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Huber, natural law and the reformational basis of the *iusprudentia universalis**

Summary

Ulrich Huber's work, *De Jure Civitatis*, contains the first serious effort to apply the Reformational perspectives on natural law to the field of Public Law. Not only did he integrate the perspectives on natural law with his views on Public Law generally, but he used the idea of natural law as the basis for jurisprudence as a whole (*iusprudentia universalis*). In his opposition to the natural law theories of Bodin, Hobbes and Pufendorf, Huber maintained the perspective that law and justice cannot be seen as the products of utility or be determined simply by their usefulness. To Huber the principles of good and bad, lawful and unlawful, just and unjust, are based on immutable principles superceding human manipulation. For these reasons, Huber emphasises the fact that natural law is not the product of man's reason, but is based on the eternal will of God. However, man is able, with his reason, to determine the will of God from its revelation in God's moral law. In effect, then, God's eternal law is the fundamental source of natural law. As such the validity of natural law principles are not subject to an agreement among men, or to the principles of civil law, but they precede the state and the authority of government. Not only do these precepts of natural law apply as normative provisions to all elements of Public Law, but also to the rights of man (among others to life and property) irrespective of the nature and composition of the state. Huber's response to Hobbes's natural law theory in particular, highlights the importance of establishing the principles of law and justice not susceptible to the manipulation of political authorities and government authority. As such Huber's theory of natural law was not only an important contribution in his own time, but he postulated an alternative which may serve as an essential corrective in legal systems where the formal notion of the state subject to law, does not penetrate to the level of informing the material idea of the law state in a fundamental sense.

Huber, natuurreg en die reformatoriese grondslag van die *iusprudentia universalis*

Ulrich Huber se werk, *De Jure Civitatis*, bevat die eerste ernstige poging om die Reformatoriese perspektiewe op die natuurreg op die terrein van die Publiekreg van toepassing te maak. Nie alleen het hy sy perspektiewe oor die natuurreg met sy siening oor die Publiekreg in die algemeen geïntegreer nie, maar hy het die idee van die

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natuurreg gebruik as basis vir die regsleer as 'n geheel (*iurisprudentia universalis*). In sy teenkanting teen die natuurregteorie van Bodinus, Hobbes en Pufendorf, het Huber die perspektief gehandhaaf dat reg en geregtigheid nie gesien kan word as die produkte van nuttigheid of bepaal word slegs deur hul bruikbaarheid. Vir Huber is die beginsels van goed en sleg, regmatig en onregmatig, regverdig en onregverdig, gebaseer op onveranderlike beginsels wat menslike manipulasie te bowe gaan. Om hierdie redes beklemtoon Huber die feit dat die natuurreg nie die produk van die mens se rede is nie, maar gebaseer is op die ewige wil van God. Die mens is egter deur sy rede in staat om die wil van God uit die openbaring van die Morele Wet te bepaal. In effek is God se ewige reg die fundamentele bron van die natuurreg. As sodanig is die gelding van die beginsels van die natuurreg nie onderhewig aan 'n ooreenkoms tussen mense of die bepalinge van die burgerlike reg nie, maar dit gaan vooraf aan die staat en die regeergesag van die owerheid. Nie alleen geld hierdie voorskrifte van die natuurreg as normatiewe bepalinge vir al die elemente van die Publiekreg nie, maar ook vir die regte van die mens (onder andere op lewe en eiendom) afgesien van die aard en samestelling van die staat. Huber se reaksie op Hobbes se natuurregteorie in besonder, beklemtoon die belang daarvan om beginsels van reg en geregtigheid te vestig wat nie onderworpe is aan manipulasie van politieke owerhede of regerings nie. As sodanig was Huber se natuurreg-teorie nie slegs 'n belangrike bydrae in sy eie tyd nie, maar het hy 'n alternatief gepostuleer wat as 'n noodsaaklike korrektyf kan dien in regstelsels waar die formele konsep van die staat onderhewig aan die reg, nie deurdring tot op die vlak waar dit die idee van die staat in 'n materiële sin bepaal nie.

1. Introduction

The 17th century Dutch author, Ulrich Huber, made pioneering observations on public law generally and constitutionalism in particular in his Latin work, *De Jure Civitatis*.¹ Not only did Huber give a systematic exposition of the basic principles of public law, he also devoted attention to the main streams of jurisprudential thought in his time. Huber developed his theory of public law at a time when the *iurisprudentia universalis*, of which his own legal theory is a clear example, was making headway. The general principles of his system of Constitutional Law formed part of this broad movement towards

1 Huber was instrumental in developing Constitutional Law as a branch of study, separate from the traditional field of Aristotelian politics — a field of law which T.J. Veen, *Recht en Nut. Studiën over en naar aanleiding van Ulrik Huber (1636-1694)* (Zwolle: Tjeenk Willink, 1976), V, describes as the *ars iuris publici universalis*. In a dissertation submitted at Leiden in 1838, *De meritis Ulrici Huberi in jus publicum universale*, at 68, Hartog Hyman Tels argued that Huber must be regarded as the “father of the science of the (principles of the) general Constitutional Law: “Ex his igitur omnibus sequi videtur, Huberum iuris publici universalis doctrinae formam dedisse, et a politica aliisque doctrinis separatam, dictamini iuris naturae fundasse, ad eam tractandam rectam iniisse viam, et denique systema condidisse, quod rebus constitutis omnino congruum, omnibus aequum esset et idoneum, aliosque qui studio partium abrepti, pravaque ratiocinatione in errorem ducti, a vero aberrassent, accurate refellisse.” His *De Jure Civitatis*, which appeared at Franeker in 1672, was the first work dealing with the *ius publicum universale*. In the meantime Pufendorf’s *De Jure Naturae et Gentium* appeared at Lund. In the seventh and eighth chapters he deals with the general principles of Constitutional Law as a segment of the *de iurisprudentia universalis*. See T.J. Veen, *Recht en Nut*, 12.

the development of a general jurisprudence.² When Huber produced his *De Jure Civitatis*, the upcoming trend in Dutch jurisprudence was an eclectic mixture of Aristotelianism and Cartesianism, which was described by Thijssen-Schoute as a *philosophia vetusnova*.³ a turning point in jurisprudence towards a mixture or synthesis of classic and enlightened ideas on natural law.⁴ Huber's natural law theory played an important role in providing the basis for his theory of the general principles of Constitutional Law within the broad movement of a *iurisprudentia universalis*, of which the two most important elements in Huber's system of Constitutional Law were sovereignty and natural law.⁵

In the field of natural law Huber gave a thorough exposition of the natural law ideas of his time, and stated his own concept of natural law, whilst the idea of natural law served as the basis for his theory of constitutionalism. The issues Huber deals with regarding natural law theory include the following: natural law as the original integrity of man according to the nations; the views of Grotius and others who define natural law only in terms of feelings, customs and conduct; natural law is understandable from the Holy Scriptures; the nature of the image of God in man; the necessity that there would have been some kind of natural law in the primeval condition of mankind, although vastly different from modern law; the notion that the corruption of man happened suddenly and not according to custom or conduct; the fact that the light of reason is not entirely extinct; to what extent the ability to distinguish between right and wrong is fixed in the mind of, and innate in man; whence did the obligation of natural law arise; the refutation of Hobbes's and Pufendorf's natural

2 For Huber's contribution to the development of a general science of Constitutional Law, see Veen, *Recht en Nut*, 13, 61 & 63.

3 C. Louise Thijssen-Schoute, *Nederlands Cartesianisme*. Verhandelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. Letterkunde, Nieuwe Reeks, dl. 60 (Amsterdam: Nederlandse Akademie van Wetenschappen, 1954), 743.

4 Also E.H. Kossmann, *Politieke theorie in het zeventiende-eeuwse Nederland* (Verhandelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. Letterkunde, Nieuwe reeks, dl. 67, no. 2) (Amsterdam: Nederlandse Akademie van Wetenschappen, 1960), 82, observes that Huber was the political theorist who ended the seventeenth century discussions by initiating a synthesis of all the tendencies of Dutch development.

