If I were to be punished then I could have made compensation to a certain extent, now Your fearful wrath presses me down completely." This is part of his humiliation. He has forgotten about his royal character, he has subjected himself to God unconditionally.<sup>280</sup> From the above statement it is abundantly clear that there is no distinction between officials in particular and individuals from the people, as far as the law of subjects in an empire unconditionally constituted is concerned. This is according to what the politicians and the theologians want.<sup>281</sup> It is sufficient to note that the officials are servants of the supreme power who received their authority from that power and are perpetually dependant on Him. The same goes for their power over the people on the authority of the Supreme Power. Against that Power Himself they have nothing more than an obligation to obey.<sup>282</sup> Some people draw a distinction between officials of the king and officials of the kingdom who are then received in a part of the empire by leaders of the people. They received a mandate to uphold the law, as did the Ephors in Sparta and the Royal Senators of Poland. In those two monarchies the Royal power was not transferred unconditionally.<sup>283</sup>

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275 I, II, VI, 50 (48(2)).

276 *Ibid.*

277 I, II, VI, 52 (48(2)-49(1)).

278 Psalm 51: 2.

279 I, II, VI, 53 (49(1)).

280 I, II, VI, 54 (49(1)-(2)).

281 I, II, VI, 55 (49(2)).

282 I, II, VI, 56 (49(2)).

283 I, II, VI, 57 (49(2)).

The opinion expressed above is confirmed and illustrated from Roman Law and the Holy Scriptures.<sup>284</sup> The basis of proof is founded on Roman Law, concerning the Constitution of Emperors where the people transferred their sovereignty to the Emperor. These statements are combined with others gathered from the old writings and also from the rule that the Emperor is not subject to the law. An argument from the sacred Scriptures about the law of the king may be added thereto.<sup>285</sup> Their arguments derived from sound philosophy are pleasing. Roman Law and Holy Scriptures are the two principal authorities which may be used here.<sup>286</sup> The highest proof derived from Roman Law is found in the words of Ulpian<sup>287</sup> concerning the Constitution of Emperors. From this source the following is gleaned: The Roman Emperor has only as much power over the people and matters of the empire, as the people previously held and exercised. The Roman people, prior to the transfer of the power to the Emperor, were free and not subjected to the power of anybody. Consequently it cannot be otherwise that the Emperor should afterwards have absolute power and be subject to nobody.<sup>288</sup> The first argument is founded in the words of Ulpian himself: the people transferred their entire sovereignty and power to him.<sup>289</sup> The interpreters are in doubt as to how the words "his" and "to him" should be understood. Some of them believe that it is reduplication of the same meaning for the sake of greater effect, which is not unusual in the Roman style of writing, so that it can be understood that the transfer of power to the Emperor was made boldly. Other interpreters understand the words "to him" as "to themselves". This view is held by Theophilus and many other interpreters to be in the same sense in which Seneca<sup>290</sup> said of the individual by which the sovereignty of the people is given to the people: "It is not necessary to make a choice between these two opinions because whatever version is chosen it still supports our argument, namely, that the people transferred their entire sovereignty and all their powers to the Emperor."<sup>291</sup> This is also supported by Justinian in the paragraph beginning with the words "and that which pleases the Emperor's Institutes concerning the natural law, the *Ius Gentium* and the Civil Law."<sup>292</sup> Huber is not ignorant of the fact that there are those who deny that such a transfer has ever been made to the Roman Emperors. They maintain that this matter was falsely stated by Justinian's ministers and that the words of Ulpian were added.<sup>293</sup> Nothing different from what the jurists said were recorded in the ancient historians.<sup>294</sup> The Emperors were clothed with all the regal powers. The Senate and the Roman people gave the Empire as such to Claudius and by law it provided him with the supreme power so that he could do whatever he wanted to and could refuse to do whatever he wanted not to

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284 I, II, VII, 1 (49(1)-(2)).

