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# Is the Law the Soul of the State?

## Chapter 4: The Rule of Law – Grotius

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### 1 Introduction

The concept of the rule of law is notoriously hard to pin down. What could it possibly mean for the law to rule, as opposed to a person? One influential answer to this question takes the following form: for law to rule, it has to rule ultimately through natural persons, in the sense that both the subjects of a political order and those who rule them understand themselves as bound by law. The rulers are rulers in that they have a legal justification for ruling, and the subjects acknowledge the authority of the law in that they appeal to the law when asking their rulers for justification of their rule in the form of a legal warrant. When the law is appreciated in this way as a kind of third party, capable of doing things via rulers and ruled alike and thus of affecting, however indirectly, events, it could perhaps be said to rule. The Roman orator, politician and thinker Marcus Tullius Cicero (106–43 BC) felicitously expressed this conception of the rule of law when he claimed that just as ‘the magistrates are in charge of the people’, ‘the laws are in charge of the magistrates’.<sup>1</sup> This meant that those who ruled did so by virtue of occupying offices that were constituted by law, and that they had to justify their actions by showing that they had legal warrant for them. It also implied a particular, formal conception of what law is – it had to be public and prospective as well as general.<sup>2</sup>

Martti Koskeniemi, in his learned and very ambitious new book, points out a further crucial implication of this conception of the rule of law, namely that the law has to have a certain independence or autonomy: ‘Explaining obedience to rules as a specifically human quality as against following one’s interests would long remain a key theme for defending law as against other idioms for justifying authority’, Koskeniemi writes by way of describing Hugo Grotius’s conception of the rule of law.<sup>3</sup> Later on in

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<sup>1</sup> Cicero, *On the Commonwealth and on the Laws*, ed. and trans. J.E.G. Zetzel (Cambridge University Press 2017), at 159.

<sup>2</sup> See B. Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (2016), chs. 1, 3, and 4.

<sup>3</sup> M. Koskeniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (2021), at 10.

the book, Koskenniemi further explains how this autonomy is conceived in Grotius's thought. The key lies in Grotius's doctrine of legal sources, on the one hand, and in his account of how the law can be said to bind anyone at all, on the other. Grotius seeks to answer, that is, two questions: 'how can we find binding law, where is its source?'. And: 'how does this law bind, how does it rule?'

## 2 The Source of Natural Law

Koskenniemi, adroitly putting a vast scholarly literature to good use, finds that Grotius, in his quest to prove the sophistic sceptic Carneades wrong and give a convincing answer to the two questions, gave an original account of the source of natural law, which entailed an original account of its obligatory nature. The source of natural law, Grotius thought, had to be found in human nature; the salient features of human nature are reason and sociability; and this our 'reasonable and sociable Nature'<sup>4</sup> makes a legal order both possible and necessary. Koskenniemi writes that Grotius's account of human sociability (*appetitus societatis*) 'was not designed to further Aristotelian happiness (*eudaimonia*) or the orthodox Stoic *summum bonum* of moral goodness but to account for the idea of being bound by rules in a community with others'.<sup>5</sup> The point is, Koskenniemi perceptively suggests, that '[h]uman beings were beings of *reason* who were able to determine their relationships by legal rules'.<sup>6</sup> So far, this tells us to look for the sources of natural law in human reason. The rules of natural law are those, Grotius writes, for which 'proofs' (*probationes*) can be given, using concepts so certain (*notiones certae*) 'as none can deny, without doing Violence to his Judgment. For the Principles of that Law, if you rightly consider, are manifest and self-evident [*per se patent atque evidentia sunt*]'.<sup>7</sup> We might say, therefore, that when it comes to the epistemology of natural law, Grotius is a rationalist: humans have epistemic access to these rules qua rational beings.<sup>8</sup>