5 Huber's treatment of the foundations of the general principles of Constitutional Law in the first six chapters of his *De Jure Civitatis*, includes an examination of the law of nature, the deviating views of Hobbes (and also Spinoza in the third edition (1694)), the *ius gentium*, the *ius divinum*, positive law and justice. See his *DJC*, I, I, I, 23 (4(2)), where it appears that the field of Constitutional Law generally, is composed of the principles of natural law, *ius gentium*, and *ius divinum*, and the institutions of the nations. See also *ibid*, 22-23 (4(1)-(2)): "Dicamus ita; [*ius publicum universale*] est Ars, quae suum cuique, in ordine civitatis, tribuere docet. Regi, quae Rectoris sunt; populo, quod est populi, & magistratibus, quod horum officia requirunt. Verbis, in ordine civitatis, differentia à iure privato continetur, quae suum cuique sine respectu ad Rempublicam quae est ordo civitatis, tribuit. Constat haec Ars praeceptis Naturalibus, Gentium & Divinis, etiam verò civilibus populorum institutis; quia, licet universalis haec Ars sit, unius tamen ordines Reipublicae supponit: omnesque populi tam in publicis quam in privatis, partim communi omnium hominum, partim jure proprio utuntur, eaque ita inter se comparata sunt, ut mutuo sese explicent ac illustrent."

law views; in which way should the immutability of natural law be understood; the division of natural law into necessary, imperative, permissive or persuasive.

In the process of judging Huber's natural law theory, one has to bear in mind the following aspects: Firstly Huber's natural law theory represents a response to both Bodinus's efforts to detach the positive law of the state from its Christian-theological foundations, and Grotius's separation of natural law and the positive law of the state.⁶ Secondly, Huber's natural law theory reflects unmistakable trends of Melancthon's natural law views, in so far as he classifies natural law as part of Divine Law.⁷ Thirdly, much of Huber's natural law theory was produced as a criticism of the natural law views of Thomas Hobbes and Baruch Spinoza.⁸

These aspects had a directive influence on his views of natural law and the state of nature; the state of nature and the need for state authority; the difference between the state of nature and the civil state; the divine image and man's faculty of reason; the obligatory nature of natural law; natural prohibitions; natural law and the equality of men; the relevance of the state of nature; natural law and the desire for society; natural law and the ownership of property in the natural state; natural law and self-protection; natural law and the principles of right and wrong.

2. Huber's theory of natural law

2.1 Natural law and the state of nature

According to Huber there was a time when the human race lived without evil desires, without shameful acts or crime.⁹ The nations believe that this doctrine is derived from scripture.¹⁰ Huber, however, prefers to believe that at first man was ignorant about sin rather than acquainted with virtue.¹¹ Therefore they knew nothing about evil and had an inexperienced simplicity about cleverness.¹² To Huber it is clear from the Holy Scriptures that the integrity of primeval man not only consisted of strong holiness and efficient justice¹³ (according to Ephesians 4 verse 24 "in justice and true sanctity"), but also in "knowledge

6 Grotius, *De Jure Belli ac Pacis*, I, I, 1 and T.J. Veen, *Recht en Nut*, 28 n. 115.

7 Veen, *Recht en Nut*, 157.

8 *Ibid.*, 161.

9 *De Jure Civitatis*, Book I, Section I, Chapter II, 1, page 4(1) [*DJC*, I, I, II, 1 (4(1))]: "Fuisse tempus, quo genus humanum sine malâ libidine, sine probo & scelere vixerit ..."

10 *Ibid.*: "etiam gentiles credere, doctrinâ è sacris ad illas propagata sed non sincera; magis enim putarunt ..."

11 *Ibid.*

12 As in Justinian, Book 2. *DJC*, I, I, II, 1 (4(2)): "adeoque nihil quam mali nesciam & adhuc astutiae inexpertam simplicitatem, quomodo *Justinus lib. 2. à pr. Macrob. 2. in somn. Scip.*"

13 *DJC*, I, I, II, 4 (5(1)): "Sed è sacris literis constat, integritatem hominum primaevam non tantum constituisse in validâ sanctitate justitiaque efficace ..."

according to the image of his Creator."¹⁴ There is no greater or more excellent example of man's intelligence than the name-giving of all things created, as related by Moses. To Huber this can only be attributed to divine strength and living perspicacity.¹⁵

2.2 The state of nature and the need for state authority

From the above, justice, sanctity and ingenuity according to God's dominion arises. The image of the Creator shines through as may be gauged from the passages in Genesis 1: 27¹⁶ and 2 Corinthians 3: 18.¹⁷ According to the writings of Ovid, if those first people had cultivated this image in mutual and exceptional love there would have been no need for state authority.¹⁸ No order would have been necessary unless it was required for the sharing of commodities and the avoidance of confusion.¹⁹ Some people argue that before the corruption and fall of mankind there was no place for the law of nature. There was at that time no experience of sin, and the love for God and one's fellow man dictated that which was conducive to this state and prohibiting anything to the contrary.²⁰

2.3 The difference between the state of nature and the civil state

To Huber there is a fairly substantial gap between the state of nature and the civil state. There was a condition of integrity which applies to human society even today.²¹ Man, in that perfection of judgment and volition which vested in primeval man, was alienated from his Creator not by gradually becoming

14 Colossians 3: 10.

15 *DJC*, I, I, II, 4 (5(1))..: "Cujus intelligentiae non potest esse majus & excellentius specimen, quam fuit denominatio omnium rerum ab Adamo facta recens creatarum, à Mose relata: quae nonnisi divina virtute virilique perspicaciâ & promptitudine committi potuit."

16 "Thus God created the man in his image: in the image of God created he him: he created them male and female" (Geneva Bible (1599)) fol. 1(verso (a)).

17 "But we all behold as in a mirrour the glorie of the Lord with open face, and are changed into the same image, from glory to glory, as by the Spirit of the Lord" (Geneva Bible (1599)) (78 (verso(a)). *DJC*, I, I, II, 5 (5(1)): "In hac justitiâ, sanctitate, Ingenio & judicio, juxta dominium in caetera terrena, Imago Creatoris relucebat ..."

18 Fab. 3, *Metamorphosis*. *DJC*, I, I, II, 5 (5(1)-(2)): "Quam imaginem si primi homines in mutuâ & eximiâ charitate custodivissent, imperio civitatis vix opus fuisset, per ea quae canit Ovid ..."

19 *DJC*, I, I, II, 5 (5(2)): "nisi, quatenus ad communicandas utilitates & confusionem vitandam ordo aliquis non fuisset non necessarius."

20 *DJC*, I, I, II, 6 (5(2)): "Tametsi enim nulla tunc esset vitiorum experientia, Dei tamen & proximi amor officia consentanea dictabat & contraria exludebat ..."

21 *DJC*, I, I, II, 7 (5(2)): "Enim vero satis magnum futurum fuisse discrimen inter jus Naturae, quod in statu Integritatis fuisset, & quod nunc obtinet in societate humana, facile constitui potest ..."

used to crimes but by dissatisfaction.²² Reason and Scripture prevail upon us to believe that this happened shortly after creation.²³

2.4 The Divine image and man's faculty of reason

To Huber the Divine image was lessened but not extinguished and the Light by which turpitude is distinguished from probity poured into the minds of men (Romans 1: 18ff.).²⁴ This was made known to mankind and mankind was enhanced through popular use.²⁵ Man trained himself more with the objects of the decision, with experience as the teacher.²⁶ Huber is not talking about the renewal of man through the Spirit of God in Christ (Ephesians 4²⁷ and Colossians 3²⁸). Natural law is concerned with that light which is called the entirety of the Divine image.²⁹ Cicero deals with this in Book 1 of his *Laws* when he states: "There is a similarity between man and God in so far as he has joint knowledge and the sculpture of the Divine volition (Romans 2 verses 14 and 15³⁰). This law is defined by Marcus Tullius Cicero as the Highest Reason infused by nature, ordering that which should be done and prohibiting the

22 *DJC*, I, I, II, 8 (5(2)). Romans 5: 12: "Wherefore, as by one man sinne entred into the world, and death by sinne, and so death went ouer all men: in whom all men have sinned" (Geneva Bible (1599) fol. 63 (verso (a))).

