Ulrich Huber's statement of the Roman-Dutch legal principles of constitutionalism in his *De Jure Civitatis* (1673)[1]

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Opsomming

Ulrich Huber se beskrywing van die Romeins-Hollandse regsbeginsels van konstitusionalisme in sy *De Jure Civitatis* (1673)

Ulrich Huber se werk De Jure Civitatis *bevat 'n omvattende uiteensetting van die Romeins-Hollandse beginsels van konstitusionaliteit. Op die tydstip wat Huber se werk gepubliseer is, is die Romeinsregtelike beginsels met betrekking tot konstitusionaliteit deur skrywers soos Baldus de Ubaldis reeds wyd toegepas. Huber het die insigte van skolastieke skrywers soos Baldus, sowel as Bodinus se teorie van politieke soewereiniteit en sosiale kontraksdenke in sy formulering van die konstitusionele beginsels van die Romeins- Hollandse Reg benut. Deur sy werk het Huber 'n belangrike bydrae gelewer tot die sistematisering van die grondslae van die Romeins-Hollandse konstitusionele denke.*

Abstract

Ulrich Huber's work De Jure Civitatis *(1673) is an encompassing exposition of the Roman-Dutch principles with regard to con-*

1 A sincere word of appreciation is extended to Professor Boelie Wessels of the University of the Free State and Johan Fourie in Bloemfontein for their assistance with translations from the original Latin text of *De Jure Civitatis*.

stitutionalism. At the time of Huber's publication, the principles of Roman law with regard to constitutionalism had already been extensively applied by scholastic authors like Baldus de Ubaldis. Huber applies the insights of the scholastic authors as well as Bodin's theory of political sovereignty and social contractarianism in his exposition of the constitutional principles of Roman-Dutch law.

1. Introduction

Medieval juristic thinkers interested in political theory and practical politics had, by the end of the 15th century, constituted a veritable "republic of jurisconsults", the products of some of the most outstanding university law faculties in Europe.[2] Amongst their ranks, jurists like Baldus agreed on the eminent authority of the *Corpus Juris Civilis* and the classical Roman law sources.[3] Roman legal science had, since the 13th century, become a permanent part of political discourse, and the medieval commentators served as a conduit between Roman law and the development of constitutional theories based on law in the 17th and 18th centuries. By the middle of the 17th century scholastic interpretations of Roman law principles and the application of such principles to practical constitutional issues, had reached impressive proportions. Ulrich Huber was one of the pioneering Dutch scholars who took upon himself the challenging task of systemising and stating the principles of Roman Dutch constitutionalism emanating from

2 Burns (Ed.) *The Cambridge History of Political Thought 1450-1700* (1996) 73.

3 Burns (Ed.) (n 2) 73: "[J]urists agreed generally on the authoritative texts in which 'doctors of law may not allege error', according to Baldus ..; namely, Justinian's Digest, Institutes, Code, and Novels for 'legists'; Gratian's *Decretum* and the thirteenth- and fourteenth-century decretals for 'canonists'; and both, of course, for those who took their degrees *utriusque*. ... But explicitly or implicitly, the form and much of the content of Roman law remained in force, effective in education and legal mentality if not always in law courts, down to the end of the old regime, and indeed long after. In various transformations since the thirteenth century Roman legal science has been a permanent part of the environment of political thought; and in some respects − social and economic dimensions and various ideological and institutional applications − it has had a deeper impact than its chief rival, Aristotelian political science, which has for so long dominated the history of political thinking."

classical Roman law and other sources. His efforts culminated in his *De Jure Civitatis*[4] − an extensive work cast in typical scholastic style − reflecting the ideas of social contractarianism, and a re-interpretation of the notion of political sovereignty inherent to theories of enlightened absolutism as well as the legacy of the literature of the Dutch Revolt.

By the first half of the 17th century juristic discourse on the legal nature of constitutional relationships between rulers and their subjects had culminated in a plurality of political paradigms. On the one extreme there were the views of the Huguenots and the monarchomachs who, on historical grounds, developed the contractarian ideas upon which the later theory of public law was grounded.[5] At the other end of the spectrum the constitutional theories of Thomas Hobbes and Hugo Grotius endeavoured to provide a deeper base to Jean Bodin's theory of political sovereignty.[6] Both theoretical approaches were fruitfully re-interpreted in his *De Jure Civitatis.*

By the mid-17th century Roman-Dutch legal scholarship was much in need of the disentanglement of Roman-Dutch legal principles of constitutionalism from the political philosophies and theories prevalent at the time, and to have the principles of Roman-Dutch constitutionalism systemised and coherently stated. In the Netherlands the Roman-Dutch legal principles of constitutionalism reflected diverse influences and had become enmeshed in political views justifying the Dutch Revolt and the political thought of authors like Lipsius and Graszwinckel on political sovereignty.

In addition, the proliferation of political ideologies had increasingly obscured the legal principles of constitutionalism and these principles had become blurred by political methodology. Although Hugo Grotius, in his *De Jure Belli ac Pacis*, had hinted at distinguishing between the public law norms of constitutional theory and the political ideologies of his time, the public law norms of Roman-Dutch legal theory had for the largest part become

4 Hereafter quoted as *De Jur Civ.* All references to this source are to the edition of 1694.
5 Franklin *Jean Bodin* (1973) 108.
6 Franklin (n 5) 108.

obscured by the intricacies of political ideologies and political models.

Ulrich Huber, arguably one of the most outstanding Roman-Dutch authors of the second half of the 17th century, contributed substantially towards systematically stating and commenting upon the Roman-Dutch legal tradition of constitutionalism. Huber's work *De Jure Civitatis* reflects the results of his mature thoughts on the legal foundations of Roman-Dutch constitutionalism. Huber's methodological position was foremost a comparative jurisprudential approach, combined with an historical analysis of public law developments from classical Roman law, through the medieval schools of scholastic jurisprudence, to the monarchomachian, Huguenot and absolutist approaches on constitutional theory, which included Grotius and Pufendorf's theories of social contractarianism based on theories of enlightened political sovereignty.

Bodin's views on sovereignty, together with his legal conception of the state that could be universally applied to issues of constitutionalism, provided a fundamental starting point for later juristic thought − including Huber's − thoughts on the constitutional limits of state power. However, Huber's juristic efforts at identifying relevant Roman-Dutch legal principles through comparative and historical jurisprudence provided him with fundamental legal mechanisms that could fruitfully be applied to establish a balancing of individual and collective autonomy in the public law sphere − something Bodin and enlightened Dutch absolutists had not been able to accomplish.

