
The Rule of Law: Sociology or Normative Theory? An Afterword to Martti Koskenniemi's Foreword

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Abstract

Martti Koskenniemi is correct to view Hugo Grotius as a thinker committed to the rule of law. But there is a crucial difference between Grotius' and Koskenniemi's respective concepts of the rule of law. Grotius' concept of the rule of law is normative and requires a moral cognitivist outlook. Koskenniemi, on the other hand, holds a sociological concept of the rule of law. Koskenniemi is correct that, for the rule of law to find its 'normative voice', Grotius may well be of help. For this normative voice to make itself heard, however, it will have to rise above the sceptical reduction of the rule of law to normatively inert sociological facts.

Martti Koskenniemi proposes to view Hugo Grotius (1583–1645) as a theorist of the rule of law. He believes that Grotius' account might help us with some of our current problems but, at the same time, suspects the rule of law to have been complicit with the creation of these problems – namely, inequality. When it comes to the normative vision that informs his own view, Koskenniemi holds his cards close to the chest, but it is clear that it is fuelled by indignation *vis-à-vis* injustice. Koskenniemi is certainly correct, it seems to me, to think of Grotius as a thinker committed to the rule of law. I also find promising his view of Grotius as someone who has something to offer legal theorists in our own time. But I think that there is a crucial difference between Grotius' normative concept of the rule of law and Koskenniemi's own views, a difference that might explain why Koskenniemi does not straightforwardly formulate his indignation in terms of an underlying theory of justice. The difference is this: Grotius is a moral cognitivist, and his concept of the rule of law flows from

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his moral realism. Koskenniemi, on the other hand, appears hesitant to commit to a notion of the rule of law that is stronger than what his sociological notion of the ‘structural bias’ exhibited by professional lawyers and other elites towards the rule of law permits – hesitant, that is, to argue with or against Grotius in normative terms of justice rather than as a sceptic viewing the rule of law from the outside, as it were, in descriptive terms. But, to me, it seems as if Koskenniemi, perhaps *malgré soi*, is in fact committed to a moral realism of his own and that his indignation is not merely that of an emotivist sceptic. In what follows, I will try and make this intuition clearer by way of an exposition of the difference between Koskenniemi’s and Grotius’ rule of law.

The works of Grotius on natural law are best interpreted as attempts at formulating a theory of justice for the state of nature. Writing at a time of violent disagreement, Grotius sought to put forward an argument about justice – its content and its sources – that would be accessible and convincing to a deeply divided audience. For reasons having to do with the historical context in which he first started to think about issues of justice, Grotius approached these questions in a perfectly radical way. His was not a political theory in any narrow sense but, rather, a theory of normative order before and beyond the state – that is, a theory of norms that could be said both to exist and be recognized without the state. Indeed, any political theory more narrowly conceived – any theory attempting to justify political authority within the state – would itself have to be based on, and justified in terms of, the kind of fundamental normative order Grotius wanted to articulate. Given the deep religious divides in 17th-century Europe, Grotius was also keenly aware of the need to appeal beyond these divides and base his edifice on denominationally neutral normative reasons. A ready-made system of norms that could plausibly be assumed to be at least partly declaratory of natural law and, therefore, defensible in rationalist terms had already made inroads throughout Europe, but especially in the centre of 17th-century legal humanism, Grotius’ United Provinces: Roman law. If Thomas Hobbes famously reported that he and fear were twins, Grotius, with equal right, could have claimed that he and the *Corpus iuris civilis*, in Gothofredus’ 1583 edition, were born together. Grotius, learned in humanist jurisprudence, took the fine-grained rules and remedies of the Roman legal order and out of them built a system of natural law.

It is important to appreciate that Grotius, who had important predecessors in Donellus, Gentili, Vázquez de Menchaca and Suárez, with the help of the Roman law of the *Corpus iuris*, built a very *legal* natural law. This is to say that, unlike, for example, the ideas about natural law expressed by the Greek Stoics, Grotius thought of natural law as a juridical system of legal norms.¹ Another way of putting it is that Grotius, although building on a massive foundation of humanist knowledge that included classical moral philosophy and ancient history, did not follow the Greek

¹ See B. Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius’ Natural Law* (2015).

moralists in basing his moral realism on virtue. He instead followed Cicero, the Roman lawyers and some of the predecessors just mentioned in articulating a view of justice that turned justice from a virtue necessary and perhaps even sufficient to secure happiness (*eudaimonia*) into a legal concept that was amenable to being articulated in legal rules. Justice, henceforth, could be expressed only in juridical terms and demanded a particular kind of legal order. But Grotius also sought to endow his theory of justice with universal scope beyond any particular state, religion or culture – justice for Grotius, therefore, comes to mean a legal order for the state of nature.