What role is left for sociability, the 'desire for society' (*appetitus societatis*), to play? Without reason and speech (*ratio et oratio*, or *logos*), Grotius seems to imply, the 'appetite for society' would remain limited to offspring and maybe some other members of the species. Grotius does not, that is, adduce human sociability to solve the problem of how large and stable societies are possible – quite to the contrary, he betrays an acute awareness that human sociability is prone to issue in conflict and sometimes war.<sup>9</sup>

This is an interesting point, which Koskenniemi perhaps does not pay sufficient attention to. Scholars often describe sociability as a device Grotius brings in to defeat

<sup>4</sup> H. Grotius, *De iure belli ac pacis* [*The Rights of War and Peace*], ed. and introd. R. Tuck (Liberty Fund 2005) (1625/1631), vol. 1, at 159, bk. 1, ch. 1, para. 12(1).

<sup>5</sup> Koskenniemi, *supra* note 3, at 303–304.

<sup>6</sup> *Ibid.*, at 304.

<sup>7</sup> Grotius, *supra* note 4, vol. 1, at 110–111, Prolegomena 39.

<sup>8</sup> Koskenniemi is too ambiguous about this, as discussed below.

<sup>9</sup> Cf. P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (1983), at 618 (on the centrality of conflict for Grotius); J. B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (1998), at 72–73 (going even further).

his sceptical Carneadean opponents and solve the problem of moral motivation.<sup>10</sup> It may not really play this role, however. Rather, sociability for Grotius changes the anthropological assumptions. Sociability itself, although originally brought in to counter Carneades's anthropological claims, cannot do all the work against scepticism.<sup>11</sup> Reason, and the means of communicating reason, have to be brought in for any normative dimension to open up. Our appetite for society only goes as far as it naturally and contingently happens to go, and Grotius is not a naturalist in this sense. Grotius's theory is normative, and he is therefore after a bigger, normative claim about what we know and have reason to do, *given* our sociable, conflict-prone nature.<sup>12</sup> Peaceful sociability presupposes, rather than automatically creates, certain rules of natural law.<sup>13</sup> Grotius often seems to suggest, that is, that human sociability in and of itself may create as many problems as it at first sight might be thought to resolve. Sociability, that is, shows why we need natural law in the first place; reason tells us what rules it prescribes, while we still need coercion to ensure motivation.<sup>14</sup>

It is important to see that, unlike the Greek Stoic argument for acting according to right reason, Grotius believes that it is not only a small elite of sages that has epistemic access to what the law of nature demands – the law of nature is universal because all human beings have access to its demands. This entails, moreover, that all human beings are under an obligation to abide by its rules and can in principle be held accountable if they don't do so. This points us to another crucial difference between Grotius and ancient Greek ethics in general, the fact that Grotius does not with his doctrine of natural law and natural rights appeal to *prudential* reasons alone; Grotius's natural law and the rights flowing from it are, rather, *obligatory*. This is because they seek to appeal to an impartial point of view from which that which self-interest may counsel – the domain of prudence, including considerations of well-being (*eudaimonia*) – can in fact diverge. Put crudely, when Greek eudaimonist philosophers seek to rebut the sceptical challenge of the sophists, they do not target the criterion of an agent's well-being and self-interest, but rather seek to tweak and enlarge the agent's concept of well-being. But when Grotius mounts his defence against Carneades, he appreciates that self-interest or well-being on the one hand and obligation to natural law on the other can in principle come apart. His task is to show that reason can generate

<sup>10</sup> C. Brooke, *Philosophic Pride: Stoicism and Political Thought from Lipsius to Rousseau* (2012), ch. 2; B. Straumann, 'Oikeiosis and appetitus societatis', 24 *Grotiana* (2003) 41; S. Darwall, 'Grotius at the Creation of Modern Moral Philosophy', 94 *Archiv für Geschichte der Philosophie* (2012) 294.

<sup>11</sup> For a deflationary account of sociability in Grotius, interpreting it as the successor notion of *fides* and a mere 'afterthought' (while not denying its enormous historical impact), see Blom, 'Sociability and Hugo Grotius', 41 *History of European Ideas* (2015) 589.

