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Property beyond princely authority: the intellectual and legal roots of Ulrik Huber's fundamental law

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Summary

In this paper I argue for a rule-of-law-reading of Ulrik Huber's fundamental law on freedom of property. My aim is to show that there is enough contemporary intellectual and legal context for such a reading. I do so by arguing along three lines: the medieval tradition that rooted the origin of private property in natural law, protection of property in the constitution of Holland in the seventeenth century, and property rights protected by fundamental law in English common law.

Keywords

Ulrik Huber – rule of law – sovereignty – property – natural law – constitution of Holland – Grotius – common law

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Government is instituted to protect property of every sort.

JAMES MADISON, *Property* (1792)

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1 Introduction: Huber on freedom of persons and property

In (one of) the first systematic accounts of constitutional law, Ulrik Huber's *De jure civitatis* (DJC, first edition 1672)¹, we find freedom of persons and private property protected by 'fundamental law'. Huber recognized several fundamental laws, a notion rather popular in his days². The one on which we focus in this paper reads: '*Salvam civibus libertatem personarum rerumque suarum dominium esse debere*'³. Along with the principles that a ruler cannot dispose over his *imperium* after his life (unless he holds it in *patrimonium*)⁴, that a *civitas* may

- 1 Huber's *De jure civitatis* is often said to be the first systematic account of (universal) constitutional law, M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, Erster Band: *Reichspublizistik und Policywissenschaft 1600–1800*, München 1988, p. 291–292. However, the claim is not uncontested, E.H. Kossmann, *Huber, Politieke theorie in het zeventiende-eeuwse Nederland*, in: *Geschiedenis als een olifant, Een keuze uit het werk van E.H. Kossmann*, edited by F. Ankersmit and W. Krul, Amsterdam 2005, p. 131–153 (published earlier in E.H. Kossmann, *Politieke theorie in het zeventiende-eeuwse Nederland*, Amsterdam 1960), published in English as *Ulric Huber (1636–1694)* in the chapter *Politica Novantiqua*, in: E.H. Kossmann, *Political thought in the Dutch Republic, Three studies*, [Verhandelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. Letterkunde, Nieuwe reeks, deel 179], Amsterdam 2000, Part 1: The course of the Dutch political theory in the seventeenth century. See also T.J. Veen, *Recht en nut, Studiën over en naar aanleiding van Ulrik Huber (1639–1694)*, [diss. Groningen], Zwolle [1976].
- 2 M. Stolleis, *Condere leges et interpretari, Gesetzgebungsmacht und Staatsbildung im 17. Jahrhundert*, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (GA)*, 100 (1984), p. 89–116, esp. p. 103 ff.; H. Höpfl, *Fundamental law and the Constitution in sixteenth-century France*, in: *Die Rolle der Juristen bei der Entstehung des modernen Staates*, edited by R. Schnur, Berlin 1986, p. 327–356; M.P. Thompson, *The history of fundamental law in political thought from the French Wars of Religion to the American Revolution*, *The American Historical Law Review*, 91.5 (1986), p. 1103–1128; on p. 1110 Thompson writes: 'By the early seventeenth century, [fundamental law] had become the standard term for any laws, rights, privileges, or customs that writers thought of special importance for the well-being of a community'. On *leges fundamentales* further the studies by H. Mohnhaupt, as his *Die Lehre von der 'Lex Fundamentalis' und die Hausgesetzgebung europäischer Dynastien*, and *Von den 'leges fundamentales' zur modernen Verfassung in Europa*, in: idem, *Historische Vergleichung im Bereich von Staat und Recht, Gesammelte Aufsätze*, [Ius Commune Sonderhefte, Studien zur Europäischen Rechtsgeschichte, 134], Frankfurt am Main 2000, p. 1–33 and 35–72.
- 3 Ulric Huber, *De jure civitatis libri tres* 1.3.5.16. I have used edition Frankfurt – Leipzig 1708.
- 4 On the various types of rulership see *De jure civitatis* 1.3.1 and 2, and Huber's *Hedendaegse rechtsgeleertheit, Soo elders, als in Frieslandt gebruikelijk*, Leeuwarden 1686 (I have also used the translation of P. Gane, *The jurisprudence of my time*, Durban 1939), 11.1.6 (= 1v.6 in the translation). Huber stresses that these various types do not further entail differences in power.

not be divided and that men are summoned before women and the first-born before those born afterwards when it comes to inheriting a kingdom⁵, freedom of persons and ownership of their property are goods excluded from the idea of political power⁶. As I have pointed out elsewhere, these goods are so to say beyond the very essence of power⁷.

However, this interpretation seems problematic if we look at the wider scope of Huber's theory on sovereignty. Supreme power for Huber is *legibus solutus* and subjects are obliged to obey the power that is set above them even if obeisance is to their detriment. He also said that the state may demand the sacrifice of life and goods of its subjects. For, said Huber with references to Hugo Grotius⁸, 'the citizen is bound to stake his life and property for the fatherland, and the law is said to be master of our property in a stronger and higher sense than we ourselves are'⁹. Moreover, the sovereign has *dominium eminens*, that is, in Huber's words, overriding ownership ('uitmuntende eygendom')¹⁰. The power of Huber's sovereign is absolute, without restrictions of time and subject, and regardless right or wrong of his decisions¹¹. How to reconcile this absolute power and the sovereign's disposal over the subjects' life and property with the idea of freedom of persons and property, as goods being exempted

5 *De jure civitatis* 1.3.5, 17–19; *Hedendaegse rechtsgeleertheit* / *The jurisprudence of my time*, II.1.7.4–7 / IV.7.4–7.

6 The expression 'freedom of persons and ownership of their property' can be found in Huber, *Hedendaegse rechtsgeleertheit* / *The jurisprudence of my time*, II.1.7.4 / IV.7.4. For *dominium* see his definition of ownership ('eigendom') in *Hedendaegse rechtsgeleertheit* / *The jurisprudence of my time*, I.2.2.5 / II.2.5: 'a right by which a person has entire power over a corporeal thing, with the right of at once demanding the same, wherever it happens to be'. In the next paragraph Huber expressly clings to the narrow meaning of the word and excludes ownership of incorporeal things from his definition.

7 I have written on Huber and fundamental laws on another occasion, see my *Ulrik Huber on fundamental laws, A European perspective*, *Comparative Legal History* (forthcoming, publication foreseen in 2016).

8 Hugo Grotius, *De jure belli ac pacis* (1625), I.1.6, also I.3.6.2 and I.4.2. Huber in this context repeatedly refers to chapter 1.4.2 of Grotius' book. See also Grotius' *Inleidinge tot de Hollandse rechts-geleerdheid* (1631), II.3.2 ('hoogher recht' for *dominium eminens*) and III.1.21 ('meerder macht').