285 Explained in 1 Samuel chapter 8.

286 I, II, VII, 1 (49(1)-(2)).

287 Book 1.

288 I, II, VII, 2 (50(1)).

289 I, II, VII, 3 (50(1)).

290 Letter 14.

291 I, II, VII, 4 (50(1)).

292 I, II, VII, 5 (50(1)).

293 To Huber this diversion was fully refuted.

294 I, II, VII, 6 (50(1)-(2)). Huber quotes Dionysius.

do. This is nothing other than free and absolute power. All power, and the right to decide over all matters was transferred to one single individual.<sup>295</sup> The Emperor was made the one master of peace and war.<sup>296</sup> Nowhere did the ancient legal authors ascribe more to the *Lex Regia*: “however we concede that the term *Lex Regia* was only later applied to the Roman Emperors. The wishes of the people could not be stated or promulgated otherwise than in the decisions of the Senate or its laws.”<sup>297</sup> Of course, the other presupposition to this argument, namely that the people originally had a free and absolute power, is so obvious that it requires no further proof, says Huber. It is just that every private individual who is the disposer and manager of his own affairs has a perfectly free power to decide for himself and to dispose as he wishes over his property. Likewise an entire people has the same power to decide and to dispose as he wishes over everything.<sup>298</sup> There is no power on earth which can impede or curtail the actions of a free people (because we maintain that they are not subject to the power of somebody else). Therefore, there is nothing standing in the way of the conclusion that the Roman Emperor had free and absolute power subject to none.<sup>299</sup> These considerations, coming from the Roman law and the correct reasoning, are in accordance with the sacred Scriptures. Scattered throughout the Old and New Testaments we see injunctions to give respect to the Kings and Powers, not only to the good and just but also to those who are hard and difficult.<sup>300</sup> Nowhere are there limits or exceptions which allow citizens to oppose the commands of their rulers. This was the teaching of the ancient Christians.<sup>301</sup> It is not wrong to say that the rulers who are unconditionally appointed have the right, given to them to treat individual citizens harshly and even to deprive them of their lives and property even if this would seem to many to be a monstrous statement: this does not mean that the injustice and insolence of the rulers become good and justifiable or cease to be wicked and that the citizens are called upon to be patient. They are not allowed to withdraw themselves from the power of the rulers or to resist them forcefully.<sup>302</sup> Proof is derived from a message often repeated and variously interpreted so that it seems of such great importance that it cannot be ignored. The people of Israel were governed by the Divine Hand through prophets and judges who were inspired from heaven. However, they became jealous and wandered away from that Divine scepter which could only be revered with the mind alone. They decided, following the

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295 Suetonius (c.64-after 122CE), in his *De Vita Caesarum: Caius Caligula* (The lives of the Caesars: Caius Caligula), written c.110 CE, XIV: “When he entered the city, full and absolute power was at once put into his hands by the unanimous consent of the senate and of the mob, which forced its way into the Senate ...” He adds that so great was the public rejoicing, that within the next three months, or less than that, more than a hundred and sixty thousand victims are said to have been slain in sacrifice.