<sup>12</sup> Koskeniemi himself is ambiguous when it comes to these normative claims. See Koskeniemi, 'EJIL Foreword: Imagining the Rule of Law: Rereading the Grotian "Tradition"', 30 *European Journal of International Law (EJIL)* (2019) 17; for my scepticism regarding Koskeniemi's take and methodological approach, see Straumann, 'The Rule of Law: Sociology or Normative Theory? An Afterword to Koskeniemi's Foreword', 30 *EJIL* (2019) 1121.

<sup>13</sup> Cf. Blom, *supra* note 11, at 602.

<sup>14</sup> See Straumann, 'Sociability', in R. Lesaffer and J. Nijman (eds), *The Cambridge Companion to Hugo Grotius* (2021).

juridical obligations owed under an impartial natural legal order, ‘an autonomous system of obligations’, as Koskenniemi writes, even and especially when these obligations run counter to self-interest and prudence.<sup>15</sup> Grotius’s natural law, that is, is law in a narrowly legalistic sense – it creates obligations simply by virtue of being discoverable as law by all.<sup>16</sup>

Koskenniemi convincingly stresses the fact that for Grotius natural law ‘had become a purely human affair’,<sup>17</sup> and that this ‘autonomous system of obligations’ gave rise to ‘strict and enforceable law’.<sup>18</sup> It could be added that it is *this* feature above all which serves to distinguish Grotius’s novel system and demarcate it from ancient Greek and Thomist ethics. Grotius’s natural law creates enforceable obligations and appears thus as a specifically ‘legal morality’,<sup>19</sup> while everything else, from *raison d’état* to Thomist ethics, amounts to prudence, to ‘Counsels and such other Precepts which, however honest and reasonable they be, lay us under no Obligation, come not under this Notion of *Law*, or *Right*’.<sup>20</sup> This is key, because it suggests both that the precepts of previous ethical systems that were not juridical or legalistic in this way are not obligatory and that Grotius was aware of his break with those normative systems.<sup>21</sup> Instead of perceiving himself in the Stoic or Thomist traditions of natural law, Grotius firmly and quite self-consciously availed himself of the one existing normative tradition he was familiar with that was entirely juridical in nature, namely the Roman legal tradition and Roman political and legal thought, especially that of Cicero.<sup>22</sup>

### 3 Reason Obliges

Natural law for Grotius is therefore not counsel, but command. But whose command is it? It is the command of right reason, Grotius answers; so far, so Stoic. But now, since the commands of right reason are conceived of as essentially juridical, since right reason issues commands in legal form, these commands generate *legal obligations*. Obligation is not, for Grotius, something that has to be added to the laws of nature by divine will, but arises from normative reason alone, from ‘the Rule and Dictate of Right Reason’.<sup>23</sup> Koskenniemi writes that if ‘natural law was authoritative (as it of course was), this was because nature had been created by God’, and consequently Grotius

<sup>15</sup> Koskenniemi, *supra* note 3, at 282.

<sup>16</sup> This leaves open the possibility that people cannot be motivated to live up to their obligations; Grotius may be, that is, an externalist about moral motivation. See Straumann, *supra* note 14. But they do have insight into what these obligations are – they are, one might say, under the spell of Sidgwick’s ‘dualism of practical reason’.

<sup>17</sup> Koskenniemi, *supra* note 3, at 305.

<sup>18</sup> *Ibid.*, at 284.

<sup>19</sup> *Ibid.*

<sup>20</sup> Grotius, *supra* note 4, vol. 1, at 148, bk. 1, ch. 1, para. 9.

<sup>21</sup> See B. Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius’s Natural Law* (2015), ch. 5; Darwall, *supra* note 10.

<sup>22</sup> See Straumann, *supra* note 21.