It was particularly the political tracts of the Dutch Revolt that established a strong basis of Roman law arguments for Dutch jurisprudence by formulating principles of public law, combined with the works of scholastic authors aimed at providing a legal basis for constitutional issues. A number of influential political publications of the period drew directly from the primary Roman law authorities in their efforts to secure the basic rights of subjects and to limit the political power of rulers: Pneumenander, *Vermaninghe aan de gemeyne Capiteynen ende Krijchsknechten in Nederlandt* (1568); the anonymous tract *Libellus supplex Imperatoriae Maiestati* (1570) (translated as *A Defence and true Declaration of the things lately done in the lowe Countrey whereby may easily be seen to whom all the beginning and cause of the late troubles and calamities is to be*

imputed (1571) and Aggaeus van Albada, *Acten van den Vrede-handel gheschiet te Colen* (1581).

Because lawyers had a dominant influence in constructing the political thought of the Dutch Revolt, with authors such as Albada, Aldegonde, Junius de Jonghe and Jacob van Wesembeeke having either studied law or had a legal professional background, it was to be expected that Dutch political authors would make frequent use of the great medieval commentators on Roman law and indeed Roman law itself.[7] The social contractarian thinking of the Dutch Revolt, together with re-interpretations of classical Roman law and scholastic legal views, provided fertile ground for Huber, from which he could draw his views for systematically stating the Roman-Dutch principles of constitutionalism.

This essay reflects upon Huber's contribution towards stating Roman-Dutch public law principles in establishing a basis from which individual and group autonomy could be legally balanced within a constitutional framework. In particular the focus is on Huber's thoughts on the people as the locus of sovereign power; the legal nature of the sovereign's power emanating from the *Lex Regia*; the nature of the limitations to the political power of the sovereign in positive law and the higher norms of natural law, the *ius gentium* and the common good; the legal acts performed by the people without the authorisation of the sovereign; juristic mechanisms for protecting fundamental rights; the legal-corporate nature of the *populus*; and the legal basis of social contracting.

2. Ulrich Huber's legal framework of Roman-Dutch constitutionalism

2.1 The juristic origins of the people's law-making powers

Huber's emphasis on the original political authority of the people to make law was not a novelty. The legal principles with regard to the law-making powers of peoples contained in the Roman law (the *jus commune* of Western Europe) were generally believed to emanate from the *Corpus Juris Civilis.* Scholastic interpretations of Roman

7 Van Gelderen *The Political Thought of the Dutch Revolt, 1555-1570* (2002) 273.

law favoured the view that the power of peoples to make laws for themselves flows from the *ius gentium*.[8] Furthermore, it was stated that the *populi* have the general ability to create their own bodies of law: such powers are inherent to a people. No other human agency has the competency to make laws for a people, and in this respect people are not dependent upon superiors to establish law.[9] In addition, all powers to make laws wielded by the emperor (or sovereign) emanate from the people.[10] The view prevailed that the *ius gentium* posits fundamental principles of human social life based on law. Therefore, the basis of the organisation of the *populus* is both rationally and legally grounded. The coming into existence of a people is not dependent upon a human agent or a human superior, for they exist without authorisation of any superior. Furthermore, the law-making powers of the people are founded solely upon the *ius gentium*. The necessary bonds for binding together the people into an entity (corporation) for exercising its law-making functions are founded upon the principle of contracting. The persons constituting the group of people associated for the purpose of making laws for themselves are legally authorised to do so by contracting with one another provided they do nothing in violation of the public law.[11]

Post-Glossator interpreters of Roman law, including the scholastic legal scholar Baldus de Ubaldis, applied and developed the principles of the *Lex Regia,* to the effect that the Roman people set up the emperor and transferred all their power to him. He adds the theocratic element that the transfer of the people's power to the emperor was afterwards confirmed by God.[12] In his system of universal public law, Huber follows the line of the scholastic medieval legal authors and their arguments based on Roman law. To Huber the middle route between bold insolence on the part of the subjects and licence to dominate by political authority is situated in acknowledging the original authority of the people. On their part the people transfer as much authority as they are willing to

8 *D* 1 1 5.
9 *D* 1 1 9.
10 *D* 1 4 1.
11 *D* 47 22 4.
12 Canning *The Political Thought of Baldus de Ubaldis* (2003) 27.

transfer.[13] In a democracy, sovereignty vests in the people as a whole.[14] The departure from the state of nature is accomplished by all the individuals contracting with one another and agreeing that the decisions of the majority are binding on everybody.[15]

2.2 The legal nature of the sovereign's power emanating from the Lex Regia

Although the *populus* is the fount and origin of the law-making power nothing prevents the people from transferring their sovereign power to a ruler. According to Roman law the Roman *populus* was the original source of the emperor's jurisdictional power.[16] In Roman law the *Lex Regia* was a legal construction used to explain the origins of the emperor's powers and constituting the Roman people's original grant of juristic power according to which the empire had been set up.[17] According to the *Lex Regia,* the emperor's authority derives from the governmental authority embodied in the people under the *ius gentium* − the source from which the Roman people ultimately drew their jurisdiction and power to institute government.[18] The implication is that under the *Lex Regia* the emperor's decrees have the force of law, since the people conferred upon him all their authority and power.[19]

There are considerable differences of opinion on the issue of the revocability of the *Lex Regia.* Whilst *Digest* 1 17 1 and 1 11 1 speaks of a "translation of power", *Institutes* 1 2 6 and *Digest* 1 4 1 refer to a "concession of power". The Glossators' interpretations differed on the matter of the rights the community could assert against its rule once the emperor had been legitimately instituted: some held that there had been a definitive alienation whereby the people had renounced their power permanently, and that they had no legislative power and could never resume what had been

13 *De Jur Civ* 1 3 19.
14 *De Jur Civ* 1 3 25.
15 *De Jur Cic* 1 3 27.
16 *D* 1 4 1 and *C* 1 17 1 1.
17 Canning (n 12) 25.
18 *D* 1 1 5.
19 *D* 1 4 1.

alienated; a second group maintained that the *translatio* amounted to nothing more than a mere *concessio* whereby an office and a *usus* were conveyed, whilst the substance of the *imperium* still remained in the Roman people.[20] Whereas the first group accepted a system of absolute monarchy, the second postulated the community's legislative power, its paramount power over the prince and permanent control over the exercise of the rights of rulership.[21] In mainstream scholastic juristic thought the transfer of the *imperium* was deemed to derive from the will of the people, and the application of the *Lex Regia* extended from the relationship between the emperor and the Roman people to that between any monarch and his subjects.[22]

In scholastic juristic thought the *will of the people* was often interpreted to represent the source from which *imperium* emanated. In effect they extended the application of the *Lex Regia* from the relationship between the emperor and the Roman people to that between any sovereign ruler and his people.[23]

In mid-17th century legal-politico thought, the transfer of the political power of the people to the ruler had become a well-established principle of democratic constitutionalism. Ulrich Huber accommodates this principle in his constitutional theory. According to Huber, the primary reasons for the formation of the state are the desire for society, the dislike of confusion and the wickedness of man.[24] Huber adds that the state was also established for the sharing of the benefits of society.[25] The unity of the citizen-body and the multitude united for the common benefit is called a body of citizens.[26] Huber adds that nothing is more certain than the fact that the authority of the state is established by the people.[27] Even in Old Testamentary times the people delegated their power to appoint a ruler (1 Samuel 8:11).[28] The state established by