296 Huber refers to Strabo, Greek geographer and historian, born c.63 n.c.

297 I, II, VII, 7 (50(2)).

298 I, II, VII, 8 (50(2)).

299 I, II, VII, 9 (50(1)-51(1)).

300 Peter, epistle 1, chapter 2, verse 18. Also see *J* [IV, 5, 17ff.].

301 Book 1, *De Jure Belli ac Pacis*. I, II, VII, 10 (51(1)).

302 I, II, VII, 11 (51(1)).

example of the neighbouring people, on a plan to ask for a king with this in mind. They were clamorous and caused Samuel much annoyance. He was aware of the fact that they were asking much outside religion and feared that God might desert his people. He resisted the request until he was ordered by God to comply with it. In order to do that he was ordered by God to explain to the people what the nature of the regal power which they demanded for themselves would be: "This will be the regal power", said Samuel, "which you asked for yourselves. He will take away your daughters and your fields and give them to his servants" and so forth.<sup>303</sup> Huber adds: "I have stated already how that power should be understood. It is not the function of a just and pious king which is described in a vastly different way in Deuteronomy 17 verse 14ff., it is much rather a habit of domination which has the effect of law in the authority over the subjects in so far, as I have said, it binds them to obey the law."<sup>304</sup> By necessity it is one of the two: either Samuel explained this power of the king so that the people could know what they were going to endure or he had in mind to make them ready for opposition.<sup>305</sup> The second possibility is incompatible, however, with the purpose which we have in this text. The gist of what he says is to dissuade the people, if possible, from their request for a king. He could not achieve this by warning them in anticipation of what would be intolerable in the rule of a king.<sup>306</sup> It does not, however, serve a purpose of teaching them what they will have to endure. What is more the words themselves openly bear this meaning: this will be the law of the king.<sup>307</sup> It is quite certain that there are commentators who explain this portion of scriptures in another way than the ancient Latin interpretation.<sup>308</sup> This implies that the entire population is always and invariably superior to the king. The Greek translation reads as follows: The righteousness of the king who rules over them and thereafter. This was the law. The ancient Latin translation follows this wording as do all the ancient writers. They translate this as the right of the king. Luther does the same: The right of the king.<sup>309</sup> Some of the more recent authors follow a different interpretation and not without sound reason, like Sixtinus Amama and the exposition of the Belgian authors of this passage.<sup>310</sup> If this is the right of the king which is explained by Samuel: "He will take away your daughters and your fields and give them to his servants" then Ahab did nothing wrong when he deprived Naboth of his vineyard.<sup>311</sup> Consequently Tremelius changed this into "the judgment of the king", or "the nature of the king."<sup>312</sup> A recent development in Belgium is that the ancient translation followed the Lutheran version: "The manner of the king",<sup>313</sup> just

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303 I, II, VII, 12 (51(1)). See *J* [IV, 5, 18ff.].

304 I, II, VII, 13 (51(1)).

305 I, II, VII, 14 (51(2)).

306 I, II, VII, 15 (51(2)).

307 *Ibid.*

308 Note *J* [IV,5,16ff.].

309 I, II, VII, 17 (51(2)-52(1)).

310 I, II, VII, 18 (52(1)).

311 I, II, VII, 19 (52(1)).

312 The reference is to Scaliger 1, Epistle 15.

313 The Dutch Authorised Version (Statenbybel) reads as follows: "Ende seyde / Dit sal des koninghs wijse zijn / die over u regeeren sal: Hy sal uwe sonen nemen /



like Piscator's "The king's manner". Diodatus in his Italian version used: "The manner," Anglius: "The manner," Genevensis: "Le traitement," and De Vatera, a reformist Spaniard, has "El juicio" and in his notes "el derecho",<sup>314</sup> both of which have the meaning of law, but with some discretion so that it can be understood as a right acquired with some discretion. It is well known that law means a rule of that which is fair and good or the capacity derived therefrom which was provided to have or do something lawfully. This means the law of the fatherland or the law of ownership. That which an owner does, he does in terms of his right as owner, just as the father performs actions in terms of his natural power. He does this lawfully and termed his right. However not all right or power is lawful. Not all rights pertaining to somebody are in principle lawful.<sup>315</sup> Should a father give his son a spanking which he does not deserve? He has the right to do so and his son has to endure it. There is a right between father and son which is not lawful because it does not conform to that which is fair and good.<sup>316</sup> Whenever the praetor takes a decision it has an effect, and whether it is just or unjust, it is always his right. The conduct of the victor or the judge is not fair and just.<sup>317</sup> Consequently there is no reason to depart from this well-known meaning of the word *mishpat*, which means law, both in its usage and etymology. It informs the citizens that they are not bound to endure the injuries caused by the king. Likewise they are not liable if the rulers have no right to deal harshly with the citizens.<sup>318</sup> Moreover if one looks at passages where *mishpat* is said to have another meaning, it has the meaning of "prescribed" or "that which was to be observed", which is not foreign to the law and therefore derived from a civil translation.<sup>319</sup> However it is clear that the objection arrived at from the example of Ahab against Naboth and similar instances is meaningless. The *Lex Regia* does not abolish the wickedness and harshness of those who cause injuries but merely compels the citizens to be patient.<sup>320</sup> Therefore Samuel draws the attention of the Hebrews to these matters explaining to them the type of yoke they are subjecting themselves to with these words. The prophet does not in any way detract from the office of king which was established by divine laws and who was to rule over the people according to his own discretion. The prophet merely taught the people that they have to be obedient not only