9 Huber, *Hedendaegse rechtsgeleertheit* / *The jurisprudence of my time*, II.1.3.15 / IV.3.15.

10 Huber, *Hedendaegse rechtsgeleertheit* / *The jurisprudence of my time*, II.1.8.25–27 / IV.8.25–27; see also I.2.2.8 / II.2.8, II.1.3.14 / IV.3.14, and *De jure civitatis*, I.2.3.25 ff. and I.3.6.38 ff.

11 See T. Veen, *Interpretations of Inst. 1.2.6, D. 1.4.1 and D. 1.3.31, Huber's historical, juridical and political-theoretical reflections on the lex Regia*, *Tijdschrift voor Rechtsgeschiedenis*, 53 (1985), p. 357–377, for Huber's absolutist interpretation of the *lex Regia* as a general, universal principle and the maxim *princeps legibus solutus* as the heart of its content.

from the very idea of political power? The answer to this question – that is: my interpretation of Huber's texts – may sound quite modern and in fact comes close to one of the core ideas in the concept of the *Rechtsstaat* / *État de droit* / *Rule of law*. Huber specified the protection provided by the aforementioned *lex fundamentalis* by saying that the freedom of persons and property is not given over to the power and will of the ruler 'without form of law', or, on another occasion: not 'without legal bounds'¹². Also the sovereign's *dominium eminens* is explicitly linked to the will of the people who constituted the political community¹³; we cannot assume, said Huber elsewhere, that these people ever have been willing to give over to the community their person and their right to own property without some legal safeguards, to hand it over in a way that the prince could make use of it *pro lubitu*, that is: *sine causa et ordine iudicii*¹⁴. Given our strong fear of death, nobody would want to take on him an obligation to suffer without a cause and without legal protection and 'democratic' safeguards, in Huber's words: *sine ordine suffragiarum et iudicii*¹⁵.

So what we find is a submission to absolute power, while holding back the person and property behind the shield of the courts and law. The authority of the prince or the state to demand the sacrifice of my life and property is only effectuated 'by form of law'.

Although Huber caught freedom of persons and property in one fundamental law, be it an echo of Grotius' idea of the *ius eminens* over us and our goods (*De iure belli ac pacis* 1.4.2.1) or an expression of the connection between talks about property and theories of respect for persons, I think that given the content ascribed to them the two elements can well be discussed separately¹⁶.

12 Thus in *Hedendaegse rechtsgeleertheit* / *The jurisprudence of my time*, II.1.7.2 and 4 / IV.7.2 and 4. See also *De iure civitatis*, 1.2.3.42 and 44, and *Hedendaegse rechtsgeleertheit* / *The jurisprudence of my time*, II.1.3.20 / IV.3.20.

13 *Hedendaegse rechtsgeleertheit* / *The jurisprudence of my time*, II.1.8.27 / IV.8.27; *De iure civitatis* 1.3.6.39.

14 See the paragraphs 39 ff. in *De iure civitatis*, 1.2.3 and *Hedendaegse rechtsgeleertheit* / *The jurisprudence of my time*, chapter II.1.3 / IV.3.

15 *De iure civitatis*, 1.2.3.42.

16 For freedom of persons we obviously have to read what Huber says in *Hedendaegse rechtsgeleertheit* / *The jurisprudence of my time*, II.1.3.16 ff. / IV.3.16 ff. and *De iure civitatis* 1.2.3.39 ff.: civil power only concerns physical, external aspects: the natural freedom to feel and think as one wills on things natural and supernatural is taken for granted, mental ideas and inner motives being matters between the individual and God; nobody can be bound by whatever pact to do what God forbade, or to keep from doing what God clearly commanded; nobody is bound by his prior consent to follow a vicious ruler into a situation that is worse than the war of all against all in the state of nature; given the general imminent fear of death nobody can be supposed to have consented to suffer unlawful attacks (that is: by sheer violence and public injustice) on his body.

I focus on property here. Does not Huber's conception of the freedom of property in fact come very close to the modern conception of property as a human right, a right restricted by the conditions provided for by law? Take for instance the European Convention on Human Rights (ECHR, 1950), granting States the competence to make 'such laws to control the use of property in accordance with the general interest (...)' or the Universal Declaration of Human Rights (UDHR, 1948), saying that no one shall be 'arbitrarily' deprived of his property¹⁷. Going back in history a little further, we ascertain that the Founding Fathers could have benefitted from reading Huber when they found out that legislative 'democratic' majorities could be a threat to individual liberties too, just as Kings were already 'known' to be. For protection they ultimately turned to the courts and due process of law, just as Huber had written more than a century earlier¹⁸. The right to property played an important role in the Framers' attempt to safeguard liberty, as this right was 'the fence to consent'¹⁹. Much of Huber's theory here, although it is questionable whether the Founding Fathers ever had read any of his books (or had even heard of him)²⁰.

Or are we actually reading Huber's theory in a way too modern? Do we not anachronistically ascribe the idea of property as a human right protected by law to an author who had never heard of the idea of human rights?

The German legal historian Otto von Gierke in 1880 indeed described Huber's ideas on freedom of persons and property in terms of fundamental and

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- 17 ECHR, art. 1 of the first protocol: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'. UDHR, art. 17: '(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property'.
- 18 See G.S. Wood in the *Preface to Liberty, property, and the foundations of the American Constitution*, edited by E.F. Paul and H. Dickman, [SUNY Series in the Constitution and Economic Rights], New York 1989, p. ix–xiv, esp. p. xiii.
- 19 E.J. Erler, *The great fence to liberty, The right to property in the American founding*, in: *Liberty, property, and the foundations of the American Constitution* (*supra*, n. 18), p. 43–63 on p. 58: 'The connection between property rights and human rights is often contemptuously dismissed (...). The right to property is the great fence to liberty, because it is the fence to consent'. J.W. Ely Jr., *The guardian of every other right, A constitutional history of property rights*, New York – Oxford 1992, p. 4: 'The framers of the Constitution were vitally concerned with the need to safeguard property rights'.
- 20 The Founding Fathers were clearly influenced by John Locke; there is no mention any of the works of Huber in J. Harrison and P. Laslett, *The library of John Locke*, Oxford 1971.

inviolable individual *rights*: ‘unantastbare Individualrechte’²¹. I would however say that Huber’s argumentation is Bodinean rather than Lockean (who’s *Two Treatises of Government*, published 1690 but probably composed in 1679–1680²², still had to be written by the time Huber published his *De jure civitatis* in 1672): the sovereign is *legibus solutus*, said Bodin, but even absolute power has its limits. Huber followed Bodin in turning to divine and natural law and (tacit) fundamental laws to find these limits. The stronger right that the state (ruler) acquires over our lives and goods cannot be used in just any way; Huber restricted its use by law, i.e. a fundamental law. I would therefore not say, with Gierke, that Huber had formulated a fundamental (human) right of the individual to be invoked against the ruler. What we find is a fundamental *law* limiting the ruler’s power. It is an institutional approach, a theory focussing on limits to the institution of state power, rather than laying emphasis on individual rights.