20 Gierke *Political Theories of the Middle Age* (1987) 43.
21 Gierke (n 20) 45.
22 Canning (n 12) 59-61.
23 Canning (n 12) 61, 62.
24 *De Jur Civ* 1 2 2
25 *De Jur Civ* 1 2 2.
26 *De Jur Civ* 1 2 2 8.
27 *De Jur Civ* 1 2 2 30.
28 *De Jur Civ* 1 2 2 32.

the people is defined as an association of a group of families for the purpose of enjoying their rights and a life to suit their needs under a sovereign authority for the sake of a life which is adequate.[29] A republican system of government differs from a state like "a soul differs from the body" or a concert from the chords.[30] The democratic consent of the minority to submit to the will of the majority is not above limitation for if the majority were manifestly to act in such a way as to deprive the minority of their life and goods, the minority would have the right to resist the majority.[31]

2.3 The nature and limitations of the sovereign's power

2.3.1 The power of the sovereign

In Roman law the emperor is *legibus solutus* to the measure that nothing resists plenitude of power, and the will of the sovereign overcomes all positive law. Ulpian's views on the *Lex Julia et Papia* read that the emperor is free from the operation of law.[32] However, the emperor's plenitude of power is *legibus solutus* in a limited sense: that he is freed from human positive laws (*leges*); in other words, that he is freed from the civil law and not from natural or divine law. In effect it means that the emperor's plenitude of power represents the fullness of authority subject to no necessity and limited by no rules of public law according to the formula *"in principe pro ratione voluntas"*. The emperor's plenitude of power is the product of the people's irrevocable alienation of power under the *ius gentium* to the *princeps* through the *Lex Regia.* From this perspective the emperor is appointed by the people who have transferred their sovereign power, and as such he does not function as the appointed representative of the body of citizens which has retained its original sovereignty.

In medieval juristic thought the notion of *plenitudo potestas* played a crucial role in the development of the idea of sovereignty. In Baldus' application of the relevant Roman law principles, he maintained that no other authority resists plenitude of power, for it

29 *De Jur Civ* 1 2 2 1-4.
30 *De Jur Civ* 1 2 2 15.
31 *De Jur Civ* 1 3 39.
32 *D* 1 3 31.

overcomes all positive law, and, in the case of the emperor, his will is reason enough.[33] To Baldus plenitude of power is the fullness of authority subject to no necessity and limited by no rules of public law, according to the formula *in principe pro ratione voluntas*.[34] However, the emperor is only *legibus solutus* in the limited sense that he is absolved from human positive law, the *leges* − that is from the civil law and not from natural or divine law.[35] In effect the emperor represents the people who have transferred their sovereign power − he is not the chosen representative of the people who retain their original sovereignty.[36]

In his *De Jure Civitatis* Ulrich Huber shifts the focus to the duties of the ruler according to natural and divine law. According to Huber's theory of public law, the establishment of the state in the form of a republican mode of government presupposes an agreement for protecting the life and property of everybody[37]: "No legal reasoning allows the personal bond of trust by which everyone has been put under obligation to be evaded on the pretext of the will of the majority (literally: 'on the pretext of universality'). An essential element of the agreement to establish the state is the condition that all individuals will commit themselves for the common good."[38] When the majority (or ultimately the sovereign ruler) shows a malicious disregard for the rights of others in conflict with the common purpose of justice, those who suffer injustice have the right of resistance.[39] Although the sovereign wields absolute political power, such power is not arbitrary; absolute power does not derogate from the pious and honest duty of rulers to perform their duties in accordance with the precepts of justice.[40] The sovereign ruler is bound to care for the advantages of his subjects and to properly exercise the justice that has been transferred to him.[41]

33 Canning (n 12) 72.
34 Canning (n 12) 72.
35 Canning (n 12) 72-73.
36 Canning (n 12) 73.
37 *De Jur Civ* 1 2 4.
38 *De Jur Civ* 1 2 4 14.
39 *De Jur Civ* 1 2 4 17.
40 *De Jur Civ* 1 2 4 23.
41 *De Jur Civ* 1 2 4 28.

The juristic nature of the state, instituted to promote the common good through justice, sets a constitutional environment within which the exercise of the laws of sovereignty are subject to the specific juristic limits and which laws are also confronted by the corporate nature of the people and its rights as a juristic person.[42]

2.3.2 The limitations on sovereign power under positive law

Although the sovereign is *legibus solutis* regarding positive law, he is bound by the inherent obligating nature of law. All political power wielded by the emperor has to be performed through law, because without law the whole constitutional system would be subject to uncertainty and governed by the whims and fancies of the sovereign.[43] The sovereign receives his powers from law and he is bound by the inherent obligating nature of positive law because the citizens are bound together by legal principles and transfer their sovereign power through the law (the *Lex Regia*). The dignity of the emperor's office demands that he subjects himself to the principles of positive law.[44] Since the days of the Glossators it was a generally accepted doctrine that an act of alienation performed by the people under the *Lex Regia* was for positive law the basis of the modern, as well as of the ancient, empire.[45] Ultimately this principle was regarded as having emanated from divine and natural law. It also became commonplace to propound the voluntary and contractual submission of the ruled as a philosophical axiom. By adding the doctrine of corporations, political theorists held that the vote of the majority is sufficient and conclusive to bind the body of the corporation (*unum collegiu et corpus*).[46]

In medieval scholastic jurisprudence it was held that although the *leges* depends upon the will of the sovereign, its existence limits him in practical terms: the emperor whose power is a legal creation, should work through law, otherwise the whole legal system would be subject to imperial caprice.[47] Furthermore, it is fitting for the

42 *De Jur Civ* 1 3 1 32.
43 Cf *D* 1 14 4.
44 *D* 1 1 11.
45 Gierke (n 20) 39.
46 Gierke (n 20) 40-41.
47 Canning (n 12) 74.

sovereign to be bound by laws, because he derives his powers from law. The emperor should live and govern according to law because his authority depends upon law.[48] The development towards binding the ruler to the fundamental duties of his office, received a strong impetus from the scholastic jurists. By the later medieval period, the relationship between the ruler and the community was steadily conceived as a relationship which involved reciprocal rights and duties.[49] Both the ruler and the community (people) were subject to political rights and duties, the union of which constituting an organic union under law. The relationships between the ruler and the individual were regarded as being legal in nature and were of a bilateral kind. Gierke concludes that rulership therefore "was never mere right; primarily it was duty; it was a divine, but for that very reason an all the more onerous calling; it was a public office; a service rendered to the whole body. Rulers are instituted for the sake of Peoples, not Peoples for the sake of Rulers".[50] Therefore the power of the ruler is not absolute, but limited by appointed bounds. His task is to further the common weal, peace and justice, with the utmost freedom for all. To this idea of office was attached the idea of sovereignty, which gradually issued in the doctrine of popular sovereignty.[51]