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dat hyse sich stellen tot sijnen wagen ende tot sijne ruyteren / dat sy voor sijnen wagen henen loopen" (Biblia, Dat is De gantsche H. Schrifture, vervattende alle de Canonijcke Boeken des Ouden en des Nieuwen Testaments ... (T' Amsteldam: De Erfgenamen wijlen Paulus van Ravestein, 1664). Theodore Haak's translation of the Dutch text (1657) reads: "And said, This shall be the way of the King, that shall reign over you: he shall take [viz. Violently] your sons, that he may appoint them for himself for his charets, and for his horsemen, that they run along before his charet."

314 I, II, VII, 20 (52(1)).

315 I, II, VII, 21 (52(1)).

316 He cites Justinian in support.

317 I, II, VII, 22 (52(1)-52(2)).

318 I, II, VII, 23 (52(2)).

319 I, II, VII, 24 (52(2)).

320 I, II, VII, 25 (52(2)).

to the good and just, but also to the wicked.<sup>321</sup> If this was not Samuel's intention, that this was the *Lex Regia* which he called to mind, it must have been his plan to indicate that it would be the right of the people to oppose those kings who behaved themselves in this way. This is not in conformity with his attitude.<sup>322</sup> Therefore there is no reason to believe that the prophet speaking to the entire population would use a word in a different way than that in which it is ordinarily used. If he did this on an occasion such as this then it would amount to nothing less than a deception by the use of ambiguous words.<sup>323</sup>

The *Lex Regia* is twofold in nature: in one respect it applies to the people and their duty to obey and be patient. Another respect described in Deuteronomy chapter 17 verse 15 deals with the duties of a good and just king and his government.<sup>324</sup> Consequently it applies to the king himself such as the Homeric king. Such was the way in which the deified Ulysses ruled, who never harmed a citizen by what he said or did: "Of course in doing so this man equaled the immortal gods."<sup>325</sup> Huber makes no use of the views expressed by the more recent interpreters of Grotius like Zieglerius, Bocclerius, Henningius and others.<sup>326</sup> They are not content with the unjust law which, however, calls for patience and which constitutes the basis of Grotius' interpretation. They decide that the right of the king is a true and firm law no less than that which every owner has in respect of a prodigal donation or other abuse of rights. It is not right and praiseworthy but it is law in the fullest and most perfect

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321 I, II, VII, 26 (52(2)). See J [IV,5,17]. The text of 1 Peter 2: 13 in the Dutch Authorised Version (Statenbybel) (the corrected version of 1664) reads as follows: "Zijt dan alle menschelicke ordeninge onderdanigh / om des Heeren wille: het zy den koningh / als de opperste macht hebbende." Theodore Haak's translation of the Dutch annotations to this text reads: "Be subject therefore [Namely, in all that they command you, if it be not contrary to God and his command. See Act 4.19] to every humane Ordinance [Gr. Humane creature: which words some take for magistracy itself, which is so called because it consists of men and is ordinarily appointed by men. Others understand it of the Ordinances and Laws which Magistrates make for the preservation of civil unity and welfare, but the first exposition agrees as well with the following words] for the Lord's sake [that is, because it is God's will to govern you by them. See Rom. 13.1. and Tim. 2.2] whether it be to the King [by whom here the Roman Emperor is understood, under whose command those Provinces were] as having the supreme power." Diodati's annotations on the Bible follows the same line: "To every] Namely, to Princes, Magistrates, Governours, made by men, and amongst men, for the conversation and guide of civill and humane society. For the Lords sake] who is the author of politick governments and of all publick order, who commands obedience to Magistrates, and binds all mens consciences thereunto, and therein is served and honoured, Eccles. 8.2. Rom. 13.5. To the king] namely, to the Romane Emperor, sometimes called a King by forain Natives." The text of 1 Peter 2: 18 has to be interpreted in the light of verse 13 and its interpretation by the Reformed authors of the time.