23 Genesis 1: 28, 31: "And God blessed them, and God said to them, Bring foorth fruit, and multiply, and fill the earth, and subdue it, and rule ouer the fish of the sea, and ouer the foule of the heauen, and ouer euery beast that mooueth vpon the earth" and "And God saw all that hee had made, and loe, it was very good. So the euening and the morning were the sixth day" (Geneva Bible (1599) (fol. 1 (verso (a))). *DJC*, I, I, II, 8 (5(2))).

24 The essence of Huber's reference is contained in Romans 1: 19, 20: "For the inuisible things of him, that is, his eternall power and Godhead, are seene by the creation of the world, being considered in *his* works, to the intent that they should be without excuse: Because that when they knewe God, they glorified him not as God, neither were thankfull, but became vaine in their thoughts, and their foolish heart was full of darknesse" (Geneva Bible (1599) (fol. 61 (verso (b))). *DJC*, I, I, II, 9 (5(2)): "Imminuta tamen, non extincta fuit imago numinis, sive Lux infusa mentibus, quâ turpia & honesta discernerentur

25 *Ibid.*

26 *Ibid.*

27 Huber alludes to Ephesians 4: 23, 24: "And be renewed in the spirit of your mind, And put on the new man, which after God is created vnto righteousness, and true holines" (Geneva Bible (1599) (fol. 86 (recto (b))).

28 This alludes to Colossians 3: 10: "And haue put on the new, which is renewed in knowledge after the image of him that created him ..." (Geneva Bible (1599) (fol. 90 (recto (b))). *DJC*, I, I, II, 9 (5(2))).

29 *DJC*, I, I, II, 10 (5(2)): "Ad lumen illud pertinet Jus naturale, quod eâ ratione totum imaginis divinae rectè dicitur ..."

30 "For when the Gentiles which haue not the Lawe, doe by nature the things *contained* in the Law, they having not the Law, are a Law vnto themselves, Which shew the effect of the Law written in their hearts, their conscience also bearing witnes & their thoughts accusing one another, or excusing" (Geneva Bible (1599) (fol. 62 (recto (b))). *DJC*, I, I, II, 10 (5(2)-(6(1))).

contrary.³¹ Where Huber refers to “reason” he understands this to be “reason dictating or commanding or that which it commands in the words of Cicero.”³² To Huber it is not necessary to say that natural law is reason itself, because it is abundantly clear that reason which commands what has to be done and prohibits the contrary does not differ from the commands of reason.³³

The highest reason is perpetual and above all, governs all human conduct.³⁴ It is grafted in by nature and consequently by God, the author of nature, as the theologians suggest, by way of definition.³⁵ Consequently Huber does not oppose this, and he feels that even Cicero does not contradict it. He calls this law the “celestial description” and the “divine mind”, and even further the “right reason” of the Supreme God. Like Plato he calls reason “God living in us”³⁶ (Book 8 on *Laws*).³⁷ Huber brings the nature of natural law into connection with the ability to distinguish between “bad and honorable”,³⁸ as stated by Chrysostom³⁹ (Homilie 14 ad Antioch), and “experience is the teacher”⁴⁰ (Euripides), and “law born from nature”⁴¹ (Paul, Romans 15; Grotius Book 1, Chapter 2, Number 10).⁴²

Huber poses the question as to whether it could be said that there are inborn principles in the human mind which are practical. He also provides the answer: “I can easily concur with the man who denies this and it is sufficient to quote what he himself says. The human mind has a capacity which can clearly be seen from the conditions of human existence, what must be done and what must be avoided.⁴³ This faculty of reason is instilled in the human mind by God.⁴⁴ If this is acknowledged then justice is done to the truth and the statement by the apostle concerning the law inscribed in the hearts of

31 Book 1 of the *Laws* where he defines the law in this way. DJC, I, I, II, 11 (6(1)).

32 Ibid., I, I, II, 12 (6(1)): “Rationem cum dicimus, dictamen Rationis intelligimus, inter quae non facimus discrimen ...”

33 Ibid. In *HR* [*Heedendaegse Rechtsgeleertheyf*], I, II, 4 (4), Huber defines natural law in terms of the dictates of reason: “De aengeborene wet, (anders het recht der nature) is het oordeel des verstands, te kenne gevende wat saeken, uyt haer eygen aert: zyn eerlyk of oneerlyk, met verbintnisse van Gods-wegen om het selve te doen ofte te laten. Ende soo is de eygenschap van dit Recht, Gebieden en Verbieden.” The dictates of natural law are immutable: “Edogh in sijn eygen zin is de aengeboorene wet onveranderlyk: soo lange de saeken blyven in de selve gestaltenisse. En behooren daer toe allerley deugden, en zynder mede strydig allerley ondeugden” (*HR*, I, II, 7 (4)).

34 Ibid., I, I, II, 13 (6(1)): “Ratio dicitur, id est, prima, perpetua & supra omnia, omnesque regens actiones humanas.”

35 Ibid., I, I, II, 13 (6(1)): *Insita à Natura*, consequenter ab auctore Naturae Deo, quod ut Theologi malunt exprimi in ipsa definitione, ita nihil refragatur ...”

36 Book 8, *On Laws*.

37 DJC, I, I, II, 13 (6(1)).

38 Ibid., I, I, II, 14 (6(1)): “Discretio igitur Turpis atque honesti ...”

39 Homilie 14, *Ad Antioch*.

40 Euripides.

41 St. Paul, Romans 15; Grotius, Book I, Chapter II, number 10.

42 DJC, I, I, II, 14 (6(2)).

43 Ibid., I, I, II, 15 (6(2)).

44 Ibid.: “Quam facultatem Rationis, si à Deo mentibus humanis inditam ...”

mankind.⁴⁵ Consequently it should not be understood that the knowledge in question does not enter the human mind without previous information⁴⁶ Huber defines the law of nature as follows: "Commanding that which should be done and prohibiting the contrary". That is the dictate originating from natural reason, to the effect that in every action there is necessity or moral turpitude which is the same as prohibiting or commanding according to Grotius.⁴⁷ These statements require reciprocal respect between people and enjoy the obligation on everyone to obey these rules.⁴⁸

2.5 The obligatory nature of natural law

The power to hold liable emanates from a superior being, who, in the present instance, can only be God. But there is no agreement in the minds of men as to the aspect or strength of God on which the obligation of natural law rests. There are those who think that it derives irresistible force from a unique cause. Some think that it is God's benevolence towards man; some think it is the eminence of God; others think that God has the virtual powers of ownership or of a master on the strength of this obligation.⁴⁹ Huber is explicit on the point that the eminence of God is an essential attribute of His even if there were no creation; therefore man himself contributes nothing to the reason for obeying the precepts of natural law.⁵⁰ It is the same eminence which would have existed even if, as Epicurus would have it, God had no interest in the affairs of mankind. This stresses the eminence of God irrespective of subjection.⁵¹ God became the owner of man upon the creation of man, and He has never ceased to be this. Consequently we can never approve of anything which does not belong to God.⁵² The binding nature of the obligation emanating from natural law is immutable as it also applies between people.⁵³

At this point Huber draws a distinction in the law of nature between *imperative*, *permissive* and *persuasive* manifestations of natural law.⁵⁴ *Imperative* is that

45 Ibid.

46 Ibid., I, I, II, 16 (6(2)).

47 Book I, Chapter I, Number 10. *DJC*, I, I, II, 17 (6(2)): "Ultima definitionis verba sunt, jubet facienda prohibetque contraria. Id est, dictat ex ipsa naturali ratione, cuius actui inesse necessitatem aut turpitudinem moralem, ideoque eundem esse vetitum vel praeceptum ..."

48 Ibid.

49 Ibid., I, I, II, 18 (6(2))-(7(1)).

50 Ibid., I, I, II, 22 (7(2)).

51 See *ibid.*, I, I, II, 23 (7(2)).

52 Romans 9: 20, 21: "But, O man, who art thou which pleadest against God? shall the thing formed say to him that formed it, Why hath thou made me thus? Hath not the potter power of the clay to make of the same lump one vessel to honour, and another unto dishonour? (Geneva Bible (1599) (fol. 66 (recto (a))). See *ibid.*, I, I, II, 23 (8(1)).

53 *Ibid.*, I, I, II, 24 (8(1)): "Necessitas obligationis ex jure naturae est immutabilis, ut inter omnes constat."