I think that my ‘rule of law reading’ of Huber’s theory, stressing the legal limits to state power as such, is in fact not too modern, and not anachronistic. I will argue for this along three lines. First I will argue on the basis of the theoretical legal discourse on the roots of property from the Middle Ages to Huber’s days. Next I will turn to the constitutional reality in the Dutch provinces in Huber’s time. A third interpretative context consists of the discussions on the English common law and will only shortly be hinted at.

I resist the temptation to look forward from Huber to the American and French revolutions, although it is frequently observed ‘that the American constitutional scheme was designed, in large part, for the protection of private property’²³. Stronger still seems the connection between the right of property and the French revolution, the French *Déclaration des droits de l’homme et du citoyen* (1789) and the French *Code civil* (1804), ‘(l)a propriété étant un droit inviolable et sacré’ (*Déclaration*, art. xvii)²⁴. It is well known that the French

21 O. von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien, Zugleich ein Beitrag zur Geschichte der Rechtssystematik*, Aalen 1958 (1880), p. 290. See also Gierke’s *Natural law and the theory of society 1500 to 1800*, transl. E. Barker, Boston 1957 [Das deutsche Genossenschaftsrecht, Bd 4: Die Staats- und Korporationslehre der Neuzeit, Berlin 1913, p. 459–61], p. 146: ‘rights of individuals’ (‘Rechte der Einzelnen’) and ‘rights of the popular community’ (‘Rechte der Volksgesamtheit’, ‘Volksrechte’).

22 So P. Laslett in his edition of John Locke, *Two treatises of government*, [Cambridge texts in the history of political thought], student edition, Cambridge 1988 (1960), p. 35.

23 M.W. McConnell, *Contract rights and property rights, A case study in the relationship between individual liberties and constitutional structure*, in: *Liberty, property, and the foundations of the American Constitution* (*supra*, n. 18), p. 141–168, on p. 142.

24 P. Garnsey, *Thinking about property, From Antiquity to the Age of Revolution*, [Ideas in context, 90], Cambridge 2007, p. 221 ff.

civil code, which has been very influential in many other European countries, circles around this one key right, 'propriété'; in the *Code civil* the law of obligations (Book three) is headed under the title 'Des différentes manières dont on acquiert la propriété'.

In this study I will look backwards instead, in search for an intellectual and legal background of Huber's ideas. It will be shown that an institutional approach indeed had a firm fundament.

2 The right of property rooted in natural law

There is abundant proof that many medieval jurists thought of a subject's *dominium* over private property as outside the domain of the ruler, as exempt from his authority. Already in the 1950's Ennio Cortese drew attention to the fact that medieval jurists defined '*potestas absoluta*' as (in the words of Kenneth Pennington) 'transcending positive law, but not as liberating the prince from the shackles of natural and divine law'²⁵. Absolute power was simply not taken for absolute in the sense of arbitrary as it did not transcend natural or divine law or the established constitution, an idea at least as old as Aristotle's *Politeia*²⁶. Legal rationalization for the exemption of private property from (absolute) princely authority was often found by locating the origin of property in natural law²⁷.

25 K. Pennington, *The Prince and the Law 1200–1600, Sovereignty and rights in the Western legal tradition*, Berkeley – Los Angeles – Oxford 1993, p. 120; E. Cortese, *La norma giuridica, Spunti teorici nel diritto comune classico*, 2 vols., [Ius Nostrum, 6.1 and 6.2], s.l. 1995 (1962), I, p. 131–136.

26 Pennington, *The Prince and the Law* (*supra*, n. 25), p. 117. I thank my colleague L. Hupperts-Cluysenaer for the reference to Aristotle's *Politics*, where we find the idea that also an absolute ruler is bound to 'customary law', or 'constitution' (discussion is open whether this customary law must be taken for natural or positive law or both, 1287b5; on this question see C.A. Bates, *Law and the Rule of law and its place relative to Politeia in Aristotle's Politics*, in: Aristotle and the philosophy of law, Theory, practice and justice, edited by L. Hupperts-Cluysenaer and N.M.M.S. Coelho, [Ius Gentium, Comparative perspectives on law and justice, vol. 23], Dordrecht 2013, p. 59–75 on p. 62–64): to rule 'lawfully' is to rule according to the will of the subjects (1285a28), and where laws do not rule, there is no constitution (1292a30–35); Bates, *ibidem*, p. 63: 'Thus the political community holds that what it holds as law truly encompasses what nature holds to be true about the justice of the matter in question'.

27 Pennington, *The Prince and the Law* (*supra*, n. 25), p. 124–125; on rights being natural see R. Tuck, *Natural rights theories, Their origin and development*, Cambridge 1979. B. Sutter, *Der Schutz der Persönlichkeit in mittelalterlichen Rechten, Zur historischen Genese der modernen Grund- und Freiheitsrechte*, in: Grund- und Freiheitsrechte von der ständischen

The idea of private property rooted in natural law (or *ius gentium*) was not uncontested in the Middle Ages; and neither is the modern view that this idea had been prominent in the Middle Ages (and after). There were other intellectual traditions that thought of private property as rooted in sin or as a human invention for the sake of utility²⁸. It seems safe to say that there had not been much theorizing on the origin of private property in Roman antiquity (Cicero's, *De officiis*, I.21, being the notorious exception), that Christian thinking initially rejected the idea of private property originating in nature, but that western legal theory (including the theories of the canonists) increasingly accepted this idea which became dominant in the seventeenth century, without however banishing the other position²⁹. As a matter of fact mundane interests sometimes, if not often, in the end determine the positions taken³⁰.

The works of Hugo Grotius, giving private property 'the status of natural law by locating its emergence in the state of nature' has been most influential³¹. Grotius deals with the question in the second chapter of the second book of his *De jure belli ac pacis*, referring to his *Mare liberum*, chapter V, where we read that 'the present-day concept of distinction of ownerships was the result (...) of a gradual process whose initial steps were taken under guidance of nature herself', and that '[t]he recognition of the existence of private property led to the

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zur spätbürgerlichen Gesellschaft, edited by G. Birtsch, [Veröffentlichungen zur Geschichte der Grund- und Freiheitsrechte, 2], Göttingen 1987, p. 17–41, underlines that often the protection of persons and property was effected by means of privileges. Such privileges can well be taken for what we would call a 'constitution', see my *Hugo Grotius, privileges, fundamental laws and rights*, Grotiana, 32 (2011), p. 1–19.