<sup>23</sup> Grotius, *supra* note 4, vol. 1, at 150, bk. 1, ch. 1, para. 10(1).

should be understood as a voluntarist, rather than a rationalist, about natural law: it is because God commands or forbids certain acts that they are obligatory, 'otherwise it would be inexplicable why they would be other than mere counsel of prudence'.<sup>24</sup>

But this picture of obligation being added by divine will, while obviously correct for Suarez, cannot be right for Grotius, for well-known reasons. Grotius makes it clear that in a *genealogical* sense, divine will is indeed the ultimate source of law, for God had willed the existence of human beings in the first place. But when it comes to the *obligatory* nature of natural law, the reasons for its validity, a voluntarist interpretation is ruled out: famously, natural law cannot be changed according to Grotius even by God, 'as God himself cannot effect, that twice two should not be four'.<sup>25</sup> This is in sharp contrast with his scholastic predecessors, who maintained that 'human beings have the ability to understand what is good and bad even without invoking God but have *no obligation proper* to act accordingly without God's command'.<sup>26</sup> For Grotius, normative reason adds obligation, because it expresses itself in legal form, and it follows from this architecture that the law of nature should give rise to natural rights, since the law is conceived here along Roman law lines as the guarantee of rights that are correlated with obligations.<sup>27</sup>

## 4 How Does Law Rule?

But now we should turn to the second question put forward above and ask how the law, on this view, can actually be said to rule. Grotius, keen on showing that enforceability is a criterion for justice under natural law, famously allows for a natural right to punish in the state of nature and is correspondingly anxious to demonstrate that the rules of natural law are sufficiently precise, clear and epistemically accessible for this enforceability to be morally defensible.<sup>28</sup> Grotius is not only a theorist of the state of nature, however, but insists in a Ciceronian fashion on the necessarily legal nature of the state. It is here that Koskenniemi very convincingly points us towards the centrality of the law for Grotius's political theory. Quoting Grotius's quote from Dio Chrysostom that the 'Law (especially that of Nations) is in a State, as the Soul in a human Body',<sup>29</sup> Koskenniemi argues that for Grotius it 'was the law that maintained the continued

<sup>24</sup> Koskenniemi, *supra* note 3, at 298.

<sup>25</sup> Grotius, *supra* note 4, vol. 1, at 155, bk. 1, ch. 1, para. 10(5).

<sup>26</sup> K. Haakonsen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (1996), at 29 (emphasis added).

<sup>27</sup> *Iustiniani Institutiones*, ed. P. Krueger, 3rd ed. (Weidmann 1908), bk. 3, ch. 13, at 110: '*obligatio est iuris vinculum, quo necessitate adstringimur alicuius rei secundum nostrae civitatis iura*'. Obligation, Justinian's *Institutes* say, is a tie or bond that is created and guaranteed by law (*ius*), with which we oblige ourselves with necessity to perform some act according to the *iura* of our state.

<sup>28</sup> It was this aspect of Grotius's natural law edifice which influenced Adam Smith so deeply: see Straumann, 'Adam Smith's Unfinished Grotius Business, Grotius's Novel Turn to Ancient Law, and the Genealogical Fallacy', 38 *Grotiana* (2017) 211.

<sup>29</sup> Koskenniemi, *supra* note 3, at 330, quoting Grotius, *supra* note 4, vol. 3, at 1249–1250, bk. 3, ch. 3, para. 2(2).

identity of a state' and when he 'wrote that the law of nations was the soul of a state he meant the basic structure of individual rights and the duty of the magistrate to enforce them'.<sup>30</sup> The law understood as the soul of the state 'created', Koskenniemi explains lucidly, 'that unity without which the pact-making individuals would remain alien to each other and their needs and interest in constant opposition'.<sup>31</sup>

Having law is a necessary condition for having a state, and, it turns out, constitutes the state's very purpose. Grotius thought that civil society was established in order to preserve peace (*tranquillitas*),<sup>32</sup> and he also thought that the state (*civitas*), having been established for the sake of enjoying law (*iuris fruendi causa*), made peace possible.<sup>33</sup> This allowed for a very wide range of constitutional options to qualify as a state,<sup>34</sup> but it retained Cicero's chief criterion for a state, that of having law.<sup>35</sup> If the formal features of law mentioned above – such as generality, being prospective, publicity – were upheld, even tyrannical states could qualify as states.<sup>36</sup> Conversely, a lack of legality in this sense means that there is no state.