54 *Ibid.*, I, I, II, 25 (8(1)): "Sed hoc loco non est omittenda distinctio Juris Naturae, quâ dicitur aliud esse *praecipiens*, aliud *permittens*, aliud *suadens*."

which agrees best with the definition of the law of nature.⁵⁵ In those rules there is a necessity or a moral turpitude. It is unchangeable, impressed on the mind of man by the Divine Sculptor.⁵⁶ *Permissive* natural law deals with matters which men may have naturally and from which he cannot be withheld by others.⁵⁷ This means that he cannot be compelled to exercise his rights. He is free to abstain from their exercise, for example, in the care for his own body; oftentimes the procreation of children, the occupation of ownerless objects and other natural capacities.⁵⁸ *Persuasive* natural law refers to those things which reason recommends as being better, without actually commanding them precisely, for example to leave an inheritance to the nearest blood relatives rather than to extraneous heirs, or where reason, though not expressly prohibiting something, frowns upon it, for example, a marriage between cousins and relatives in the second, or even third, degree of relationship.⁵⁹

2.6 Natural law and natural prohibitions

Another consideration that applies here is that natural prohibitions have several degrees of wickedness in all of which natural law and shame play a part, as Paul explains in Book 14 Paragraph 2 on how marriage should be entered into correctly.⁶⁰ In some cases the prohibition is so strong that conduct performed in conflict therewith is nefarious, for example, a marriage with a parent or a sister. Some are disgraceful but may in certain circumstances be acceptable, such as marriages with divorcees or the widows of brothers. Certain conduct is unbecoming but not prohibited, for example, for a man to allow his hair to

55 In his *HR* (I, II, 5 (4)), Huber describes this form of natural law as follows: “Waer toe alleen behoort, het gene *nootsakelyk* gedaen of gelaten moet werden ...”

56 *DJC*, I, I, II, 25 (8(1)): “Praecipiens est id, quod proprie definitioni Juris naturae convenit, circa ea, quibus inest aut necessitas aut turpitude moralis; & hoc est immutabile; quippe à sculpturâ divinâ hominum animis impressum.”

57 In addition to the general principle of imperative natural law, Huber distinguishes the principle of permissive natural law: “maer oneygentlyk brengt men tot de selve wet, dingen die wel geoorloft zyn, maer die, *sonder misdaed*, konnen anders gedaen worden; als, dat de wet der nature toelaet sigh selfs tegen geweld te verdedigen, in vryheyt te leven, het gene niemant toebehoort aen te vaerden, en soo voorts. Men noemt dit wel het *Toelaetende Recht der Nature*” (*HR*, I, II, 5 (4)).

58 *DJC*, I, I, II, 26 (8(1)): “Jus permittens continet ejusmodi facultates, è quibus naturaliter aliquid habere vel agere licet, ut nec ab aliis impediri possit: verum ita, ut ad exercitium illarum nemo tenetur, sed iis pro lubitu quilibet abstinere possit; Cujusmodi est Tutela corporis sui, plerumque sane, procreatio sobolis, occupatio rerum, quae Nullius sunt, aliaeque naturales facultates.”

59 *Ibid.*, I, I, II, 27 (8(2)). In his *HR*, I, II, 6 (4)), Huber describes the nature of this form of natural law as follows: “Somtyts brengt men ook tot de *aengeborene wet*, soodanige saeken, die beter gedaen als gelaeten worden; maer die echter niet t’ eenemael *ongeoorloft* zyn, om anders gedaen te worden, gelyk als men zegt. ... De nature leert dat men’t goedt moet laeten aen t’ naeste bloedt. en diergelyke meer. Dit wordt gezeght *Aenraedende Recht der Nature* ...”.

60 *DJC*, I, I, II, 28 (8(2)): “Huc etiam pertinet consideratio, quod prohibitiones naturales habent varios gradus inhonesti, in quibus omnibus vertitur quidem naturale jus & pudor ...”

grow. From these examples, says Huber, it is clear that the distinction between that which is honourable and moral necessity which is disapproved of by others is not far removed from reason.⁶¹

2.7 Natural law and the equality of men

Huber states that Thomas Hobbes embarked upon a new track “expensively praised by many”, of exploring the law of nature in his book on the state (*De Cive*) of which the following is more or less a summary: The origin of states is not so much a natural desire for statehood, but a reciprocal fear arising from the equality of men and their desire for the same commodities.⁶² From this comes the rivalry of talents and the desire of injuring one another to the extent of a war of all against all in the natural state.⁶³ In the face of these, everybody seeks to look after his own interests and to protect himself and his family with such means as he considers necessary and which everybody in his discretion considers dear to him.⁶⁴ In a state of equality, as in the natural state, nobody can consider himself the judge of anybody else. Consequently everybody enjoys the right to do as he pleases and of which he is capable, taking into account his strength. Nobody causes an injury to anybody else even if he forces another to suffer an injury. Everybody has every right against the other and this goes on infinitely because there is an ineluctable state of war of all against all.⁶⁵ Reason demands the abandonment of this natural state and nature postulates the law that there is no permanence in this law of all against all. The withdrawal from that law takes place by way of bi-lateral agreement or an agreement where one of the parties has already rendered performance — of course pacts are not valid in the state of nature (Chapter 2).⁶⁶ From this springs another and singular rule of nature, namely that agreements should be observed.⁶⁷ An injury can only exist after the shifting of rights to somebody else. A pact cannot bring about a withdrawal of the right of all against all, unless a great multitude agrees to it.⁶⁸ Thereby the wishes of all are unified and this, to Hobbes, is the basis of the state and of government. From this, civil laws, like pacts of the state, proceed. Consequently prior to withdrawal

61 Ibid.

62 Ibid., I, I, III, 1 (9(1)): “Originem Civitatum non tam esse à naturali desiderio societatis, quam à mutuo metu, propter Hominum aequalitatem ...”

63 Ibid., I, I, III, 2 (9(1)). Hobbes, *De Cive*, caput I, number 6 (page 115) states: “But the most frequent reason why men desire to hurt each other, ariseth hence, that many men at the same time have an appetite to the same thing; which yet very often they can neither enjoy in common, nor yet divide it; whence it follows that the strongest must have it, and who is strongest must be decided by the sword.”

64 *DJC*, I, I, III, 2 (9(1)). *De Cive*, I, 7-9.

65 See Hobbes, *De Cive*, I, 7, 8, 9, 10ff. (115ff.). *DJC*, I, I, III, 2 (9(1)).

66 See Hobbes, *De Cive*, II (121ff.).

67 *DJC*, I, I, III, 4 (9(2)). *De Cive*, Chapter III, Paragraph 4 (page 137-8) [III, 4 (137-8)]: “From these grounds it follows, that an injury can be done to no man but him with whom we enter covenant, or to whom somewhat is made over by deed of gift, or to whom somewhat is promised by way of bargain. And therefore damaging and injuring are often disjoined.”

68 *DJC*, I, I, II, 4 (9(2)).

from the natural state, there is no possibility of causing injury to somebody else.⁶⁹ According to Hobbes only from the civil law can one understand what is correct and what is wrong, good or bad.⁷⁰ Hobbes emphasises that the nature of theft, murder, adultery and injury can only be gauged from the Civil Law.⁷¹

2.8 The relevance of the state of nature

Huber states that nobody should ever think that what Hobbes teaches about the state of nature is no longer relevant in our time. One should realise that all states and all the people are not subject to only one government.⁷² People live in a natural state as Hobbes indicates:⁷³ The condition of inter-state relations is natural, and this means hostile.⁷⁴ They never stop fighting. Consequently it can never be said that there is peace. It is only a “breathing space” in which one country watches every nod and stirring of the other.⁷⁵ They think that their security does not stem from treaties but from their strength and planning.⁷⁶ In this way, diverse nations and the people of diverse nations can do each other no harm, but the stronger have the right to compel the weaker to do and to give whatever they wish.⁷⁷

Huber now critically investigates the tenability of Hobbes's natural law theory. To Huber man's nature is so corrupt that one man hates the other and if given the opportunity one man will enslave the other, rob and kill him.⁷⁸ Generally speaking this cannot be denied and is abundantly proved by experience and by the Holy Scripture. Therefore, if the natural condition subsists anywhere without government in the state, there can be no doubt that the scene will be dominated by a war of all against all. This is not confined to barbaric clans but can be proved from recent examples in Friesland.⁷⁹ The Dutch nation was famous for its freedom and, after the time of Charlemagne, was not ruled by a domestic or a foreign prince. Eventually the nation degenerated into the unbridled license of all without any restraint of one man or several.⁸⁰ For

69 Ibid.

70 Ibid.: “*ex lege civili sola colligendum esse, quid fas, quid nefas, bonum aut scelestum fit ...*”

71 *De Cive*, VI, 16 (185): “Theft, murder, adultery, and all injuries, are forbidden by the laws of nature; but what is to be called *theft*, what *murder*, what *adultery*, what *injury* in a citizen, this is not to be determined by the natural, but by the civil law.”