28 See for instance Garnsey, *Thinking about property* (*supra*, n. 24), esp. chapter 5 and 6 (both on the state of nature and the origin of private property), and 8 ('Property as a human right'), in which chapters he ignores the medieval jurists; for property as a consequence of the Fall and rooted in sin, see p. 128 ff. The jurists are discussed in chapter 7 ('Property as a legal right', on p. 201: 'To sum up: we should not look to the medieval jurists for major conceptual advances in the area of property theory').

29 This short overview is based on the subsequent paragraphs on property in J.M. Kelly, *A short history of Western legal theory*, Oxford 1997.

30 R. Pipes, *Property and freedom*, London 1999, p. 8, aligns these traditions with Plato (utopian communism, ethical idealism) and Aristotle (utilitarian realism); see p. 17–18 for the turn within the Catholic Church from 'defending property as a regrettable but unavoidable reality to defending it on principle' against the background of the need to protect clerical holdings from seizures by the crown. See also the poverty-discussion in Tuck, *Natural rights theories* (*supra*, n. 27), p. 17 ff.

31 Garnsey, *Thinking about property* (*supra*, n. 24), p. 136; Grotius is 'the most important figure' in the history told by Tuck, *Natural rights theories* (*supra*, n. 27), p. 58. On Grotius also J. Waldron, *The right to private property*, Oxford 1990, especially ch. 6.

establishment of a law on the matter, and this law was patterned after nature's plan'³². All this happened, we read a little further on in the chapter, in the same period that the establishment of states was first undertaken.

Still, there were authors in the seventeenth century who defended a positive law position, saying that private property had its origin in society and man-made law. The Dutch jurist Cornelis van Bijnkershoek (1673–1743), after considering several positions in his *Dissertatio de dominio maris* (1703), concluded: '*nihil putam superesse, quam ut dominium adscribamus Juri Civili*'³³.

Theories on private property always have had important implications for ideas on sovereignty. The two interact. As Jeremy Waldron points out, rights-based arguments on property hold in essence 'that individuals have an interest in owning things which is important enough to command respect and to constrain political action'³⁴. Placing the origin of private property in the natural law implicated theoretically that the institution could not be abolished by human intervention, and that private property anticipated the state and human lawgiving³⁵. Practically it mattered because it implicated that a ruler could not legitimately expropriate the goods of his subjects without a cause (*causa*), or without being pressed by necessity, or resting his action on the public good (*bonum publicum*)³⁶. Now it is true that *bonum publicum* was much of a magic formula without much protective potential against state intervention, once coined by J.J. Moser a 'Universal-Staats-Medicin', as long as it was the ruler himself who decided what the public good demanded³⁷.

32 Hugo Grotius, *De jure belli ac pacis* (1625), prol. 8 (*alieni abstinencia*, abstaining from that which is another's, flowing immediately from the *fons iuris*: the care of maintaining human sociability) and the second chapter of Book II (referring in the second paragraph to his *Mare liberum*, c.5); the translation of the quotations from *Mare liberum* is by R. Feenstra in his 2009 edition and translation (Leiden – Boston), p. 16 (55).

33 Quote found in G.C.J.J. van den Bergh, *Eigendom, Grepen uit de geschiedenis van een omstrede begrip*, [Rechtshistorische cahiers, 1], Deventer 1988, on p. 85–86: '*nihil putam superesse, quam ut dominium adscribamus Juri Civili, civium enim est conventio, ut quisque sua habeat tuita separatim, etiam citra possessionem naturalem*'.

34 Waldron, *The right to private property* (*supra*, n. 31), p. 3.

35 Note however that it also gave room for a defence of both slavery and absolutism: 'if natural men possess property rights over their liberty and material world, then they may trade away that property for any return they themselves might think fit', Tuck, *Natural right theories* (*supra*, n. 27), p. 56–57.

36 This corresponds to the first of the four categories that Waldron, *The right to private property* (*supra*, n. 31), p. 16 ff., distinguishes that a right-based claim to property may stand for.

37 I took the reference to J.J. Moser, *Von der Teutschen Reichs-Stände Landen* (...) (1769) from H. Mohnhaupt, *Der Entwicklungsgang von den wohlervorbenen, konzessionierten Rechten und Privilegien zu den dem Menschen zugehörigen Grundrechten*, Europäische Grund-

In the sources we also find a second thought immediately flowing from the idea of the naturalness of private property that is significant for our story. Some of the medieval jurists came to the conclusion that if property is based in natural law, so too must be the means to defend property. To a jurist raised and educated in the Roman law tradition this step in fact could appear familiar, not to say logical, since in Roman law somebody's legal position is marked by the *actiones* he could make use of, rather than by his subjective rights³⁸. Hugo Grotius in his *Inleidinge tot de Hollandsche rechts-geleerdheid* (1631) still defined 'eigendom' (private property) in terms of the right to vindicate possession³⁹. If a prince cannot take away a subject's property, so ran the medieval argument, neither has he the authority to deny his subjects an action to vindicate their property. The means to vindicate property were consequently ultimately rooted in natural law⁴⁰.

What is most important for my argument is that the outcome of the medieval theory rooting private property in natural law, and thus beyond the reach of the ruler, was incorporated by Jean Bodin in his *Six livres de la République* (1576) in which he systematically laid out his epoch-making theory of sovereignty. The limits Bodin set on monarchy, among which respect for the right of property, made Goyard-Fabre conclude that Bodin's thoughts had an ineffaceable imprint of medieval theories⁴¹. Bodin explicitly and vehemently rejects the opinion of some 'flatterers' who defend that the Pope and the Emperor could take the goods of their subjects. He adds: 'aussi plusieurs docteurs, et mesmes les Canonistes, detestent ceste opinion là comme contraire à la loy de Dieu mais c'est tres-mal limité, de dire qu'ils le peuuent faire de puissance absoluë (...) veu que la puissance absoluë n'est autre chose que derogation aux lois ciuiles'⁴². According to Ralph Giesey the jurist Bodin had during his career

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rechte Zeitschrift, 31 (2004), p. 604–611, on p. 607; see also Mohnhaupt, *Von den 'leges fundamentales' zur modernen Verfassung in Europa* (supra, n. 2), p. 66.

38 See also Tuck, *Natural right theories* (supra, n. 27), p. 41 ('the action was what really mattered'); see also B. Straumann, *Is modern liberty ancient?, Roman remedies and natural rights in Hugo Grotius's early works on Natural Law*, *Law and History Review*, 27.1 (2007), p. 55–85.