But the most interesting aspect of Grotius's attempt to pin down the very purpose of the state is perhaps that he effectively claims that sociability creates conditions where peace cannot be had without law.<sup>37</sup> Since for Grotius the chief obligation under natural law consists in respect for property rights,<sup>38</sup> this raises the question of how these rights survive in the state – the second question posed above of how the natural law can be made to rule. For Grotius, this hinges on the idea that peace and the enjoyment and rule of law are intrinsically connected. But Grotius has also confined justice and the rule of law to enforceable rights, and this means that distributive justice, as conceived by Aristotle and Grotius's scholastic predecessors, was for Grotius no longer

<sup>30</sup> Koskenniemi, *supra* note 3, at 330.

<sup>31</sup> *Ibid.*, at 331.

<sup>32</sup> Grotius, *supra* note 4, vol. 1, at 338, bk. 1, ch. 4, para. 2(1): '*Sed civili societate ad tuendam tranquillitatem instituta.*'

<sup>33</sup> Grotius, *supra* note 4, vol. 1, at 162, bk. 1, ch. 1, para. 14(1): '*Est autem Civitas coetus perfectus liberorum hominum, iuris fruendi et communis utilitatis causa sociatus.*' Cf. *ibid.*, vol. 3, at 1247, bk. 3, ch. 3, para. 2(1). Here Grotius pulls together '*iuris consensu sociatus*' from Cicero's definition of 'republic' in Cicero's *On the Commonwealth*, *supra* note 1, at 18, bk. 1, ch. 39, and '*iustitiae fruendae causa*' from Cicero's explanation and justification of government in *De Officiis*, ed. M. Winterbottom (Oxford University Press 1994), at 85–86, bk. 2, ch. 41.

<sup>34</sup> See, for a convincing account of Grotius as a theorist of the state with relevance for us today, N. Bhuta, 'The State Theory of Grotius', 73 *Current Legal Problems* (2020) 127, esp. at 34–35. See also Blom, 'Sovereignty in Grotius', in E. De Bom, R. Lesaffer and W. Thomas (eds), *Early Modern Sovereignties* (2020) 15.

<sup>35</sup> Grotius performs some fancy footwork at Grotius, *supra* note 4, vol. 3, at 1249–1250, bk. 3, ch. 3, para. 2(2), seemingly disavowing Cicero in favour of Augustine (from the 1631 edition onwards), but at the end of the passage clearly returning to Cicero's criterion as stated in the *Republic*.

<sup>36</sup> For a theory of why coercion or 'sovereignty by acquisition' might be prior to sovereignty by institution, see Straumann, 'Leaving the State of Nature: Polybius on Resentment and the Emergence of Morals and Political Order', 37 *Polis* (2020) 9.

<sup>37</sup> Which seems to imply that not just knaves, but even angels, need government: cf. Kavka, 'Why Even Morally Perfect People Would Need Government', 12 *Social Philosophy and Policy* (1995) 1.