72 *DJC*, I, I, III, 5 (10(1)): “Ne quis autem ea, quae de statu naturali docet Auctor, usu carere putet hisce temporibus, sciendum, omnes civitates, omnesque populos non uni subjectos Imperio ...”

73 In *De Cive*, XIII, 7 (260-261).

74 This means that the state of nature still has practical implications.

75 Ibid.

76 Ibid. See *De Cive*, XIII, 8 (261-2).

77 Ibid.

78 *DJC*, I, I, III, 6 (10(1)).

79 Ibid.

80 Ibid., I, I, III, 7 (10(1)): “Nam celebris illa gentis nostrae libertas, quae post tempora Caroli Magni, nullum Principem domesticum aut alienigenam passa erat, tandem in resolutam omnium ordinum licentiam ...”

almost a whole century the ancestors of the Fries people lived in a virtual state of war of all against all. The entire nation was torn into two great factions,⁸¹ but without any fixed boundaries, and the sword flashed over the entire country. Everyone depended on his own patriarch and his own strength. Often battles were waged with disregard for the laws of warfare. There was blood and slaughter not only in the fury of battle but there was also savagery against the captives, inhuman dungeons, ugly punishments and whatever civil unrest and unleashed could do, exercised without end or measure. There was no escape from this hazardous destruction than by way of a single very strict and very powerful government. This was provided first by the Saxons⁸² and then the Austrians.⁸³

2.9 Natural law and the desire for society

Huber, therefore, does not object to the first statement made by Hobbes, namely that the natural condition entails the war of everybody against everybody.⁸⁴ Neither does he object to the statement flowing from the first vow.⁸⁵ A reciprocal fear was the reason for people to think of an ordered society to protect themselves against injuries among themselves and assaults coming from others.⁸⁶ If these two propositions are agreed to, says Huber, there can be no opposition to two further statements which, if conceded or approved of, seize and destroy many subsequent evils postulated by Hobbes. Firstly: the inborn love for society, coupled with fear, was the reason for man to enter into a state.⁸⁷ The other one, the desire to commit violence, to subject and to rob others in the natural state, can by no means be called law but in reality constitutes injuries.⁸⁸ The second results from the approval of the first.⁸⁹ If one should look at the first proposition adduced, Hobbes himself concedes: for man, immediately when he is born, is in a “perpetual and troublesome solitude.” Thereby Hobbes does not deny that people are compelled by nature to seek the company of others. He maintains that the agreement entered into by states cannot be understood by infants.⁹⁰ It is clear that this is the way in which all people are brought into this world by nature: all people are born unfit for the civil society.⁹¹ However, Huber also agrees with Cicero⁹² that all people are

81 The Schieringers and Vetkopers.

82 In 1498.

83 *DJC*, I, I, III, 7 (10(2)): “Nec alius è tantis malis exitus quam per unius Imperium adductius & validius, quod primum à Saxonibus, dein ab Austriacis supervenit, inveniri potuit.”

84 *Ibid.*, I, I, III, 8 (10(2)): “Non recusamus igitur primam positionem Hobbesii summam, quod *Status naturalis sit bellum omnium contra omnes.*”

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*, I, I, III, 8 (10(2)).

90 *Ibid.*, I, I, III, 9 (11(1)).

91 *Ibid.* According to Hobbes’s line of argument, this means that there is no natural inclination to political society. Man’s desire for society does not come naturally but through education.

92 *De Legibus*, I, X, 28.

born for justice. Will anybody hear anything different when for the use and exercise of justice a certain maturity of mental and judicial perspectives is required? This is consistent with his subsequent statement: in the same sense there are many people who, due to mental illness or faulty education, remain unfit to enter society. Cicero is not ignorant thereof as is clear from the preceding passage where he states that justice is established by nature but our minds are easily influenced and start to turn in whichever way they are twisted by wicked customs and worthless opinions.⁹³ Reason is not so strong that it cannot be corrupted and turned upside down by emotions. In addition, in the case of many people, custom has become strong to the extent that that which is true and correct ceases to be the dictate of reason.⁹⁴ But it is true and it remains manifestly clear, despite the worthless exceptions raised by Hobbes, that people in their natural state desire the society and the company of others.⁹⁵ This can only happen if they are equipped with the dictates of reason. Violence should not be used against those who do not deserve it, they are not to be troubled or robbed if they have perpetrated no violence and have not transgressed against you.⁹⁶ People understand that no society can grow because they cannot do without these things.⁹⁷

2.10 Natural law and the ownership of property in the natural state

Huber felt it necessary to state that the ownership of objects existed long before states were established.⁹⁸ This grew gradually over a protracted period of time. Any ownerless object, according to natural reason, with which mankind is endowed, becomes the property of the possessor. It stands to reason that he cannot be deprived of his ownership.⁹⁹ The same applies to the other rational dictates of nature: not to do to others which you would not like to be done to you; you must live honourably; other people should in no way be harmed.¹⁰⁰ Other similar rules required for the protection of society, emanating from the

93 Ibid., I, I, III, 10 (11(1)).

94 Ibid.: "Nec enim ea vis est Rationis, ut affectibus corrumpi agique in transversum nequeat; nec quod in multis hominibus id ita usu venit, ideo quod verum & rectum est, definit esse Rationis dictamen."

95 Ibid., I, I, III, 11 (1): "Quod si verum est, ut per inanissimas Hobbesii exceptionis non definit esse manifestum, homines in ipso naturali statu cupere societatem & conjunctionem cum aliis ..."

96 Therefore natural law cannot command that which threatens political society.

97 Ibid., I, I, III, 10 (11(1)).

98 Ibid., I, I, III, 11 (1)).

99 Huber (ibid., I, I, III, 11 (11(2))) relies on the authority of Justinian, *Institutes*, 2, 1, 11-12 & *Digesta*, 41, 1, 3, on this point.

100 Ibid., I, I, III, 12 (11(2)): "Idem de reliquis naturae rationalis dictatis, ut quod tibi non vis fieri, id alteri ne feceris; honeste vivendum, alterum nullo modo laedendum esse ..." In his *HR*, I, II, 8 (4)), Huber mentions some of these precepts of nature: "Sy heeft verscheydene Gront-regels, als namentlyk, *Leeft eerlyk, Quest niemand, Geeft een yder het zyne, Doet een yder dat gy wilt men u sal doen*, en diergelyke meer."

immediate rational instinct, should be observed.¹⁰¹ Huber concludes that these dictates are laws on the strength of their acquaintance with the divine revelation.¹⁰² The Apostle called these decisions in the minds of the nations the Laws of God, which God revealed to them and which enjoyed legal validity with them, and which were witnessed by their consciences.¹⁰³ From these conclusions the following definition of the law of nature is derived: these are laws of God revealed to man by God, which enjoy the force of law amongst men and to which they feel themselves bound by conscience;¹⁰⁴ seeing that there are many duties owed by some people towards others imposed by the same Ruler (God) to which they are subjected and which they are accustomed to perform reciprocally.¹⁰⁵ In terms of those laws some people are obligated to others even without preceding agreement and without respect for the order of the state.¹⁰⁶ Consequently the following statements are refuted and they collapse: prior to the agreement no injuries could be caused; in the state of nature everybody is forced to do whatever he likes to whomsoever he chooses;¹⁰⁷ that which is good or bad, honourable or shameful, depends solely on the Civil Law. Huber, however, relies on Aristotle, who states that it is commonly accepted that something is by nature just or unjust even if there is no society among men and no agreement: "But it is not necessary for us to quote Aristotle against Hobbes.¹⁰⁸ The reason which I adduce is evident to my way of thinking and supported by the Word of God. Of course God engraves those laws in our minds by which men are bound amongst themselves as a superior community even without agreements; that which is in conflict with these laws he calls wicked and states this in Chapter 4."¹⁰⁹

101 *DJC*, I, I, III, 12 (11(2)).