39 Hugo Grotius, *Inleidinge tot de Hollandsche rechts-geleerdheid* (1631), II.3.1 and 4.

40 Pennington, *The Prince and the Law* (supra, n. 25), p. 132 ff. on 'Natural Law and the Judicial Process', especially p. 148 ff. (Odofredus on p. 151, Guido of Suzzara on p. 152 ff.).

41 S. Goyard-Fabre, *Jean Bodin et le droit de la République*, Paris 1989, p. 160. See also R.E. Giesey, *Medieval jurisprudence in Bodin's concept of sovereignty*, in: Jean Bodin, edited by H. Denzer, [Verhandlungen der internationalen Bodin Tagung in München], München 1973, p. 167–186.

42 Jean Bodin, *Les six livres de la République, avec l'apologie de René Herpin*, Aalen 1977 (Paris 1583), I.viii, ed. p. 156.

come to realize 'the operation of natural law in living legal practice', natural law imposing limits on sovereignty, and had discovered, in the words of Giesey, 'the juristic actuality of *princeps legibus alligatus*'⁴³. Giesey goes so far as to argue that Bodin advocated limited monarchy, the monarch being '*legibus solutus* only in respect to civil laws and *legibus alligatus* in respect to natural law'. One of the limitations on the sovereign's power Bodin had come to realize was the guarantee of the subjects' proprietary rights. Despite Bodin's alleged intentions, the *Six livres* were generally understood as advocating truly absolute monarchy. According to Giesey this so happened due to the change of the meaning of natural law into 'mere morality'⁴⁴. Important for our argument is that the medieval natural law limitations on the ruler's power, including the limitations guaranteed by property rights, had found their way into the first systematic account of sovereignty, written in the last quarter of the sixteenth century⁴⁵.

Before we continue, it seems prudent to note that according to Huber himself the right of property was rooted in the law of nations (*ius gentium*, 'het recht der volkeren')⁴⁶, the law of nations in turn being that law which has acquired binding force ('macht van verbintnisse') through observance by the whole of humanity, or the best part of it⁴⁷. On the other hand he also said that the rule 'Give to every man his own' belongs to natural law⁴⁸; and in his *De jure civitatis* we read that *dominia rerum* existed before civil communities (*civitates*) were established⁴⁹. Whatever we should make of this, the above mentioned discussion among the jurists and Bodin's view were not dealt with to locate the roots of property, but to show the often alleged specific status of the right of property and the venerable age of the idea that property is in one way or the other considered as beyond princely authority.

43 Giesey, *Medieval jurisprudence* (*supra*, n. 41), p. 180–181; see also Pennington. *The Prince and the Law* (*supra*, n. 25), p. 24 and 283; Goyard-Fabre, *Jean Bodin* (*supra*, n. 41), p. 160–164.

44 Giesey, *Medieval jurisprudence* (*supra*, n. 41), p. 181 and 183.

45 Part of Giesey's argument (*Medieval jurisprudence* (*supra*, n. 41), p. 184) is that 'Bodin (...) belongs to the last generation which had a thorough experience with the older medieval tradition (...). After him, however, it is doubtful that anyone could find the great tradition of Bartolus and his followers in either the universities or the courts'. Bodin was interpreted as the advocate of absolutism, since his readers had lost access to the medieval tradition in Bodin's marginal notes and the natural law limitations it included.

46 *Hedendaegse rechtsgeleertheit / The jurisprudence of my time*, I.1.2.22 and I.2.3.5 / I.2.22 and II.3.5.

47 *Ibid.*, I.1.2.22 / I.2.22.

48 *Ibid.*, I.1.2.8 / I.2.8.

49 *De jure civitatis*, I.1.3.11, with references to Inst. 2.1.11–12 and D. 41.1.

The medieval jurists and Bodin had reached intellectual positions not far from Huber's, who set essential limits on political power and defended that the subject's obligation to obey is never and nowhere without exceptions⁵⁰. Huber labelled the limits *leges fundamentales*; respect for the subject's property was one of them. This limit could only be passed over 'by form of law', and the victim should have access to the courts. The notion of *lex fundamentalis* may have been relatively new, the idea to protect private property against princely authority, so I tried to show, was not. Huber's 'Dutch' readers will have been well familiar with the notion of fundamental laws, as it was more often used in the Dutch provinces in Huber's days. To give a famous example: the verdict against Hugo Grotius was based on the fact that he (and the other accused members of the Oldenbarnevelt-faction) had violated the bond and fundamental laws ('bant ende fundamentele wetten')⁵¹ of the United Provinces; seemingly the Union of Utrecht was thought of here – at least that is what Grotius seems to have made of it⁵². Let us stay with Grotius for a while, but focus again on property.

3 Grotius and the law of Holland

My second line of argument in defense of what I called above a rule of law interpretation of Huber's thoughts on property as protected by fundamental law, rests on what particularly Hugo Grotius had to say on the constitution of Holland at the beginning of the seventeenth century. Of course, Holland is not

⁵⁰ Huber, *De jure civitatis*, especially 1.2.3.39 ff. and 1.3.5.1 ff.

⁵¹ The 'Sententie' is printed in *Verhooren en andere bescheiden betreffende het rechtsgeding van Hugo de Groot*, edited by R. Fruin, Utrecht 1871, p. 337 ff., on p. 337: 'Alsoo Hugo de Groot (...) buyten pijn ende banden van ijsere bekend heeft, ende (...) Heeren Rechteren voorts gebleken is, dat nyet tegenstaende niemant geoorloft en is, den bant ende fundamentele wetten, daerop de Regieringe der Vereenichde Nederlanden gefundeert, ende deselve Landen (...) tot noch toe beschermt sijn, te violeren, of te verbreecken: hij gevangen hem onderstaen heeft (...)' (follow all the proved charges against Grotius).

⁵² Based on my reading of Grotius' *Verantwoordingh Vande Wettelijke Regieringh Van Hollandt Ende West-Frieslandt, Midtsgaders Eenigher nabuyrige Provincien, sulckx die was voor de veranderingh, gevallen inden Jare 1618*, Parijs 1622, ed. p. 143: 'Den text van de Unie, waer op de Authoriteyt vande Staten Generael is gefundeert (...)' (the Union's text, on which the States General's authority is founded); in the Latin translation *Apologeticus eorum qui Hollandiae Westfrisiaeque et vicinis quibusquam nationibus ex legibus praefuerunt ante mutationem quae evenit anno MDCXVIII*, Paris 1622, ed. p. 259: 'Federis tabulae, in quibus omnis potestas procerum Federatorum fundata est ...'.