<sup>38</sup> Grotius, *supra* note 4, vol. 1, at 184, bk. 1, ch. 2, para. 1(5) (almost a paraphrase of Cicero, *De Officiis*, *supra* note 33, at 104, bk. 2, ch. 78).

within the domain of justice strictly speaking.<sup>39</sup> How, we might ask, can there be peace when the rule of law does not make room for distributional concerns?<sup>40</sup>

## 5 The Grotian Proviso

Koskenniemi briefly touches on this with a few remarks,<sup>41</sup> but in the little space I have left I will try and add to this, for it seems to me that there is lurking in Grotius a fascinating theory of justice that is interesting in its own right and speaks directly to the chief dual concern of Koskenniemi with sovereignty and property.<sup>42</sup> As Koskenniemi points out, taxation is not to serve re-distributional purposes, on pains of violating the very purpose of the state.<sup>43</sup> But, as he also notes, Grotius does acknowledge a right of necessity, and it is here that he makes an interesting proposal. First, note that this is a *right* strictly speaking, so it does not belong to distributive justice, but is enforceable.<sup>44</sup> Second, although Grotius in his political theory is generally fond of arguments based on actual, historical consent and contract, he does here make an argument for need-based rights that arise from *hypothetical* consent, an argument we might call ‘the Grotian proviso’. ‘There is all the Reason in the World to suppose’, Grotius argues, that ‘those who first introduced the Property of Goods’ in the state of nature ‘designed to deviate as little as possible from the Rules of natural Equity; and so it is with this Restriction, that the Rights of Proprietors have been established’. It follows, Grotius writes, that ‘in a Case of absolute Necessity, that antient Right [*ius*] of using Things, as if they still remained common, must revive, and be in full Force’.<sup>45</sup> Positive law is not the ground of validity for this and other rights of necessity, but merely ‘enforces . . . by its authority’ the ‘Maxims of natural Equity’.<sup>46</sup>

The Grotian proviso establishes, it seems, a however minimal need-based enforceable right to material support for those who do not own anything. Importantly, this is not framed as a claim of distributive justice, but as a natural right with corresponding obligation under corrective justice, where the obligation arises, not from consent, but from what right reason commands when applying the heuristic of hypothetical consent. Private property rights may have to yield to rights of the destitute as a matter

<sup>39</sup> See Straumann, *supra* note 21, at 119–129. But note that *material* necessity and the claims it generates are not, for either Aristotle or Aquinas, concerns of distributive justice, which is concerned, rather, with the distribution of honours and offices according to merit.

<sup>40</sup> For a different reading of Grotius, see Nijman, ‘Grotius’ Rule of Law and the Human Sense of Justice: An Afterword to Martti Koskenniemi’s Foreword’, 30 *EJIL* (2019) 1105.

<sup>41</sup> Koskenniemi, *supra* note 3, at 342–343.

<sup>42</sup> *Ibid.*, at 11.

<sup>43</sup> *Ibid.*, at 343.

<sup>44</sup> Aquinas, too, acknowledges claims in times of extreme need, but does not frame these as enforceable rights: T. Aquinas, *Opera Omnia*, vol. 9, *Secunda Secundae Summae Theologiae*, quaest. 66, art. 7, at 92–93.

<sup>45</sup> Grotius, *supra* note 4, vol. 2, at 433–434, bk. 2, ch. 2, para. 6(1–2). Cf. the justification for eminent domain along the same lines at *ibid.*, vol. 3, at 1556, bk. 3, ch. 20, para. 7(1): ‘*illi ipsi voluisse censendi sunt qui in civilem coetum coierunt.*’ This results in a kind of ‘hypothetical-contract originalism’, which, when indexed to post-Industrial Revolution growth, could result in a not-so-minimal right of necessity.

<sup>46</sup> Grotius, *supra* note 4, vol. 2, at 434, bk. 2, ch. 2, para. 6(3).

of right, not virtuous charity. Property rights, on this view, are not suspended by necessity and need, but limited by a use-right that survives from the state of nature. We have here a theory of rights of those in need that is not a theory of distributive, but of corrective justice, a theory that may well provide the nucleus of an answer for those, such as Professor Koskenniemi himself, who do not think that ‘our new vocabularies’ will suffice to deal with our ‘problems today’, but look to the history of political and legal thought to provide new answers.<sup>47</sup> Grotius’s views on law and how it can be made to rule may well deserve another look.

<sup>47</sup> Koskenniemi, *supra* note 3, at 13.