Arguments supportive of the legal bonds limiting the powers of the sovereign escalated in the literature of the Dutch Revolt. In the tract *Political Education Containing Various and Important Arguments and Proofs* (1582), the anonymous author quotes from the *Codex Justinianus* on *"De legibus et constitutionibus"* in support of the principle that "it is a worthy voice that the one who has been put in majesty, professes to be a Prince and to be bound by the laws, for the authority so strongly depends on the authority of the law"[52], and for a sovereign to submit himself to the laws, "is in fact a greater thing than imperial power".[53] Also *Codex* 6 23 3 is quoted in support of the principle that although the jurisprudence of the empire

48 Canning (n 12) 74.
49 Gierke (n 20) 34.
50 Gierke (n 20) 34.
51 Gierke (n 20) 34-36.
52 *C* 1 14 4.
53 *C* 1 14 4.

exempts the sovereign from complying with the ordinary legal formalities, still no duty is so incumbent upon him as to live in obedience to the laws.[54] This point is also stressed in the *Digest* to the effect that the law is a rule to which all men must be subject, including the sovereign.[55] The tract *Political Education*, justifying the Dutch Revolt, emphasised the promotion of the "welfare and prosperity of the community and subjects" by political rulers. It also stressed the principle that governmental office is not a matter of glory and liberty, but a burdensome duty of public service and, being "instituted to do justice", a prince should excel, above all, in virtue.[56] The anonymous author also refers to the *Codex* in support of the principle that it is worthy of a reigning sovereign for him to profess to be subject to law.[57] This Justinian text − a constitution of Theodocius II − played a major role from the medieval times to sustain the idea of limited, "constitutional rule".[58] In addition the Roman law maxim that "what touches all is to be approved by all", provided the groundwork for the development of the idea of government by (popular) consent.[59]

The emerging Roman Dutch principles limiting the ruler's powers and stating the ruler's duties, found fruitful application in Huber's constitutional theory. Alluding to the *Lex Julia Maiestatis*, Huber defines sovereignty in a political sense as the dignity and grandeur attached to the office of the ruler.[60] The transfer of the supreme power of the people to the ruler, therefore, implies the transfer of power to the *office* of the ruler. Echoing the Roman law principle of *digna vox*, and alluding to the comments by Cujacius, Huber advances the principle that the ruler is subject to and bound by his laws: the ruler is not absolved from obedience to his own laws.[61]

The Roman law-scholastic legal limitations are extended by Huber in defining the juristic limits to which rulers are bound in performing

54 *C* 6 23 3.
55 *D* 1 3 2.
56 Van Gelderen (n 7) 157.
57 *C* 1 14 4.
58 Van Gelderen (n 7) 158.
59 Van Gelderen (n 7) 211.
60 *De Jur Civ* 1 3 1.
61 *De Jur Civ* 1 3 1 37.

their political and legal duties. Although the people transferred their whole political power of government to the sovereign, and bestowed all power upon him, and although the political sovereign has total and inalienable power[62], he remains bound by the law; therefore the ruler is not allowed − beyond a true [not imagined] cause of public utility − to violate the possessions of citizens.[63] Furthermore, it is excluded from the power of rulers to violate the persons and goods of subjects and to do open violence to citizens.[64]

The state is inherently constituted as a legal entity subject to universal norms of public law. Although the laws of sovereignty concern the laws relating to supreme power and ensure that the power of the sword is applied for the protection of life and property[65], the legal nature of the state also limits the laws of sovereignty in their enforcement.[66] Because the laws of sovereignty aim at ensuring justice, they cannot be used to promote injustice.[67]

2.3.3 The limitations on sovereign power under natural and divine law

In addition to the precepts of positive law applicable to the exercise of sovereign power by the *princeps* in Roman law, there are also other legal norms demanding obedience from the emperor. The discussion on the term "law" in *Digesta* 1 1 11 implies that in a wide sense the emperor performs his duties subject to all law − including the higher norms of natural and divine law.[68]

In Roman law the will of the sovereign to pass law is subject to the moral, religious and rational limits set by the norms of the *ius nature*, *ius gentium* and *ius divinum*.[69] In Hermogenianus' *Epitomes*

62 In *De Jur Civ* 1 3 5 1 and 4 Huber quotes from Roman law sources to prove that the sovereign is not obligated by any law, not even by those which sanction those things which are prescribed by the law of nature, the law of nations and divine law. The reason is that the power of law lies in the need for civil obedience (*De Jur Civ* 1 3 5 5).
63 *De Jur Civ* 1 2 7 34.
64 *De Jur Civ* 1 2 7 1.
65 *De Jur Civ* 1 3 6 4.
66 *De Jur Civ* 1 3 6 4ff.
67 *De Jur Civ* 1 3 6 44.
68 *D* 1 1 11.
69 *D* 1 1 11 and I 1 2 1.

of Law,[70] the *ius gentium* is designated as the source of the right to property. The *ius gentium* is also cited as the fount of principles for distinguishing between races; the founding of kingdoms; the establishing of boundaries of land; the constructing of buildings; and for commerce, purchases, sales, leases, rents, and the creation of obligations, "such being excepted as were introduced by the Civil Law".[71] Therefore, the emperor is not the owner of the property of his subjects but, through the *dominium mundi,* has the duty to conserve and protect such rights.[72] Because the emperor is not the source of property rights, the *princeps* is not the proprietor of such rights, and such property rights that people have, are derived from the *ius gentium.*

In medieval scholastic juristic thought, the legal limits to the *potestas absoluta* set by the *ius naturale, ius gentium* and the *ius divinum* provided a structure within which the sovereign was bound to execute his will in accordance with moral, religious and rational principles. Private property, for example, was regarded as inviolable because of its origin from the *ius gentium*.[73] In medieval juristic thought, the emperor was not regarded as the ultimate owner of the property of the subjects, but through his *dominion mundi* was under the obligation to conserve and protect it.[74] Although legal limits to the right of private property were acknowledged, the derivation of property rights from the *ius gentium* prevented the *princeps* from establishing himself as the proprietor of such rights.[75]

In the political literature of the Dutch Revolt, arguments in favour of the sovereign's subjection to the *ius naturale* and the *ius gentium* were often presented to emphasise the legal limits within which the sovereign may operate. In the tract *Political Education* the author cites Justinian's *Digest* in favour of the principle that although the sovereign is *legibus solutus* he may not dispense with the "law of God and of nature and his promises".[76] With reference to Justinian's

70 Bk 1.
71 *D* 1 1 5.
72 Cf *C* 7 37 3.
73 Hermogenianus' *Epitomes of Law* in *D* 1 1 5.
74 Cf *C* 7 37 3.
75 Canning (n 12) 82.
76 *D* 1 3 31.