322 I, II, VII, 27 (52(1)).

323 I, II, VII, 28 (52(2)).

324 Compare J [IV,5,18ff.].

325 I, II, VII, 29 (53(1)).

326 I, II, VII, 30 (53(1)).

sense.<sup>327</sup> The adjudication of the matter depends on whether the right of ownership arises from the wishes of the Israelite people or whether it is properly from the *Lex Regia*.<sup>328</sup> The difference between these two forms is that in a despotic rule, where the monarch is in the position of an owner, and the subjects are like slaves in the regal situation, the position is that of a guardian and citizens who enjoy personal freedom and freedom of their property. They lose their sovereignty “and exceptional items” which in a dominate is given to the monarch.<sup>329</sup> In this way the Turkish, Persian and all the oriental rulers may kill their citizens. They do not believe that in doing so they exceed the limits of their powers. In civil kingdoms the position is different even though they enjoy free and absolute power.<sup>330</sup> In Christian empires, they may be absolute but they do not have the right of ownership but rather civil rights. It follows that apart from public interest, which is real and not imaginary. This cannot cause harm to the property or person of the citizens.<sup>331</sup> Private individuals are not given the right to resist transgressions of that nature. The Israelites were no different. The people had become base as a result of their vanity and dislike for the sons of Samuel and their weariness of theocratic rule, and wanted to be ruled in such a way that it would not be necessary for them to serve.<sup>332</sup> This was shown by Solomon especially after his death and was clearly shown at other times.<sup>333</sup> The truth is that they sought a king just like the neighbouring countries who were ruled by despotic governments. They did not want a monarchy equal in nature to the rest. They agreed that this was alien to their way of thinking.<sup>334</sup> Huber believes, therefore, that the prophet wanted to keep the Hebrews away, and to show them the nature of the Asiatic kingdoms. They were against real and good law. They would be bound to show passive obedience and could not give true law to wicked rulers.<sup>335</sup>

### 3.3 The extent to which supreme power can be changed by agreement

Smaller nations may be joined together into a unitary state or by a strict bond whereby everything in peace and war and whatever is necessary for defence are shared. The supreme power of all may remain intact as proved by many examples. The sovereignty of each member is lost where the few are bound to follow the role of the majority. The same applies to an unequal federation where one nation is compelled to observe the sovereignty of another. No member of the federation may have jurisdiction over the rest. This is not allowed for all the allies or for the superior unless it is expressly provided for. If the right of appeal, however, is given to the citizens of each ally, this is

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327 *Ibid.*

328 I, II, VII, 31 (53(1)).

329 I, II, VII, 32 (53(1)-(2)).

330 I, II, VII, 33 (53(2)).

331 I, II, VII, 34 (53(2)).

332 *Ibid.* This is strongly emphasised by Huber.

333 I, II, VII, 35 (53(2)).

334 I, II, VII, 36 (53(2)).

335 I, II, VII, 37 (53(2)).

defined by the supreme power. If one of the allies can be forced by the rest to provide tribute or military personnel, this is no hindrance to supreme power. Therefore even the vanquished who are forced to pay tribute and even vassal states are capable of having supreme power.<sup>336</sup> The smallness of a state does not detract from its sovereignty and nowhere is this more conspicuous than where the sovereign states are confined to single cities.<sup>337</sup> The older generation, when dealing with the state, explained this very simply. After the Macedonian and Roman wars hardly any other public associations were left.<sup>338</sup> Athens, Sparta, Argos, Corinth, Thebes and whatever others were famous, were governed in this way.<sup>339</sup> No other cause favoured this division of peoples more than the wars of Philip of Macedon against the Greeks, the Romans against Italy and the wars in Spain and France.<sup>340</sup> Thereafter by victories or for the sake of convenience, consent was reached that several nations should coalesce in greater bodies so that countries were formed in a unitary state, or were tightly bound together by way of a federation.<sup>341</sup> This caused supreme powers to be extinguished so that he who was in command now obeyed commands. Those which previously were states became members of a greater state. It was considered better to have sovereignty over one state rather than over many.<sup>342</sup> A federation, where several states were not dissolved into one, has several forms wherein no supreme power is lost.<sup>343</sup> Taken universally there can be either an equal or an unequal federation. An equal federation, clearly does not stand in the way of supreme power. It merely restrains freedom to deal with a certain matter on which an agreement has been reached, but in natural matters the fullest liberty may exist.<sup>344</sup> In an amphiatyonic federation a public tribunal was established for the entire Greece for public matters. It is beyond dispute that individual Greek cities were not deprived of their supreme powers.<sup>345</sup> The federation of the Aetolian and Achagon nations united several states into one as may be learnt from Polybius.<sup>346</sup> A community of war and peace with a contribution of everything necessary for the common defense with the exclusion of the sovereignty of every nation is possible.<sup>347</sup> The constituent parts are not intact for in those matters which are made communal and in which the votes of those who are together are counted, the individual has no power, but only all the partners taken together.<sup>348</sup> Nevertheless in all those matters where the opinion of the majority is not superior the power of the individual remains, and nothing is detracted from