102 As he stated in the previous chapter.

103 These laws are actually duties imposed by God on man in his relations towards others. They apply independently of the state.

104 *Ibid.*, I, I, III, 12 (11(2)).

105 *Ibid.* It is clear that, for Huber, the Moral Law has validity for all times and for all nations. In his *Heedendaegse Rechts-Geleertheyt [HR]* (Amsterdam: Johannes Rotterdam, 1742), Book I, Chapter II, 18 (page 5) [I, II, 18 (5)], Huber states the universal validity of the Moral Law as follows: "En met dien zin is het, dat de algemeene Zeedelyke Wet, of de Tien-gebooden, hoewel ook naementlyk aen 't Joodse volk gegeven, volgens de Voor-reeden, Hoort Israel: evenwel verstaen wort alle Christene volkeren te verplichten tot gehoorsaemheyd, voor soo veel daer in niets begrepen is, (uytgenomen het vierde Gebodt) als wat het aengeboren recht van de menschen is vereysschende." It is important to note that Huber does not elaborate on his statement that a new law was instituted by Christ, which, apparently did not merely restate the Mosaic Moral Law: "De nieuwe wet door de Heere Christus gegeven raekt ongetwyffelt, soo wel van wegen de macht des Wetgevers, als ten aanzien van de stoffe der gebooden, alle volkeren" (*HR*, I, II, 19 (5)). At I, II, 14 (5), Huber states the immutable validity of the Moral Law as follows: "Het Recht aen alle volkeren gemein, bestaet in *regulen*, nae dewelcke de Jooden haer leven moesten richten, sonder aensien op den *stant*, en gelegentheyd van 't Joodse Volk, ofte *Burgerschap*. Men noemtse gemeenlyk *Moreele*, dat is, *Zedelyke Wet*."

106 *Ibid.*: "per leges illas alii alii obligati sunt, etiam sine praevis pactis & sine respectu ad ordinem Civitatis."

107 *Ibid.*, I, I, III, 13 (11(2)).

108 *Ibid.*, I, I, III, 13 (11(2)-12(1)): "Sed Aristotelem frustra adversus Hobbesium adducimus."

109 *Ibid.*

2.11 Natural law and self-protection

Huber considers it true to say that *everybody has the right to protect his life and limb and may employ adequate measures for this purpose*.¹¹⁰ It is untrue, however, to say: *Everybody is his own judge and may employ measures for this purpose*. These measures are infinite so that everybody may do as he pleases according to natural law. For somebody to be his own judge and to employ measures adequate to ensure his safety does not mean that he is free to conjure up other measures to suit him. He may only judge truly in terms of the Right Reason.¹¹¹ He can do this or that only without damage to human society for the sake of protecting or increasing his own interests.

2.12 Huber's criticism of Hobbes's theory of natural law and state power

It is the custom amongst men that the stronger rules those whom he is able to rule.¹¹² The war of everybody against everybody obtains forever in the natural state if there is no rule of a single individual in the state.¹¹³ To call this Law which cannot be divided from Reason, says Huber, is wrong, and everybody, even without education, will know this. Huber doubts whether anybody before Hobbes held this view. Huber states that the Hobbesian approach is of no avail because it argues from the divine power to the condition of man-made law.¹¹⁴ The right of God over the entire creation cannot be inferred from His *power* alone, but also from the fact that God holds everything by His *right of*

110 Ibid., I, I, III, 14 (12(1)): "Verum quidem est, quod jus cuique sit, vitam membraque sua tueri mediisque ad hoc efficiendum idoneis uti ..."

111 Ibid.

112 As the Athenians ad Melius Thucydides Book 5.

113 Ibid., I, I, III, 15 (12(1)-(2)): "bellum omnium contra omnes dari perpetuum in statu naturali, hoc est, extra unius imperium civitatis ..."

114 Ibid., I, I, III, 16 (12(2)): "Denique, non juvat Hobbesium, quod a divina potentia ad statum humani juris argumentatur." Also note Huber, *Digressiones Justinianae in partes duas, quarum altera nova, distinctiae: quibus varia & imprimis humaniora juris continentur. Insetus est De jure in re & ad rem quod dicitur, tractatus, & adjuncta de ratione discendi atque docendi juris Diatribae, per modum Dialogi. Cum indice rerum & verborum* (Franequerae, 1688), 466-467. Hobbes, *De Cive*, XV (289ff.). Although Hobbes recognises the existence of natural laws having the power of divine law, these only bind man in his conscience towards God: "These dictates of Reason (or natural laws), men use to call by the name of Lawes; but improperly: for they are but Conclusions, or Theoremes concerning what conduceth to the conservation and defence of themselves; whereas Law, properly is the word of him, that by right hath command over others. But yet if we consider the same Theoremes, as delivered in the word of God, that by right commandeth all things; then are they properly called Lawes" (*Leviathan*, Part I, chapter 15 (page 216-7) [I, 15 (216-7)]). Also see *De Cive*, III, 27 (148-149) & IV (153ff.). Hobbes's view is that whoever transgresses a law of nature, does not infringe a legal duty towards his fellow man, because between equal men duties can only arise from agreement, as a result of which the state of nature degenerates into a state of war (*De Cive*, V, 2 & 3ff. (166-7)).

ownership.¹¹⁵ This right can by no means be attributed to man against his fellow man without a preceding cause. Besides that there is no valid relationship between the infinite goodness of God, His wisdom, justice and omnipotence all taken together, and human imperfection.¹¹⁶ Therefore if, in the final resort, the Law of Nature is that which unavoidable reason commands or prohibits, it follows that it is incorrect to say that the foundation of the Law of Nature is only that which Hobbes (“author of perilous philosophy”) states so that everyone should protect life and limb to the best of his abilities.¹¹⁷ According to Grotius the view that that which somebody does in a natural state does not constitute an injury to anybody, is false except for a few exceptions.¹¹⁸ It is inborn to man and based on sound reason to desire society and to hate solitude. Society cannot be achieved when there is license to injure or harass others in other ways.¹¹⁹ Consequently nature above all other matters creates a kinship among people. Nothing more simple in the condition of nature can be found than that rule of heavenly origin: do not do to another that which you do not wish to happen to yourself.¹²⁰ Anything happening in conflict with these rules is clearly unlawful.¹²¹ The dictates of natural law are diminished by the fact that the depravity of the human mind often drives people to attempt that which is wrong. The corruption of human nature impels to the hatred of God and man.¹²² Huber does not deny that if there were a great multitude of people without the state governing their condition, there would be nothing more than a war of everybody against everybody else. From a citizen’s point of view this applies to the greatest part by far of the human race. But it does not by any means follow that the harm done is lawful.¹²³ Hobbes understands that the reason for these associations between people, is their fear and the desire to seize benefits and offices from others.¹²⁴ However, says Huber, whatever happened concerning these considerations is certain and obvious: even if people have no experience of evil and no one is afraid of the other, they will covet society and hate solitude. It is definite that those people who have not been gripped by ambition, were, and in future will be, inclined to join the society of the state.¹²⁵ Therefore, if that desire occupies the minds of people it follows that those things without which no society can exist will be noticed in the minds of people. And those things are not to injure anybody else and not to do to another that which one does not want to be done to oneself.¹²⁶ These things are necessary to cultivate a society as we

115 *DJC*, I, I, III, 16 (12(2)).

116 *Ibid.*

117 *Ibid.* See Hobbes, *De Cive*, II, I (121-123), 7 (125).

118 *DJC*, I, I, III, 19 (numbered 4) (13(1)).

119 *Ibid.*, I, I, III, 20 (numbered 5) (13(10-2)).

120 *Ibid.*: “Quin & regulam coelestis oris, *quod tibi non vis fieri, id alteri ne feceris*, qua nihil simplicius, in simplicissimo statu Naturali obtinere oportet ...”

121 *Ibid.*: “Quod igitur contra haec dictamina sit, id injuriam esse manifestum est.”