Codex the author advances that although the jurisprudence of the empire exempts the sovereign from complying with the ordinary legal formalities, still no duty is so incumbent upon him as to live in obedience to the laws.[77]

Following the approach of the Roman law and scholastic legal authors, Ulrich Huber maintains that although rulers who have been appointed by the people are free from the positive laws, they are subject to the legal obligations derived from the laws of nature, the laws of nations and the law of God, as well as to the fundamental laws in the constitutional system.[78] The sovereign ruler is subject to the law of nature, the law of nations and divine law, therefore he can be constrained and punished on account of his crimes since he exceeds the boundaries of legitimate leadership and because criminal law is also part of natural law.[79]

The obligating force of fundamental laws is contained in the fact that they originate from common agreement between rulers and their subjects and therefore receive their power from the law of nature or the law of nations.[80] Although constitutional privileges are not to be regarded as fundamental laws, such privileges may attain the power of fundamental laws by repeated stipulation and both the ruler and the subjects accepting the obligatory force emanating there from.[81] Fundamental laws belong to two types: some are expressly stated, whilst others are tacitly constituted. These laws concern the fundamental rights of citizens to the freedom of their persons, their right to life and the right to ownership of their possessions.[82] Such laws are called "fundamental" because they signify the fundamental norms upon which the whole constitutional structure leans and which should be regarded as being of fundamental importance.[83] Nothing prevents a people from exercising its inherent law-making power to conclude fundamental laws with rulers or from enforcing the stipulations thereof with the full sanction

77 *C* 6 23 3.
78 *De Jur Civ* 1 3 5 (Sum).
79 *De Jur Civ* 1 3 5 8.
80 *De Jur Civ* 1 3 5 (Sum) and 1 3 5 77.
81 *De Jur Civ* (Sum).
82 *De Jur Civ* 1 3 5 15 & 16.
83 *De Jur Civ* 1 3 5 20.

of natural law: “Natural obligation is efficient since it not only puts the debtor and one who promises under obligation, but also gives the creditor or the one who demands a formal promise, the right to demand and prosecute; and such an obligation arises from the agreements between those who are not circumstanced as subjects and rulers or those people who were not subjected to the supreme power. In the same manner it also arises from fundamental laws of such a kind as were rendered valid between kind and people.”[84] The effect of such laws is that in some instances a sharing of power is accomplished between rulers and their subjects.[85]

2.3.4 The bonds of the common good and the law-making power of the people

In classical Roman law the emperor is under the duty to serve and govern subject to the common good (the *utilitas publica*) because the emperor is under the obligation to achieve the good of his subjects.[86] Under the Roman law of the Republic two aspects seem to be closely related: first, the people transferred their sovereign legal authority to the sovereign[87]; second, the emperor should do what is useful to his subjects by maintaining “public discipline”.[88] The authority wielded by the emperor is to be performed through republican forms of governance to procure the common good. If the emperor were to act for his private benefit and subjective good, he would be acting like a tyrant because the emperor is expected to conduct himself like a father − he is under obligation to rule his subjects well, and they are bound to obey him well. In the event of unjust or illegitimate rule undermining the common good, such conduct would amount to tyranny to which the people have the right to resist.[89] The rule of a tyrant is invalid because he has no jurisdiction to govern illegitimately.[90]

The Roman law principles regarding the conserving of the public good gained strong support and development from the medieval

84 *De Jur Civ* 1 3 5 72.
85 *De Jur Civ* 1 3 5 79.
86 Cf *D* 1 4 1.
87 *D* 1 4 1.
88 *D* 1 11 1.
89 Cf *C* 1 2 16.
90 Cf *C* 1 2 16.

jurists. A number of important legal principles emanated from the fundamental duty of the *princeps* to further the common good. First, the emperor has the duty to serve the *utilitas publica* by achieving the good of his subjects; second, adequate protection of the common good is only possible in a republican regime sensitive to the liberty and rights of the subjects − if the emperor were to act for his private benefit he would conduct himself like a tyrant; third, the total transfer of the political power of the subjects under the *Lex Regia* leaves the subjects with a natural right of resistance in the event of the sovereign acting like a tyrant; fourth, the *populi* have the innate right to make law because peoples originate from the *ius gentium*, and the people's government comes also from the *ius gentium* − a people has governmental power just as every animal is ruled by its own spirit and soul; fifth, self-government by the people is a necessary and integral aspect of that people's existence; sixth, the people have an indigenous law-making competency in the interests of the common good.[91]

The scholastic jurists' interpretation of the legal principles in the *Corpus Juris Civilis* represents a significant development towards providing a legal basis for the common good to limit the sovereign's political powers and towards the development of a theory of popular government. In Baldus' views on tyranny, he awards the principle of the common good a central place. The marks of tyranny, according to Baldus, are threefold: that the ruler maintains faction strife amongst his subjects, that he impoverishes them, and that he has them persecuted and tormented in body and goods. According to Bartolus, one does not owe such a government submissiveness by right or reason, and one should therefore remove and forsake it. When a ruler breaks his fidelity, one is no longer obliged in conscience to remain faithful to him − "to whom breaks faith, faith is broken".[92]

The Dutch literature supporting the Dutch Revolt opposed tyrannous rule because it undermines the common good and the welfare of the subjects. Aggaeus van Albada, in his *Acten van den Vreden-*

91 Canning (n 12) 99-104.

92 Raath and Henning "The Impact of Scholasticism and Protestantism on Ulrich Huber's views on constitutionalism and tyranny" 2004 *TRW* 70.

handel (1581), applied Roman law principles and scholastic legal interpretations in favour of the argument that states are created to serve the common good: "to foster the common welfare and good, yes, to consider their own welfare inferior to the common".[93] By aligning the political justification of the Revolt with the Renaissance appropriation of classical texts and with late medieval and 16th-century studies of Roman law, Albada gave strong impetus to the idea of popular sovereignty.[94]

Huber's approach towards the issue of tyranny reflects strong influence of both Roman law and scholasticism. In line with Aristotle's definition of a tyrant as someone who uses government for his own benefit and not that of his subjects, Huber adds that tyranny is a manifestation of conduct in opposition to the duties of a ruler whose power has been established for the sake of the citizens.[95] Therefore a tyrant is somebody who seeks his own interests more than those of the citizens.[96] Huber quotes Aristotle in support of the definition of tyranny "according to which if any king behaves himself in such a way ... that everything is conducted to satisfy his lusts and to further his interests".[97]