Frisia (were Huber resided; his *Hedendaegse rechtsgeleerheyt* has a focus on 'Frieslandt'). But the two provinces were part of the same Dutch Republic in which Holland held a prominent place, and the basic constitutional facts of Holland will have been familiar in Franeker where Huber lectured. Moreover, Huber's public law as laid down in his *De jure civitatis* was not restricted to any specific province, country of empire, as it was meant to be 'universal'⁵³. The reason for me to look at Grotius in this context, is, again, to show that a rule of law reading of the passages from Huber's work with which we started did have a contemporary embedding, that such a reading – to say it differently – is not without temporal and spatial context.

Before we look at his words, however, it is good to remember that Grotius in the works that we will look at was far from impartial in constitutional matters. He had played an active role in Holland's and the Republic's politics, eventually at the cost of his own freedom and property⁵⁴. My most prominent source here, his *Verantwoordingh* or *Apologeticus* in Latin (both 1622)⁵⁵, is actually the statement in which Grotius tried to defend the course of action he and the others of the defeated Oldenbarnevelt-faction had followed and to criticize the case that had been brought against them by the States General. Therefore, before we turn to the works of Grotius a short introduction to Dutch politics in the roaring 10's of the seventeenth century⁵⁶.

Early 1617 during the Twelve Years Truce in the Revolt against the Spanish King the Dutch Republic witnessed 'an unmistakable note of rebellion in the air'⁵⁷. The armistice gave room for religious (Counter-Remonstrant against Remonstrant) and socio-political (all against the regents) tensions to come to the

53 Ulrici Huberi *Oratio* [III] / Ulrik Huber *Redevoering*, translated F. Akkerman, T.J. Veen and A.G. Westerbrink, annotated, introduced and appendix T.J. Veen, Zwolle 1978 and the *prae-fatio* to his *DJC*; Veen, *Recht en nut* (*supra*, n. 1), esp. p. 100 ff.

54 On the life of Hugo Grotius see H. Nellen, *Hugo de Groot, Een leven in strijd om de vrede, 1583–1645*, Amsterdam 2007, recently published in English: *Hugo Grotius, A lifelong struggle for peace in Church and State, 1583–1645*, Leiden – Boston 2014. On the Dutch Republic see J.I. Israel, *The Dutch Republic, Its rise, greatness, and fall 1477–1806*, Oxford 1995; on its 'constitution' see S.J. Fockema Andreae, *De Nederlandse Staat onder de Republiek*, [Koninklijke Nederlandse Akademie van Wetenschappen, Verhandelingen, Afd. Letterkunde, Nieuwe Reeks, deel LXVIII, nr. 3], s.l. [Amsterdam] 1985 (1960) and R. Fruin, *Geschiedenis der Staatsinstellingen in Nederland tot den val der Republiek*, edited by H.T. Colenbrander, 's-Gravenhage 1980 (1922) and the literature (mostly in Dutch) below.

55 See *supra*, n. 52.

56 Parts of the text following are freely taken from my *Hugo Grotius, privileges, fundamental laws and rights* (*supra*, n. 27).

57 Israel, *The Dutch Republic* (*supra*, n. 54), p. 438.

fore. The States of Holland reacted to the situation by passing the so-called Sharp Resolution (4 August 1617), in which several measures were taken to empower the governments of Holland's towns to restore and protect order.

In 1617 Grotius was still an esteemed member of Holland's (Remonstrant) elite and in several works he defended the Sharp Resolution against protests of the *Hof van Holland* (High Court) and the *Hoge Raad* (Supreme Court) among others⁵⁸. Most interesting for our discussion here is what Grotius said on what is called *handsluiting* in Dutch, the express authorization of the States of Holland to prohibit judicial courts (as the Hof van Holland and Hoge Raad) to take (further) notice in a case of a burgher against his (town) government⁵⁹. Grotius argued that the States of Holland, being the Country's true bearer of sovereignty, can legitimately revoke and limit any power that had been delegated to any other institution⁶⁰. This included, so he said, the power of the judicial courts, who hold jurisdiction only by way of commission from the (sovereign) States; and they hold it only until revocation. In strong Bodinean terms Grotius remarked that all 'parts' of sovereignty are annex to one another other in such a way that one 'part' cannot be separated from the rest without the danger of

58 See his *Verclaringhe van de Staten van Hollandt* (1617) and the *Justificatie van de Resolutie* (1618). As we can learn from Grotius' 'Memorie van mijne intentien en notabele bejeningen' in: *Verhooren en andere bescheiden* (*supra*, n. 51), p. 1–80 on p. 1 and 2 the *Verclaringhe* was written partly by Oldenbarnevelt, partly by Grotius, the *Justificatie* mostly by Grotius. See also J. ter Meulen and P.J.J. Diermanse, *Bibliographie des écrits imprimés de Hugo Grotius*, The Hague 1950, nos. 855 and 861. Shortly before the Resolution was concluded Grotius had already written an extensive and systematic defense of *handsluiting* in his *Advys, Nopende 't Recht, de Steden competerende in cas van Judicature*, Middelburg [1710] (Ter Meulen / Diermanse, *Bibliographie* (*supra*), no. 805), translated in Latin as *Responsio* (Ter Meulen / Diermanse, *Bibliographie* (*supra*), no. 807) and *Debat van de Staten van Holland tegen de deductien van den Hoogen Raad en van het Hof van Holland*, in: *Kroniek van het historisch genootschap te Utrecht*, 26 (1870), zesde serie, eerste deel, Utrecht 1871, p. 161–196 (Ter Meulen / Diermanse, *Bibliographie* (*supra*), no. 806), the texts of *Advys* and *Debat* being very similar, yet not identical.

59 J. den Tex, *Olderbarnevelts geschil met de hoven van justitie*, *Bijdragen en Mededelingen betreffende de Geschiedenis der Nederlanden*, 84 (1969), p. 5–23. As such *handsluiting* was not new, as a 1591 Resolution had already prohibited judicial proceedings against a town without preceding notification and comment of that town's government. In those years it was about banishments of persons who sided with the Spanish in the first place. In 1617 the further reaching measure of the Sharp Resolution (even after notification and comment of the town government a case could not be tried by a judicial court) concerned mainly banishments of Counter-Remonstrants from 'Remonstrant' towns.

60 *Debat*, ed. p. 162 ff.

losing it all⁶¹. This certainly holds true, so Grotius, for the plenitude of jurisdiction ('volheyt van jurisdictie') which includes the right of evocation and the right to appoint judges, and which is often depicted as one of the essentials of sovereignty⁶². The conclusion should be that a sovereign surely and evidently has the power to close of recourse to the judicial courts. And the sovereign should have this power even more surely and evidently in cases of banishments, which are acts of policing a town.