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336 I, III, III, 1 (66(1)).

337 *Ibid.*

338 I, III, III, 2 (66(1)).

339 I, III, III, 3 (66(1)).

340 I, III, III, 4 (66(1)).

341 I, III, III, 5 (66(1)-(2)).

342 I, III, III, 6 (66(2)).

343 I, III, III, 7 (66(2)).

344 I, III, III, 8 (66(2)).

345 I, III, III, 9 (66(2)-67(1)).

346 I, III, III, 10 (67(1)).

347 I, III, III, 11 (67(1)).

348 I, III, III, 12 (67(1)).

their sovereignty.<sup>349</sup> An example is provided by the unified republic of Belgium, at the time of Huber, which was tightly joined together by the treaty of Trajectinium, while the sovereignty of each state was left intact.<sup>350</sup> Only those matters which, in terms of the agreement were delegated to one council of the federation or the States General, as it is called, were excepted. Certain special matters were withdrawn from the vote by members.<sup>351</sup> Similarly in the Swiss nation, there is a measure of doubt as to whether they are joined any more loosely than the Belgian federation.<sup>352</sup> In the empire or kingdom of Germany it is a matter of appearance rather than essence. The appearance is created by the fact that the German federation calls its head of state Kaiser, Emperor or Augustus. These words imply the idea of sovereignty which is ascribed thereto and they convey appearance of majesty.<sup>353</sup> The German princes and states, when Huber wrote his *De Jure Civitatis*, all enjoy sovereignty independent of the authority of the Emperor. Consequently the insular states of the German empire are in no way as tightly bound in unity as are the Belgian states. There is no doubt that Germany is a federated body with several sovereign members, rather than a single state.<sup>354</sup> Consequently the German jurists call Germany a territorial superiority. This is easy to understand for those who are conversant with the origin of the words, that in this way rather than in appearance the German federation differs from the sovereignty of other republics.<sup>355</sup> The German Emperor never allows himself to be honoured by the name of majesty, as he does not even accord this name to eternal kings.<sup>356</sup> There is more than doubt about an unequal federation. In the first place a distinction should be made as to whether a transitional or a permanent federation is to be established.<sup>357</sup> If this inequality is imposed by one on the other because of expenses incurred to redeem an injury, then it is clear that it has no effect on the sovereignty.<sup>358</sup> Neither is this the case where one nation agrees with the other to jointly conserve the sovereignty of the ruler or people of the other.<sup>359</sup> This is caused if one nation is superior to the other in dignity. It does not detract from the liberty or sovereignty of the other. It is the same with our clients whom we understand to be free, although they are not our equals as far as authority and dignity are concerned.<sup>360</sup> It is not incompatible with the sovereignty of member states if they agree that the council of the federation or the state which is the most important amongst them, may try the citizens of single states on various charges, and if they are convicted, punish them.

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349 I, III, III, 13 (67(1)).