Ulrich Huber follows the Roman law-scholastic juristic line to the effect that the people have the right to limit the power they hand over to government.[98] After government has been established the people still retain law-making power.[99] Even though the people have not gathered in one place, they nevertheless remain a communion by law and a united multitude by agreement, in respect of which there is nothing that forbids some law-making power from being preserved and exercised.[100] Huber adds that there is no reason why the people should not be able to preserve a part of their sovereignty together with a sound rule of law.[101] This implies that the people may

93 *D* 1 1 3 (the right to repel violent injuries).
94 Van Gelderen (n 7) 157.
95 *De Jur Civ* 1 9 1 3.
96 *De Jur Civ* 1 9 2 6.
97 *De Jur Civ* 1 9 3 52; Raath and Henning "The Impact of Scholasticism" (n 97) 67-68.
98 *De Jur Civ* 1 3 4 32.
99 *De Jur Civ* 1 3 4 30.
100 *De Jur Civ* 1 3 4 35.
101 *De Jur Civ* 1 3 4 41.

reserve certain powers and rights for themselves.[102] Two important implications flow from the original power vested in the people: first, all promises made by rulers have to be carried out, "just as the head of a household is obligated who has promised something to his wife, children and slaves"[103]; second, individual citizens may demand of their rulers that they do not lay claim to that which has never been given or handed over to them. In the event where a ruler appropriates powers of government that were not given to him, he is a private citizen up to that point and the citizens are not bound to submit to him.[104]

The state is not just any collection of human beings but is constituted for a specific purpose, namely to dispense justice and maintain the common good. The core function of justice is to award all people their due. In concrete terms this means, to Huber, that if citizens are forced to yield their property to others without reward, it is the duty of the state to restore the property to their owners as soon as possible.[105] Eminent domain does not do away with, but limits and governs the property of private citizens.[106] However, care should be exercised in having recourse to eminent domain because "the scoundrels of despotism hide under this label", and demands of eminent domain could easily be made to unlawfully deprive citizens of their property.[107]

Regarding the rights of liberty, Huber states that due to the monarchical and despotic tendencies of his time, "liberty is truly precious and golden" and that it must be guarded with the utmost care.[108] Because of the dangers of tyranny, the people must be more attentive to blocking up the way by which leaders can proceed (literally: "crawl") to tyranny and arbitrary power; not only through fundamental laws but also through energetic mediators in order to prevent prejudicing (literally: "attacking") the rights of the subjects.[109]

102 *De Jur Civ* 1 3 4 42-43.
103 *De Jur Civ* 1 3 4 44.
104 *De Jur Civ* 1 3 4 55.
105 *De Jur Civ* 1 3 6 44.
106 *De Jur Civ* 1 3 6 50.
107 *De Jur Civ* 1 3 6 51.
108 *De Jur Civ* 1 2 8 (Sum).
109 *De Jur Civ* 1 2 8 13.

The Roman legal principles on tyranny and the scholastic reinterpretations of the Roman law principles shaped Huber's perspectives on tyrannous conduct of political rulers in significant respects. The right to resist tyranny is in the first place situated in the hands of the representatives of the people.[110] However, if the ruler should avail himself of violence and strength, so that he cannot be restrained by the representatives, there is nothing to withhold individuals from resisting the tyrant.[111] Huber's hesitation to allow for a legal right to resist, except when there is no other way of protecting the *populus*, is reflected by his standpoint that if a tyrant behaves himself in such a way as to satisfy his lusts and further his personal interests, if there is no hope of an improvement in the future, if there can be no doubt that the republic is going to "rack and ruin", then there is nothing unjust or absurd in the opinion which provides the subjects with the capacity to resist.[112] When the political situation in the state has deteriorated to the level that it becomes a matter of protecting the state from total collapse, it also becomes a matter of self-protection. When this is firmly established resistance may start with anybody, and an official has no more right against the supreme power than the lowest of citizens, although the initiative should come from the highest magistrates (or representatives of the people).[113]

2.3.5 Juristic mechanisms for protecting fundamental rights The corporational nature of the people

In Roman law a number of references to the formation of corporations[114], the property of corporations[115], municipal corporations[116], the sempeternity of corporations[117] and human associations[118] provided authority for scholastic jurists to distinguish between the individual persons in the citizen body and the citizen-body having a

110 *De Jur Civ* 1 9 3 9.
111 *De Jur Civ* 1 9 3 11.
112 *De Jur Civ* 1 9 3 52.
113 *De Jur Civ* 1 9 3 53.
114 *D* 3 4 1.
115 *D* 29 2 25 1.
116 *D* 3 4 7.
117 *D* 3 4 7 2.
118 *D* 41 3 30.

corporate nature. The people as a corporation is, therefore, both a body composed of a plurality of human beings and an abstract entity distinct from its human members. The human components making up the corporation are not merely isolated individuals (*singuli*) but corporate persons (*universi*). This distinction between *singuli* and *universi* hinges on the definition of the *universitas.* In brief a *universitas* is a collection of persons bound together into a unity.[119] Although classical Roman law did not award the term *persona* to a corporation, Roman law corporations had the characteristic of immortality.[120]

Although Roman law corporations did not have legal personality, the medieval scholastics extended juristic corporation theory to include citizen bodies composed of a plurality of human beings as abstract unitary entities distinct from their human members under the rubric of legal persons.[121] The immediate effects of Baldus' inclusion of people under the rubric of corporations were that the human components of corporations were not merely regarded as isolated individuals (*singuli*) but corporate persons (*universi*)[122], and that the *populus* could not simply be equated with the individual members who compose it, but that it was rather a collection of natural persons bound into a unity: "Therefore separate individuals do not make up the people, and thus properly speaking the people is not men, but a collection of men into a body which is mystical and taken as abstract, and the significance of which has been discovered by the intellect".[123] The *persona universalis* is one person composed of many; it is an abstract person distinct from the human persons composing it, and it has immortality (a *persona perpetua*).[124] In describing the *populus* as a *persona* Baldus treats it as possessing legal personality distinct from the individual persons who compose it. Medieval jurists like Baldus bridged the gap between the concept *persona* in the *Corpus Juris Civilis* − human beings as natural persons − and the extension of legal personality to corporations.[125] The *populus* as a legal person does not derive its

119 *D* 3 4 7 1 & 2.
120 *D* 5 1 76, 3 4 9 & 1 1 9.
121 Canning (n 12) 186.
122 Canning (n 12) 186-187.
123 Canning (n 12) 187.
124 Canning (n 12) 189.
125 Canning (n 12) 190.

existence from any superior but from the *ius gentium* itself. The distinct juristic contribution of Baldus and the Commentators is situated in awarding the corporational entity with legal personality, thereby making it a subject of rights distinct from its members of which the *populus*, as a fictive person, provides a clear example of a *universitas* acting through the instrumentality of its members who represent it.[126] In Baldus' legal view, ultimate authority vests in the *populus* itself, which, as a corporation, acts through its representatives who perform legal acts on behalf of the juristic person.[127]