122 *Ibid.*, I, I, III, 21 (numbered 6) (13(2)): “Nam quicquid *Hobbes* de infesto hominis in statu naturae ingenio memorat ...”

123 *Ibid.*

124 *Ibid.*, I, I, III, 22 (numbered 7) (13(2)): “Hobbes colligit, consociationis causam inter homines, mutuum esse metum, Item studium utilitatis honorisque prae aliis usurpandi.”

125 *Ibid.*, I, I, III, 23 (numbered 8) (13(2)-14(1)).

126 *Ibid.*, I, I, III, 24 (numbered 9) (14(1)).

know from the statement and the original law of nature with which Huber dealt in the preceding chapter on the law of nature.¹²⁷ Consequently, says Huber, it is clear to everybody that the hypothesis postulated by Hobbes is false.¹²⁸ According to natural law it is acceptable for one state to invade the other.¹²⁹ On the strength of the same law the stronger may claim from the weaker an undertaking of future obedience.¹³⁰ However, power or excellence can never be the reason for passing laws for somebody else.¹³¹ It is merely a probable reason for an acquisition of rights, once certain manageable limits have been stated. It is a false hypothesis to say that natural law requires the abandonment of all law over everything, because this is injurious to peace.¹³²

2.14 The law of nature and the right of ownership

Huber maintains that it does not follow that in the natural state everything belongs to everybody.¹³³ This is stated by Hobbes, and from that he concludes that anybody can claim anything for himself. He reaches this conclusion in the following way: the natural condition exists in so far as it precedes the state. Consequently, before the state we cannot speak of mine and yours.¹³⁴ Huber argues the contrary position as follows: at the beginning of the human race numbers created no confusion and no reciprocal danger.¹³⁵ The state was not created immediately. For a long time the power of the patriarch flourished which, it stands to reason, was natural. Contrary to Hobbes's view, it did not arise from consent or warfare.¹³⁶ Even if the family was widely dispersed and living in many dwelling places, they were subject to the power of a single individual whose power exceeded that of an official.¹³⁷ Now the terms "mine" and "yours" came into existence with the first crowd of people and therefore, prior to the state, whatever anybody wanted as far as food, clothing and rest were concerned, could not be shared.¹³⁸ Sound reason and the rules mentioned above state that it is wrong to deprive people of these. In this sense, says Huber, Justinian observes very correctly that when somebody possesses an ownerless object it becomes the property of the possessor by natural reason.¹³⁹ Consequently it is clear that before there were states, knowledge and use of the terms

127 Romans 1: 19 & 2: 14, 15.

128 *Ibid.*, I, I, III, 26 (numbered 11) (14(1)).

129 *De Cive*, I, 12 (117).

130 *Ibid.*, I, 14 (118-9).

131 *DJC*, I, I, III, 26 (numbered 11 (14(1))): "Neque enim potentia aut excellentia, juris perfecti in alium causa esse potest."

132 *Ibid.*, I, I, III, 28 (numbered 13) (14(1)-(2)).

133 *Ibid.*, I, I, III, 29 (numbered 14) (14(2)).

134 *De Cive*, VI, 15 (184-5).

135 *DJC*, I, I, III, 30 (numbered 15) (14(2)).

136 *De Cive*, X, 10 (230) & VI, 3 (175-176).

137 *Ibid.*: "Etsi familiae late diffusae & in plures cohabitationes sparsae, uni tamen capiti subjectae, Imperia magis quam familiae fierint: Quoniam familia est societas usus quotidiani causa, Civitas autem Societas domuum" See Aristotle, *Politics*, I, I.

138 *Ibid.*, I, I, III, 32 (numbered 16) (14(2)).

139 *Institutes*, 11 & 12.

“mine” and “yours” existed and became more frequently used among people. There were two ways of acquiring ownership namely *original* and *derivative*.¹⁴⁰ *Original acquisition* of ownership took place where people, before states existed, took those things which they required for themselves.¹⁴¹ *Derivative acquisition* took place when somebody voluntarily transferred something which he had acquired to somebody else.¹⁴² Once an object has been transferred according to this law, neither the transferee nor any other person can be deprived thereof. A simple handing over cannot confer a right on somebody else over my property. There has to be some indication of my undisputed wish.¹⁴³ These acquisitions and transfers preceded the advent of the state for some length of time so that confusion about ownership, or the fear of men, would not force the state into an invidious position.¹⁴⁴ In addition, in the same way as the transfer of a tangible object transfers ownership to somebody else, in such a way that it cannot be reached, if somebody makes a promise to another, the individual to whom the stipulation is made acquires a right.¹⁴⁵ Whatever you promise to somebody else, if through your own doing the right over the promised object is in the hands of somebody else sound reason requires that you do not deprive that person of the object.¹⁴⁶ Hence it is clear that what Hobbes says, to the effect that somebody may in terms of the law of nature retract a promise already accepted by somebody else on account of a probable threat, is false: “My own fears cannot be a reason to enable me to take away or deprive somebody of his rights.”¹⁴⁷ It is not in conflict with the law of nature that if anybody provides somebody else with a reason to fear he may be prohibited or may be compelled to give an undertaking of indemnity.¹⁴⁸ From these considerations it follows that prior to the coming into existence of states, it was wrong to deprive somebody of his rights, and it was wrong to break a promise.¹⁴⁹ Consequently this is wrong in terms of the law of nature amongst those who are not bound by the positive law. Like the rulers of the people, the people are unable to bind themselves reciprocally and they are not subject to the same supreme power.¹⁵⁰ Whatever Hobbes argued about the natural condition prior to the advent of states must be understood to apply to separate states amongst themselves.¹⁵¹

140 *DJC*, I, I, III, 33 (numbered 17) (15(1)): “Ergo manifestum est, antecivitates, notitiam usumque *mei & tui* fuisse jam atque coepisse inter homines frequentari: Et quidem duplex, *originarium & derivativum*.”

141 *Ibid.*

142 *Ibid.*

143 *Ibid.*

144 *Ibid.*

145 *Ibid.*, I, I, III, 34 (numbered 18) (15(1)).

146 *Ibid.*

147 *Ibid.*

148 *Ibid.*

149 *Ibid.*, I, I, III, 35 (numbered 19) (15(2)): “Ex his jam sequitur, ante civitates conditas etiam fuisse nefas, ut *alteri quis suum eriperet* fidemque promissi violaret.”

150 *Ibid.*

151 *Ibid.*, I, I, III, 36 (numbered 20) (15(2)).

2.15 Natural law and the principles of right and wrong

To Huber it is definite that natural law applies not only to those items acquired voluntarily but also to those which precede all human agreement¹⁵² — the dictates of the correct reason is adequate for all mortal conditions and ages.¹⁵³ Therefore, all human conduct is governed by the law of nature as long as human society, even in the state, persists.¹⁵⁴ Consequently it is easy to discern that it is wrong to say that what is right and what is wrong, or good or bad, should be judged in terms of the civil law,¹⁵⁵ because it is clear that mine and yours could be injured prior to the civil law and injuries in terms of the law of nature, even without agreements, could be adjudged.¹⁵⁶ Besides, all those things which are opposed to moral necessity never cease to be bad, irrespective of what has been provided for in the civil law or not — as Euripides says: that which is bad in itself can never become honourable.¹⁵⁷ From all this it is clear what is unlawful — theft, homicide, adultery and injury. This may be learnt from the civil law. They are such not by any other means than by those laws which explain them.¹⁵⁸ From all these things it may be inferred that it was correctly stated that there are no laws of nations in the natural state.¹⁵⁹ To Huber it is clear that the laws which were passed in man's natural condition were obligatory laws.¹⁶⁰ Huber warns that the word "obligation" should not be understood in the Roman way where no obligation was known without an act. It should be understood in the popular way.¹⁶¹ In so far as anything binds somebody to do something he is said to be under an "obligation".¹⁶² Huber adds: "Such are the dictates engraved in the hearts of men according to the Apostle's Epistle to the Romans as quoted; this is an irrefutable matter."¹⁶³

152 Ibid., I, I, III, 39 (numbered 23) (15(2)): "Quia certum est, jus naturale non minus pertinere ad ea *quae actus humanae voluntatis consequuntur*, quam ad ea, quae omnes hominum conventiones praecedunt."