Things had changed dramatically for Grotius in 1622 when his *Verantwoordingh* and *Apologeticus* were published. Part of Prince Maurits' successful *coup d'état* of 1618 had been the capturing and sentencing of the most prominent leaders of the Remonstrant faction: Oldenbarnevelt, Hogerbeets, Ledenbergh and Grotius⁶³. Their cases were brought before an extraordinary court commissioned by the States General. This is an important element in Grotius' argument in his apology of 1622, as it makes clear that he and the others were tried by a political court, not by an ordinary, judicial court. Oldenbarnevelt was sentenced to death (beheaded 13 May 1619); Ledenbergh had committed suicide in September 1618; Hogerbeets and Grotius were sentenced to life imprisonment and their goods were seized. The charge against all four had been disruption of the Country's administration ('perturbatie van de politie'), afterwards qualified as *crimen laesae majestatis*⁶⁴.

In defense of the Oldenbarnevelt politics, Grotius in 1622 as in 1617 held that banishments are acts in the sphere of policing a town, acts that thus fall within

- 61 *Debat*, ed. p. 193. Note that in other texts Grotius is eager to 'demarcate his own views from those of Bodin' (thus P. Borschberg, *Grotius, the social contract and political resistance, A study of the unpublished thesis LVI*, IILJ Working Paper 2006/7, [History and Theory of International Law Series], p. 20), especially when it comes to the (in)divisible nature of sovereignty.
- 62 Cf. also H. Gerlach, *Het proces tegen Oldenbarnevelt en de 'maximen in den staet'*, [diss. Leiden], Haarlem 1965, p. 542.
- 63 Nellen, *Hugo de Groot* (*supra*, n. 54), ch. VIII; J. den Tex, *Le procès d'Oldenbarnevelt (1618–1619), fut-il un meurtre judiciaire?*, *Tijdschrift voor Rechtsgeschiedenis*, 22 (1954), p. 136–168.
- 64 The qualification afterwards can possibly be linked to the need to block a claim of Oldenbarnevelt's heirs to the seized goods, Den Tex, *Le procès d'Oldenbarnevelt* (*supra*, n. 63), p. 143 (also p. 153–154), following Grotius, *Verantwoordingh*, ch. XVIII, ed. p. 162, for a *crimen laesae majestatis* nullified this claim. According to a proverb quoted by Grotius (*idem*, ed. p. 162–163) the *crimen laesae majestatis* is the only crime for persons without a crime: 'Ja 't is een Spreec-woordt geworden, dat het *Crimen laese Majestatis* is het eenige *Crimen* van Persoonen, die zijn zonder *Crimen*'. The sentence of Grotius and the later declaration that included the qualification *crimen laesae majestatis* can be found in *Verhooren en andere bescheiden* (*supra*, n. 51), p. 337–353.

the competence of the administration and not necessarily in the court's jurisdiction. But this time he explicitly added that this holds only as long as the banishment is not accompanied with loss of one's honor or goods. We find this addition in a section that Grotius had opened with the distinction that had 'always' been made in Holland between the executive and the judiciary⁶⁵. Grotius substantiated his argument with a reference to a *missive* of Prince William of Orange from 1584 (authorizing magistrates to take action against subversive persons *sine existimationis damno et salvis rebus*), and some Resolutions of the States in the same spirit from the years after. Further on Grotius formulates a principle of all free states (*libera republica*), that it is odious to let anyone else than ordinary judges ('ordinarisse rechters') decide over a resident's blood, honor and property, in Latin: *de capite ac fortunis civium*⁶⁶. Ordinary judges, that is: courts and judges in the service of the judiciary. The point he was making was that the politically instructed court commissioned by the States General that had decided the cases against the Oldenbarnevelt-faction in fact didn't have jurisdiction over them since the body, life, liberty, honor and goods of the persons involved had been at stake⁶⁷.

There is a lot to say about what Grotius writes here. Interesting is the list of body, life, liberty, honor and goods, a list which with some variations is known from his more familiar theoretical works as 'things' in which every person (by nature) has a right. In Grotius' *Inleidinge* (written 1619–1621 during captivity at Loevestein) we find a person's life, body, liberty and honor as 'inalienable' things (*inalienabiles*, 'onwandelbare zaken') that 'belong to' somebody, in the sense that they cannot be transferred to somebody else; in the *De iure belli ac pacis* (first edition 1625) he said that by nature every human being holds as his own (*suum*) his life, body, limbs, reputation, honor and freedom to act (*vita, corpus, membra, fama, honor, actiones propriae*)⁶⁸. For my argument it is

65 '(...) in Hollant altijd is onderscheyden gheweest de autoriteyt van bevel tot conservatie vande Politie, vande magt van Judicature' (*Verantwoordingh*, ed. p. 129; see also p. 9); in the Latin text (*Apologeticus*, ed. p. 232–233): 'quod in Hollandia distinctum semper fuit ius imperandi id quod salus publica exigit, a iudicum potestate'.

66 Grotius, *Verantwoordingh*, ed. p. 151: 'In alle vrije Regieringh is het hatelijck over 't Bloedt, Eer ende Goedt van de Inghesetene, andere, als ordinarisse Rechters, te stellen'; *Apologeticus*, ed. p. 274.

67 *Verantwoordingh*, ed. p. 147: 'Lijf, Leven, Vrijhey, Eer ende Goedt' (see also on p. 139); *Apologeticus*, ed. p. 267: '[agebatur] ... de vita, de libertate, de fortunis hominum'.

68 *Inleidinge tot de Hollandsche rechts-geleerdheid* ('Introduction to the jurisprudence of Holland'), II.1.41 and 42; *De iure belli ac pacis*, II.17.2.1. That Grotius was inspired by Hugo Donellus (*Commentarium de iure civili libri viginti octo*, II.8 (ed. Francofurti 1626, p. 45): 'Haec a natura cuique tributa sunt quatuor: vita, incolumitas corporis, libertas, existi-

interesting that in 1622 in his apology on the proceedings against himself and the rest of the Oldenbarnevelt-faction 'goods' ('Goedt') had been included in the list. This in itself is not a significant alteration of the spirit of his other works, as property is of course not inalienable and thus not to be included in the list of inalienable things in the *Inleidinge*, whereas on the other hand it is our labor, the *actiones proprie* in *De iure belli ac pacis*, which by nature makes external things, goods, 'belong' to us.

Did Grotius have a point when he claimed that the extraordinary court set up by the States General, a political institution, didn't have jurisdiction to try the Oldenbarnevelt-faction now that their body, life, liberty, honor and goods had been violated? To answer this question, let us shortly look at some aspects of the Dutch Republic's constitution at the beginning of the seventeenth century.