The immediate effect of the legal developments pertaining to the theory of corporations initiated by the Legalists and Canonists was the statement of the nature of human society in juristic terms. Gierke describes the tendency towards providing a juristic basis to the nature of human society as the development of doctrines "which were being steadily elaborated and unfolded" and which "became no mere doctrines of public law, but were also the exponents of an independent Philosophy of State and Law such as had not previously existed. And just because this was so, they introduced a quite new force into the history of legal ideas".[128] It was particularly Huber who successfully applied the fruits of juristic corporation theory in systemising the legal principles of Roman-Dutch constitutional theory. In particular Huber's jurisprudence systemised the enormous mass of legal material that was enshrined in Roman and Scholastic legal sources to provide a comprehensive body of Roman-Dutch constitutional norms. Huber applied professional jurisprudential theory to bring the aerial scheme of thought into combination with the actual public life of larger and smaller societies, and by so doing postulated a science of positive public law – a project initiated by the Scholastic jurists – and provided both political philosophy and practical politics with legal concepts serviceable for the construction of a system of universal public law principles. Through the legal theory of corporations, Huber developed the groundwork of the Legalists and Decretists, whereby political theory was subjected to juristic and political thought supported by strong legal principles and perspectives. By

126 Canning (n 12) 191.
127 Canning (n 12) 204.
128 Gierke (n 20) 1.

visualising the state as the "highest and largest community" with legal personality, Huber initiated fruitful legal doctrine for purposes of describing and limiting political power and stating the legal doctrine of constitutionalism in Roman-Dutch law.

The scholastic concept of the corporational nature of political society was extended and amplified by Huber to the measure that it served fundamentally important functions in his statement of the legal principles of Roman-Dutch constitutionalism. Corporations are defined as unions (or bodies of subjects) united together under a definite rule for common advantage.[129] Corporations are distinguished from societies (e.g. of tax-collectors and merchants) on the basis that corporations function under a definite (or fixed) system of rule.[130] In addition, corporations have to function both for the common benefit of the corporation and for the common good of society.[131]

Corporations have property separate from the property of their individual members, and the affairs of corporations are distinguished from the affairs of the individual members.[132] Corporations have legal subjectivity; the single members of the corporation are not bound by a contract or a transgression of the corporation, at any rate not as far as they are individuals.[133] Corporations are bound by the contracts into which the directors have entered in the name of the corporations.[134] Because the corporation as a whole is composed of its parts, it cannot happen that when the corporation is obligated the burden flows to its members.[135]

The contract of the emperor and the coronation oath

In Cicero's *De Officiis*, covenanting, contracting and the making of oaths are regarded with the utmost solemnity. Fidelity to promises and agreements not only forms the foundation of justice[136], but also binds together those who belong to the same nation.[137] The founda-

129 *De Jur Civ* 1 3 1 14.
130 *De Jur Civ* 1 3 1 14.
131 *De Jur Civ* 1 3 1 31.
132 *De Jur Civ* 1 3 1 35.
133 *De Jur Civ* 1 3 136.
134 *De Jur Civ* 1 3 6 11.
135 *De Jur Civ* 2 3 15.
136 *Off* 1 7 23.
137 *Off* 3 17 69.

tional principle undergirding all the transactions on which the social relations of daily life depend is the keeping of good faith: trusteeships, partnerships, trusts, commissions, and in buying and selling.[138] From the writings of Cicero it appears that the making of oaths before the people's assembly was not an exceptional occurrence.[139] In the final instance, agreement forms the basis of the establishment of a society for the common good: "But a people is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good", whereby a "scattered and wandering multitude" is transformed into a body of citizens by mutual agreement.[140]

The text of *Digest* 1 4 1 leaves the possibility for interpreting the transfer of the people's power, in contractual terms, to the emperor. The transfer of the sovereignty of the people to the emperor, whether permanently[141] or conditionally[142], could well be accommodated within the paradigm of formal agreements established between the people and the emperor. Although the emperor is not bound by the positive law, he is bound by the law of contract.[143] Furthermore, according to *Digest* 2 1 14, if anyone of equal or higher rank submits himself to the jurisdiction of another, the latter can administer justice against him. Applied to the relationship in terms of which the people transfer their sovereign power to the emperor, the emperor's execution of power could well be explained in contractual terms. Medieval authors appealed to both Scriptures and the authority of the Jurists to establish a contractual basis for limiting the sovereign's power: the contract between David and the people of Israel, as well as the Jurists' view that according to the *ius gentium,* every free people may set a superior over itself, provided a platform for establishing limits to political governance based on law.[144] Because the keeping of contractual obligations emanates

138 *Off* 3 17 70.
139 *Rep* 1 4 7.
140 *Rep* 1 25 39.
141 *D* 1 17 1 7 & 1 11 1.
142 *D* 1 4 1.
143 Cf *C* 1 14 4.
144 Gierke (n 20) 39.

from natural law, the emperor's duty to honour his obligations and undertakings to the people is based on norms that transcend the duties imposed by positive law. The immediate implication is that the sanctity of contract, and the *fides* involved in keeping it, are so important that they are seen as the products of the *ius naturale* or *ius gentium,* and as they were prior to any positive law power possessed by the emperor, limit him and anyone else in the state. Under contractual obligations the imperial power entrusted through the *Lex Regia* is not truly absolute power, but a power with a limiting and defining purpose, attached to that specific office.

Medieval jurists like Baldus regarded the feudal bond as a fundamental legal relationship – or contract – without which human intercourse in society would be impossible.[145] The sanctity of contractual undertakings and the *fides* involved in keeping them, are so important that they are to be deemed so fundamental – because they are the products of the *ius naturale* or the *ius gentium* – that they are prior to any positive law power possessed by the emperor, thus limiting the exercise of power in the public sphere.[146] The limits to the emperor's powers have important implications: first, the sovereign cannot appropriate the empire for his own purposes − he is not *dominus* of the empire, but is bound by his office to act in the interests of the empire.[147] If, for example, the emperor would alienate part of the empire committed to his care, he would injure his own *dignitas* and be breaking his coronation oath.[148] Because the empire is foremost a legal entity the political power of the emperor is only absolute as far as the basic constitutional legal framework extends.[149] Because the empire is a legal entity it cannot be changed in a way contrary to its legal disposition.[150] The coronation oath performed by the emperor places him in a position where he is not legally empowered to change the legal nature of the corporate whole.[151] Baldus says that, because the royal office is set up by the kingdom as a corporation, he regards the

145 Canning (n 12) 83.
146 Canning (n 12) 83.
147 Canning (n 12) 86.
148 Canning (n 12) 86.
149 Canning (n 12) 87.
150 Canning (n 12) 88.
151 Canning (n 12) 51.