153 Ibid., I, I, III, 40 (numbered 24) (15(2)): "Quippe dictamen rectae rationis omnium mortalium statui ac aetati adaequatum est."

154 Ibid., I, I, III, 41 (numbered 25) (15(2)): "Ideoque omnes humanae actiones reguntur jure Naturae, quamdiu Societas humana, etiam utique in civitate, durat."

155 Ibid., I, I, III, 42 (numbered 26) (15(2)). He refers to *De Cive*, VI, 16 (185).

156 Ibid., I, I, III, 43 (numbered 27) (15(2)): "Nam quia meum & tuum violari quoque potest ante legem civilem, palam est, injurias quoque per legem Naturae, citra pactiones, posse dijudicari."

157 Ibid., I, I, III, 44 (numbered 28) (16(1)).

158 Ibid., I, I, III, 46 (numbered 30) (16(1)).

159 Ibid., I, I, III, 47 (numbered 31) (16(1)): "Praeterea ex his omnibus judicatur, an recte ab eodem sit dictum, *Leges naturae nullas esse in statu naturali*."

160 Ibid., I, I, III, 49 (numbered 33) (16(1)): "Easque leges esse, quales in illo statu dari queunt, nempe *regulas obligantes*, manifestum est."

161 Ibid., I, I, III, 50 (numbered 34) (16(1)): "Scilicet: Obligationis voce non ex arte Romana, quae nullam sine facto novit, sed populariter accepta."

162 Ibid., I, I, III, 51 (numbered 35) (16(1)).

163 Ibid., I, I, III, 52 (numbered 36) (16(1)): "Talia, inquam, esse dictata cordibus hominum insculpta, ex Apostolo *epist. Ad Roman. Locis modo citatis* inrefragabile est."

3. Conclusion

Whilst Bodin strove to separate the law of the state from its Christian-theological roots, Grotius did much the same for natural law as a system of law independent of the state. Grotius also completed the development towards the separation of natural law from its theological underpinnings.¹⁶⁴ Although Huber followed the avenue of emphasising the autonomous value of natural law thinking, he reverted to the traditional Reformational views on natural and divine law in his efforts to use natural law as the basis for the general principles of Constitutional Law.¹⁶⁵ Whereas Bodin based his theory of the enforcement of law on the existence of a binding agreement between the parties constituting the state, Huber bases the state on principles of natural law, flowing from man's natural reason and God's divine law for mankind. This enables Huber to formulate a theory of the natural rights of man founded on man's rational faculties. The ownership of objects, therefore, began long before states were established, because any ownerless object by natural reason becomes the property of the possessor. These natural rights are subject to the precepts of reason, for example to do unto others as one would like others to do to oneself; to live honourably (*honeste vivere*); not to harm others (*alterum non laedere*), and to give to each his own (*sui cuique tribuens*). These dictates are laws on the strength of acquaintance with divine revelation. These dictates in the minds of mankind are the laws of God. The dictates of natural law are dependent upon the strength of the acquaintance with the divine revelation — these decisions in the minds of the nations are called the laws of God. These laws are binding irrespective of preceding agreement and without respect to the order of the state. From this perspective, Huber is in a position to refute the idea that prior to an agreement between the citizens in the state, no injuries are caused and that in the state of nature everybody may do whatever he likes to whomever he chooses and that that which is good or bad depends solely on the Civil Law because, says Huber, God engraves the laws in our minds by which men are bound amongst themselves as a superior community even without agreements. In two important respects Huber's natural law theory intercepted the positivistic implications of Bodin's and Hobbes's natural law theories. Firstly, divine law is the transcendental foundation of all law in the state, contra Hobbes's emphasis on the sovereign will of the legislator. Secondly, the natural rights, based on divine precepts of rationality, form a wider basis for enforcing justice in the state, contra Hobbes's subjecting law to man's faculty of will. In the civil state political authorities do not have the power to intrude upon man's basic rights or to act "irrationally". This makes Huber's natural law theory one of the earliest examples of advanced rule of law thinking within the paradigm of the law state. His law state theory also provided Huber with the effective theoretical

164 See e.g. his remarks that the law of nature, applied to the state of nature prior to the formation of the state, even if there was no God — "quod sine summo scelere dari nequit" (*De Jure Belli ac Pacis*, Prol., 11). However, this does not imply that natural law principles are completely separated from theology: he acknowledges the existence of positive divine law which has to be taken into consideration in answering questions pertaining to the nature of the legal relations among nations.

165 Thereby Huber deviated from the classical views which saw the law of nature as part of political theory generally.

basis for refuting Hobbes's state absolutism in terms of which the political sovereign is bound to no higher human authority: which means that no man is justified in exercising control over the actions of the sovereign.

Huber argues that there are two instances in which the people may separate themselves by means of secession or resistance from the authority of the sovereign: firstly, in the case where the subjects have their property taken by the sovereign, and secondly, where they are unlawfully killed by the sovereign.¹⁶⁶ In the event where the state is no longer able to provide for the safety of the subjects, every person regains the rights he had in the natural state, a right which Hobbes does not make provision for. The essence of Huber's argument contra Hobbes, has universal appeal: utility cannot serve as a norm for law and justice.¹⁶⁷ Following Grotius's views in his *De Jure Belli ac Pacis* (1625), Huber argued for the existence of immutable, eternal principles of good and evil, just and unjust, irreducible to considerations of utility. Fundamentally Huber was inclined to the development of a Reformational perspective on Public Law, and opposed the Cartesian elements in Hobbes's theory in an age in which the Reformational perspectives on law and justice were dimmed by the rapidly increasing movement towards secular jurisprudence, and jurists and political theorists were experimenting with models of enlightened absolutism.¹⁶⁸

166 *DJC*, I, II, V, 35 (42(2)).

167 *DJC*, I, I, III, 14 (12(1)).

168 Veen, *Recht en Nut*, 237: "Er (Huber) suchte die Ursache für Hobbes Scheitern als politischer Philosoph darin, dass dieser die cartesianische Methode angewandt hatte."

Bibliography

GENEVA BIBLE

1599. The Bible, That Is, The holy Scriptures contained in the Olde and Newe Testament, Translated According to the Ebrew and Greeke, and conferred London: Christopher Barker.

HOBBS T

1978. *Leviathan*. Harmondsworth, Middlesex: Penguin Books.

1978. *De Homine* (transl. Charles T. Wood, T.S.K. Scott-Craig, and Bernard Gert) and *De Cive* (transl. Thomas Hobbes, also known as *Philosophical Rudiments Concerning Government and Society*). Humanities Press/Harvester Press.

HUBER U

1688. *Digressiones Justiniae in partes duas, quarum altera nova, distinctiae: quibus varia & imprimis humaniora juris continentur. Insertus est De jure in re & ad rem quod dicitur, tractatus, & adjecta de ratione discendi atque docendi juris Diatribe, per modum Dialogi. Cum indice rerum & verborum*. Franekeræ.

1694. *De Jure Civitatis, Libri Tres. Novam Publici Universalis disciplinam continentes. Insertis aliquot de jure sacrorum & Ecclesiae, capitibus*. Edition Tertia, Priore multo locupletior. Cum Indice rerum necessario. Franekeræ: Henricum Amama & Zachariam Taedema.

1742. *Heedendaegse Rechtsgeleertheit, Soo elders, als in Frieslandt gebruikelyk*. Amsterdam: Johannes Rotterdam.

KOSSMANN EH

1954. *Politieke theorie in het zeventiende-eeuwse Nederland* (Verhandelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. Letterkunde, Nieuwe reeks, deel 67, no. 2). Amsterdam: Nederlandse Akademie van Wetenschappen, afd. Letterkunde.

TELS HH

1838. *De Jure publico usque ad Ulricum Huberum* (diss. Litt. Leiden 1838. Lugduni-Batavorum).

THIJSEN-SCHOUTE CL

1954. *Nederlands Cartesianisme*. Amsterdam: Verhandelingen der Koninklijke Nederlandse Akademie van Wetenschappen, afd. Letterkunde, Nieuwe reeks, deel 60.

VEEN TJ

1976. *Recht en Nut. Studiën over en naar aanleiding van Ulrik Huber (1636-1694)*. Zwolle: Tjeenk Willink.