350 He refers to Grotius's comments on the ancient Republic of Batavia. I, III, III, 14 (67(1)).

351 I, III, III, 15 (67(1)).

352 I, III, III, 16 (67(1)).

353 I, III, III, 17 (67(1)-(2)).

354 I, III, III, 18 (67(2)).

355 I, III, III, 19 (67(2)).

356 I, III, III, 20 (67(2)).

357 I, III, III, 21 (67(2)).

358 I, III, III, 22 (67(2)).

359 I, III, III, 23 (67(2)).

360 I, III, III, 24 (67(2)-68(1)).

In a federation of equals the power to try the other allies or certain of their citizens may be delegated on agreement.<sup>361</sup> Without an agreement, neither of the federated states nor the general council to which the administration of matters relating to the federation has been delegated, may decide in a court of law on the lives and property of people who are in the individual states.<sup>362</sup> Unless it is proved that those people who govern the member states are reluctant to punish those who transgress against the federation and are, in fact, more inclined to accept them in public protection.<sup>363</sup> In that case the other allies have the right to capture the delinquents and if they are convicted, to punish them. It would seem that in such a case it is not done as a government but rather in terms of the law of war: "But, ... it must be clear that this was a transgression against the federation, otherwise this may be used as an excuse for a conspiracy of the partner of the federation to commit violence."<sup>364</sup> Huber feels that it is permissible to apply this argument to the *Apology* of Grotius which he wrote on behalf of the deposed magistrates of Holland against the conduct of the remaining Provinces:<sup>365</sup> "I do not decide whether the Batavian leaders were justified because Grotius denies this, but I dispute the basis on which he does so: the States General could in no circumstances force them. I remember that those same people together with the Batavians themselves used force against other members of the federation for a purpose not linked to the safety of the federation. I think that the same may be said of the exception made of the Dutch leaders in 1650. I do not touch on the question of the facts: this is a discussion of the legal position."<sup>366</sup> According to Huber it should be observed that it might happen, that those allies may in a certain respect be seen as equal to one of the states. This takes place in those realms where according to the law of war one part rules on behalf of the States General.<sup>367</sup> To the extent that in these matters the consent of the majority may be regarded as the wishes of all, that which takes place in one state is regarded as universally valid, for example in the territory of the States General which in part consists of Britain and Flanders which were acquired by conquest.<sup>368</sup> However if the citizens of the federated countries are given the right to appeal against the conduct of their rulers to anyone from the federation or to the General Council, this condition means a clear diminution of the sovereignty of a member state in the federation.<sup>369</sup> Consequently where the sovereignty is intact an appeal to the General Council available to the individual states in the federation cannot be countenanced as clearly discussed by the Frisian leaders in a letter to the General Council. Moreover, in 1678 a public edict declared those people who complained about the public regime in Friesland to the General Council, guilty of *Crimen*

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361 I, III, III, 25 (68(1)).

362 I, III, III, 26 (68(1)).

363 I, III, III, 27 (68(1)).

364 I, III, III, 28 (68(1)).

365 I, III, III, 29 (68(1)).

366 I, III, III, 30 (68(1)-(2)).

367 I, III, III, 31 (68(2)).

368 I, III, III, 32 (68(2)).

369 I, III, III, 33 (68(2)).

*Laesae Majestatis*.<sup>370</sup> The position is different if the highest officials of one state are forced to bring disputes between themselves to the General Council in terms of an agreement entered into. This happened in the case of Groningen and Omland. They joined the common federation on the condition that the dispute between the state and the agrarians be decided by the General Council.<sup>371</sup> A federated state may be forced and punished for not adhering to the rules of the federation. This leaves the sovereignty intact and does not bring about an unequal federation.<sup>372</sup> If countries are federated they are not different from what they were in their natural state so that one state may use armed force against another if it fails to keep the promises it made. There is no lack of example for this kind of issue, even in the federated provinces of Belgium.<sup>373</sup> What is the position if the strongest state in the federation has the right to use armed force against the rest, to exact tribute at its discretion, to sue and to force merchants to pay?<sup>374</sup> That which is provided for the common defence and conceded in terms of an agreement cannot affect the sovereignty according to the dictates of reason and of teaching by example. The Spartans and the Athenian leaders treated the rest of the federated countries in that way, but the lesser people in the federation were beyond all doubt free, and they enjoyed sovereignty. The position of the people of Drent is not much different in our case.<sup>375</sup> Even if people are conquered in a war or required to pay tribute to the victor annually and for ever, they still do not lose sovereignty. A monetary obligation does not prevent the tributary from freely performing the acts of government over the subjects. There is no shortage of examples of this from the present age or other times.<sup>376</sup> An even more cogent example may be mentioned: feudal governments have a master to whom they owe servitude, yet they still retain servitude, provided that their vassals lack the right of appeal to that master.<sup>377</sup> Servitude in this sense means nothing more than a duty to provide military assistance to the master. Once this has been done there is nothing to impede his ability to govern his people. His laws cannot be rendered ineffective.<sup>378</sup> It is sufficient for sovereignty if the people in question have nobody higher or greater whom they have to obey. For them it is the highest beyond which they cannot go.<sup>379</sup> Of course this means the capacity to command and obey within the borders of each state.<sup>380</sup>