office of the sovereign as a function limited by the purpose for which it was instituted, which purpose is to protect the rights of the kingdom − it is a separate entity and the source of the monarch's authority. Thus all rulers should swear a coronation oath to conserve the rights of their kingdoms. The duties attached to the coronation oath demand of the sovereign that he should protect the welfare of the *res publica*.[152]

During the period of the Dutch Revolt, Dutch arguments with Roman law and scholastic arguments in favour of the contractual nature of the public law relationships between the ruler and the people were abundant.[153] Also the discourse on the solemn bonds of oath-taking and conclusion of contracts by the sovereign reached its zenith in the period immediately preceding the revolt. In the Dutch tracts of the period, classical Roman law sources were quoted extensively in support of the contractual bonds, emanating from the natural law and the law of nations, to which the sovereign is subject. Authors stressed the solemnity of contracts and solemn undertakings[154]: contractual undertakings have to be performed.[155] Also scholastic authors and sources were quoted to stress the weight of legal undertakings and the duties of the sovereign towards the subjects. In the *Libellus Supplex Imperatione Maiestati* (1570), a number of references to the works of famous late medieval commentators occur. Bartolus of Sasseferrato's comments on Ulpian's rule in the *Digest*[156] are quoted to the effect that the conditions on which an office has been accepted must be respected, as well as Bartolus' commentary on the *Digest*[157], in order to prove that the "mutual assent and contract, they be in force of covenants agreed upon", are deemed to form part of the common law of the Netherlands.[158]

3. Conclusion

The articulation of Roman-law based arguments in favour of limited government, together with scholastic interpretations for and the

152 Canning (n 12) 219 220.
153 Van Gelderen (n 7) 125.
154 *D* 2 15 16.
155 *D* 19 1 13 8, 19 1 25 & 12 2 2-3. Also cf *C* 2 4 41.
156 50 6 2.
157 50 10 5 & 1 1 9.
158 Van Gelderen (n 7) 52.

legal limits of political governance, culminated in the Dutch politico-legal thought of the late 16th century which absorbed and transcended late medieval political interpretations of the preceding era. The injection of a strong measure of juristic thought inspired by Roman law and scholastic jurisprudence introduced and/or amplified fundamental concepts into Roman-Dutch legal thought that had important implications for the relationships between rulers and subjects in public law: firstly, the value of contracts having a limiting effect on the powers of rulers; secondly, subjecting the political power of the sovereign to fundamental limitations emanating from the internal nature of law itself; thirdly, elevating justice and the interests of the common good above the particular political relationships between the sovereign and the subjects. These elements served as the basis of Ulrich Huber's approach towards and his statement of the Roman-Dutch legal principles of constitutionalism.

The law-based democratic constitutional theory of Huber can be described as an ideal-type construct in which the principles of the autonomy of the individual and the autonomy of the collective are integrated in a highly complex system of justice-oriented governance under law. The scholastic-juristic interpretation of Roman law principles regarding the public law relationships between ruler and subjects provided Huber with a juristic basis from which he could both historically and systematically describe the legal principles of the constitutional state.

Some of the core issues addressed in Huber's *De Jure Civitatis* concern the question of how the political power wielded by the majority (consequently transferred to a ruler with sovereign political power), to live under laws that it has made for itself and which it can modify as it wishes, can be reconciled with the legal interests and rights of the individual. Huber's treatment of this aspect reflects his insight into the complexities associated with the core issues in the liberal democratic state. The following three constitutional aspects represent fundamental principles in Huber's statement of the juristic elements contained in a universal system of public law.

Firstly, Huber focuses on the nature of the state based on law: the republican quest for the common good in a society committed to justice, provides the basis for the legitimacy of the democratic association. To Huber the state cannot tolerate the arbitrary and

selfish use of power by rulers and/or the majority in the state. In Huber's view, democracy recognises that the unwritten law that puts the political entity in the service of its subjects should override the expression of the sovereign (whether the people or their representatives) just as it overrules individual autonomy in the state.

Secondly, Huber provides for fundamental rights for all in society, because if the people are sovereign then all members should share in the political power through the exercise of their rights. The principle of pluralism is closely attached to the fundamental rights of each individual. The private sphere of individual autonomy is not derived from that of the collective. Just as the reality of personal relations remains distinct from the relations that exist between people by virtue of living together in the same political society, Huber distinguishes the personal sphere of individuals from the sphere of state action under a system of public law. In Huber's theory, the private sphere of personal relations is strengthened by the individual's right to associate freely and to establish legal persons for the protection and furthering of the individual's interests in the diverse areas of human existence. Associations established on individual liberty also reflect the principle of pluralism under the tenets of justice and the demands of the common good.

Thirdly, both the competencies of the sovereign political authority and the liberty of the individuals in the pluralist regime are limited. Only the state, through its sovereign political authority, is authorised to repress private violence through the wielding of the power of the sword in promoting public justice. However, the laws of sovereignty allowing the use of public force are limited in their application. Even the law allowing for the state to maintain public order and justice does not allow for the state to apply violence to innocent citizens.

Although Huber expressed himself in typical Bodinian terms and presented his arguments in the then current scholastic mode of discourse, his legal reasoning in his *De Jure Civitatis* represents a remarkably refined and balanced approach, at a high level of sophistication, to issues concerning constitutionalism. Huber's arguments could fruitfully be considered as authority for adding weight to constitutional approaches that have virtually become commonplaces in our constitutional regime. Huber's emphasis on the inherent power of the law to limit political authority, his ideas regarding the role legal personality could play in bolstering individual

autonomy, and his emphasis on justice and the common good, are typical examples of ideas that could meaningfully contribute towards establishing a more robust culture of balancing the rights of public authorities in wielding the sword power, and the individual rights of the subjects.

Huber's discourse on the legal principles undergirding Roman-Dutch constitutionalism goes a long way toward removing the myth that the South African constitutional dispensation was established (and functions) in a "common law void". It also counters the idea that our constitutional dispensation functions in a context devoid of common law authorities undergirding our constitutional culture. Furthermore it also upsets the notion that there is virtually no common law authority our courts can appeal to in interpreting and developing the concept of constitutionalism.

Arguably the strongest element emanating from Huber's discourse on constitutionalism, and which could more fruitfully be considered in the interpretation of our constitutional provisions, is the idea that both state and law contain material principles inherent to the legal structure of society for limiting the exercise of political power. The material limits emanating from the legal nature of society provide a broad "juristic spirit" reflective of the following notions: binding the political relationships between ruler and subjects to reciprocal rights and duties; interpreting lordship/political governance primarily as a duty attached to public office (and never a mere right); the institution of rulers for the sake of peoples, not peoples for the sake of rulers; the confining of the powers of rulers to specific bounds and the furtherance of the common weal, peace and justice; furthering the liberty enjoyed by all in society, including the right to form group persons to further group interests and the rights and legal interests of minorities in the state − ultimately inclusive of the right of popular sovereignty and republican forms of governance, and the right of resistance against unjust and tyrannical measures.