Rijpperda Wierdsma points out that in Grotius's days forfeiture of goods could indeed only be imposed by a court's order. Also the distinction between the executive and the judiciary Grotius draws in his *Apologeticus* was real, despite the fact that contemporaries were familiar with the concepts of '*sententias, sive condemnationes*' from the executive and '*justitia politica*'⁶⁹. These terms suggest a mixture of juridical and administrative flavors. To legitimate political forms of administration of justice people usually pointed out that Lady Justice is often too slow to act accurately in times of pressing need, an argument also used by Grotius in his 1617 defense of the Sharp Resolution. Fockema Andreae points out that the judicial protection of property just mentioned was in fact an effective and frequently used remedy against and prevention of administrative arbitrariness⁷⁰. Recourse to the court was open if property was endangered or attacked by administrative intervention and the injured could ask the court to grant him a 'maintenue' or a 'complainte', aimed at protection of his possessions. Rijpperda Wierdsma concluded that in the

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matio') is shown more than once by R. Feenstra, especially in his *Hugues Doneau et les juristes néerlandais du XVII^e siècle, L'influence de son 'système' sur l'évolution du droit privé avant le Pandectisme*, in: Jacques Godefroy (1587–1652) et l'Humanisme juridique à Genève, Actes du colloque Jacques Godefroy, edited by B. Schmidlin and A. Dufour, Bâle – Francfort-sur-le-Main 1991, p. 231–243, reprinted (with addenda) in R. Feenstra, *Legal scholarship and doctrines of private law, 13th–18th centuries*, Aldershot 1996, iv.

69 J.V. Rijpperda Wierdsma, *Politie en justitie, Een studie over Hollandschen staatsbouw tijdens de Republiek*, [diss. Leiden], Zwolle 1937, p. 152 ff. and the references in fn. 6.

70 Fockema Andreae, *De Nederlandse Staat* (*supra*, n. 54), p. 103–104. Also Den Tex, *Oldenbarnevelts geschil met de hoven van justitie* (*supra*, n. 59), p. 5–6, fn. 1a, arguing against Gerlach, *Het proces tegen Oldenbarnevelt* (*supra*, n. 62), p. 543 fn. 1.

Dutch Republic property was in fact better safeguarded than personal freedom⁷¹.

This picture demonstrates that Grotius had a point. The power of the seventeenth-century administration reached deep into the resident's lives, but limits were set to the execution of civil power. The law of Holland provided for juridical protection of property (even if Grotius himself was actually deprived of this protection). This is not to suggest that the sovereign in the Dutch Republic could not use immovables for public interest, that he could not make use of his *dominium eminens* if he considered this use expedient. Fockema Andreae points out that he could and that the sovereign was then 'strictly speaking' not bound to conditions and forms⁷².

This concise picture of the law of Holland indicates that Huber's fundamental law on the freedom of property was not without a legal context. However, it is good to point out once more that according to Huber also the *dominium eminens* was directly and explicitly founded upon the will of the people who constituted the political community and that nobody could be assumed to give over the right to own property without legal safeguards or to allow the sovereign to make use of his right *pro lubitu, sine causa et ordine iudicii, sine ordine suffragiarum et iudicii*⁷³.

4 English law

Tentatively I want to pay attention to a third context that might substantiate a rule of law reading of Huber's work. The context I have in mind is the English common law and the sixteenth- and seventeenth-century discussions in England on property rights vis à vis the sovereign⁷⁴. Although Huber explicitly referred to the Englishman Thomas Hobbes, I am not sure whether he in any way

71 Rijpperda Wierdsma, *Politie en justitie* (*supra*, n. 69), p. 154.

72 Fockema Andreae, *De Nederlandse Staat* (*supra*, n. 54), p. 179–180. Strictly speaking ('strikt genomen' in Dutch), for Fockema Andreae also points out that at the end of the eighteenth century reality showed less arbitrariness than the theory would suggest.

73 *Hedendaegse rechtsgeleertheit | The jurisprudence of my time*, II.1.8.27 / IV.8.27; *De jure civitatis* 1.3.6.39–40. In these texts we find 'safeguards' against arbitrary use of the *dominium eminens* similar to what we find *supra*, n. 72 in Fockema Andreae's picture of the situation at the end of the eighteenth century: infringement on private property only in cases of necessity for public utility, and the obligation to pay compensation.

74 I think Huber is much closer to the English ideas on fundamental laws than the common continental views; Mohnhaupt, *Von den 'leges fundamentales'* (*supra*, n. 2), p. 64–65.

had been influenced by the English legal discussions. The least we can say, however, is that Huber's theory is quite similar to the ideas of an anonymous pamphleteer, who in *An Essay Upon the Original and Design of Magistracy* (1689) came to the conclusion that '[c]ontrol over one's property was deemed to be so fundamental a liberty that each individual's retention of that control, subject only to 'judicial process' was tacitly understood'⁷⁵.

In the seventeenth century the rhetoric of fundamental law seems to have had 'only a small effect' on the understanding of law in England⁷⁶. But if anything *did* effect the understanding, it seems to have been the right of property, 'a passionate political concern of the 1680s'⁷⁷. Such rights were an important instrument in the Parliament's struggle for legislative sovereignty. A person's right of property being inviolable, it could only be transferred or altered by his consent. As it was of course Parliament that 'represented' the subjects (in the sense that the consent of Parliament is the consent of the represented), Parliament's consent was needed and taxation was lawful only if the 'common consent' of the realm was obtained in Parliament⁷⁸.

Despite the differences, the discussion in England does again indicate that Huber did not stand alone with his idea of private property protected by fundamental law.

5 Conclusion

I have tried to show that a rule of law reading of Huber's fundamental law concerning the freedom of persons and private property setting legal limits on the institution of state power is not without intellectual and legal context, both spatial and temporal. I focused on property. In Huber's days, a tradition of legal theorizing that placed property beyond princely authority had since long been established. This theory had found its way into Bodin's idea on sovereignty, whereas in England discussions on property as a fundamental right played an important role in the seventeenth-century political struggle for Parliament's

75 See H. Nenner, *Liberty, Law, and Property, The Constitution in retrospect from 1689*, in: *Liberty secured?, Britain before and after 1688*, edited by J.R. Jones, [The making of modern freedom], Stanford (California) 1992, p. 88–121, on p. 89.

76 Nenner, *Liberty, law, and property* (*supra*, n. 75), p. 99.

77 Nenner, *Liberty, law, and property* (*supra*, n. 75), p. 99.

78 J. Goldsworthy, *The sovereignty of Parliament, History and philosophy*, Oxford 2004 (1999), p. 69.

legislative sovereignty. In Holland, Grotius's 1622 attack on the trials against himself and the rest of the defeated Oldenbarnevelt-faction showed that the medieval ideas to a certain extent found expression in the law of Holland: private property was protected against state intervention by access to judicial courts.