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370 I, III, III, 34 (68(2)).

371 I, III, III, 35 (68(2)).

372 I, III, III, 36 (69(1)).

373 I, III, III, 37 (69(1)).

374 I, III, III, 38 (69(1)).

375 I, III, III, 39 (69(1)).

376 I, III, III, 40 (69(1)-(2)).

377 I, III, III, 41 (69(2)).

378 I, III, III, 42 (69(2)).

379 I, III, III, 43 (69(2)): "Sufficit enim ad jus summae potestatis, quod subditi cujusque nihil altius aut majus habent, cui parere debeant; hoc enim ipsis summum est, quo altius ascendere nequeunt."

380 I, III, III, 44 (69(2)): "Quippe ratio imperandi atque parendi intra fines cujusque civitatis liberae continentur." He refers to Grotius at this point.

#### 4. Conclusion

Ulrich Huber's theory of public law in general and constitutionalism in particular is largely unknown because his *magnum opus* on these issues, *De Jure Civitatis*, has never been translated from the Latin. This is a valuable source for gauging the upcoming pre-liberal thought in the seventeenth century, incorporating absolute voluntarism in a theory of aristocratic rule. Joris van Eijnatten typifies Huber's theory of law and politics as representative of the so-called *philosophia novantiqua*, thereby combining traditional Aristotelianism with a Cartesian-Hobbesian emphasis on individual will.<sup>381</sup> Huber has a strong aversion to the cynical opportunism of Machiavelli, the tyrannical hypocrisy of Cromwell and the "outrageous political ideas of Thomas Hobbes", thereby subjecting the private sphere radically to the public sphere, arguing, as Hobbes implies, that if the authorities command us publicly to reject Christ, we should obey, knowing in our hearts that we do, in fact, truly believe in Him.<sup>382</sup> However, Huber is not free from the political universalism of the enlightened absolutism as advanced by Grotius and Hobbes. The main difference between Hobbes and Huber is that, whereas Hobbes has a stronger inclination towards absolutism, Huber is, relatively speaking, more concerned about the protection of individuals from abuse by government. Furthermore Huber has a more positive view of human nature. To him sanctity and universal justice can be achieved if the people honestly persist. His strong view on aristocratic government differs from Hobbes' view insofar as Huber provides for a covenant between rulers and subjects in addition to the covenant concluded between the members of those subjected to the rule of government. Although Huber sincerely strives to protect the interests of the individual members of the body politic — he states for example that the interests of the community cannot supercede the interests of the individual — the effect of his political theory is a distinct leaning towards political universalism. The effects of his system of social contract are that the decision of the majority is imputed to each individual; consequently, if something has been decided very harshly, everybody has to impute it as much against himself as against others. The power of the majority of the citizens is transferred to certain people — this is the origin of aristocracy. The possibility of resistance to abuse by government is very limited in Huber's theory. The result, therefore, is that the subjection and exploitation of the subjects by political rulers is not excluded. John Locke's political theory produced the same implications approximately ten years later, and these are already evident in Huber's contract theory. For a study of the pre-liberal views on politics, preparing the way for the theories of populist democracy in John Locke's and Jean-Jacques Rousseau's political theories, Ulrich Huber's *De Jure Civitatis* is a most important source.

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381 1993, 355 n. 276.

382 *Ibid.*, 160.



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