What about the rule of law? Koskeniemi thinks that Grotius, although he did not have the term, nevertheless had the concept. This must be right, and worries about anachronism in this case are unfounded.² Indeed, one might say that Grotius, with his natural-law theory of justice, formulated a legal core that must necessarily be contained by any kind of legal order worthy of the name. Grotius' natural law is a legalized moral theory, and, for Grotius, because he is a moral realist, social order can only be justified if it is a legal order that is based on, and consistent with, the natural law foundation that Grotius laid out in his *De iure belli ac pacis*.³ On this view, positive law – and political order, in general – presupposes an account of pre-political rights and obligations. Grotius' natural law is designed to give such an account, and the reason it takes legal form is because Grotius believes that human sociability – that is, the sociability of beings endowed with reason – creates both possibilities as well as problems of a kind that make sociability only possible within a legal order.⁴ Law, for Grotius, becomes an autonomous source of normative reasons, quite independent from what anyone deems to be in his or her self-interest. This independence, of course, makes eudaimonism untenable for Grotius.⁵ Grotius' natural law is rationalist; it derives its obligatory nature, its certainty as well as its validity from normative reason, which gives us epistemic access to it and, in Hobbes' words, leaves thus 'all men unexcusable'.⁶ The importance and epistemic certainty of natural law not only results in its entrenchment but also limits its subject area.⁷

² See Stumpf, 'Hugo Grotius and the Universal Rule of Law', in A. Carty and J. Nijman (eds), *Morality and Responsibility of Rulers: European and Chinese Origins of a Rule of Law as Justice for World Order* (2018) 187.

³ H. Grotius, *De iure belli ac pacis* [*The Rights of War and Peace*], edited and introduced by R. Tuck (2005 [1625/1631]).

⁴ Sociability, often interpreted as part of Grotius' answer to the moral sceptic, for Grotius creates as many problems as it solves; Grotius' answer to the sceptic ultimately does not rely on (social) instinct but, rather, on normative reason. See Straumann, 'Grotius on Sociability', in R. Lesaffer and J. Nijman (eds), *The Cambridge Companion to Hugo Grotius* (forthcoming).

⁵ Eudaimonism depends on an account of the human end properly insulated from scepticism, yet Grotius, following Cicero, doubts that we have such an account. See *ibid.*; see also Darwall, 'Grotius at the Creation of Modern Moral Philosophy', 94 *Archiv für Geschichte der Philosophie* (2012) 296.

⁶ N. Malcolm (ed.), *Leviathan* (2012), vol. 2, at 240.

⁷ See Straumann, 'Adam Smith's Unfinished Grotius Business, Grotius's Novel Turn to Ancient Law, and the Genealogical Fallacy', 38 *Grotiana* (2017) 211, at 218–220.

On the motivational level, sociability breeds a need for law since sociable beings need assurance of compliance.⁸ As Thomas Nagel argues, the ‘existence of a just order ... depends on consistent patterns of conduct and persisting institutions that have a persuasive effect on the shape of people’s lives. Separate individuals, however attached to such an ideal, have no motive, or even opportunity, to conform to such patterns or institutions on their own, without the assurance that their conduct will in fact be part of a reliable and effective system’.⁹ Law can now be understood to articulate the conditions of the possibility for a peaceful social life for rational beings. On the view defended by Grotius – and, one might add, by Hobbes – it is only law that can formulate these necessary conditions for peace. Justice, that is, has to be expressed in the form of law. Law places substantive restrictions on arbitrary rule due to some of its formal features – its clarity, generality and impartiality, its certainty and its predictability.

This brings us back to the rule of law and the differences between Grotius and Koskenniemi. For Grotius, the rule of law could be said to be contained in some of the categorical features of the law of nature that he formulates; as Michael Oakeshott puts it, in those ‘conditions which distinguish a legal order and in default of which whatever purports to be a legal order is not what it purports to be’.¹⁰ There is a natural law minimum, as it were, a juridical hard core that necessarily conditions even the positive legal order and has to be preserved in it for any legal order to remain a legal order. In stark contrast, Koskenniemi invites us to see the rule of law, not as a normative notion but, rather, as a sociological one. The rule of law is said to rely merely on a ‘structural bias accepted by the elites’.¹¹ It is here, I think, that an important tension with Grotius opens up. Koskenniemi, at times despairing of the rule of law, charges it with having been ‘complicit in creating and perpetuating ... ever-growing inequality’ and thinks that the rule of law can only be saved if it can ‘find a normative voice that addresses that inequality directly’.¹²

This is Koskenniemi’s declared motivation for turning to Grotius. Now one might think that it is misguided, in principle, to seek to address the problem of inequality with a concept such as the rule of law, which has been said to ‘bake no bread’ and to be ‘unable to distribute loaves or fishes (it has none)’¹³ or to address it with a legal

⁸ Whether Grotius thought that natural law itself, apart from providing assurance as to other people’s behaviour, may motivate us to follow it, is a separate question that I cannot go into here, but we should note that motivation, unlike obligation, is a psychological, not a normative, notion. A natural right to punish is crucial for Grotius, and we should note that Koskenniemi is wrong to think that humanitarian intervention is not ‘allowable on Grotian premises’. Koskenniemi, ‘EJIL Foreword: Imagining the Rule of Law: Rereading the Grotian “Tradition”’, 30(1) *European Journal of International Law* 17, at 38; see also Criddle, ‘Three Grotian Theories of Humanitarian Intervention’, 16 *Theoretical Inquiries in Law* (2015) 473.

⁹ Nagel, ‘The Problem of Global Justice’, 33 *Philosophy and Public Affairs* (2005) 113, at 116.

¹⁰ Oakeshott, ‘The Rule of Law’, in M. Oakeshott, *On History and Other Essays* (1999) 129.

¹¹ This continues earlier work; for criticism, see Dyzenhaus, ‘Formalism, Realism and the Politics of Indeterminacy’, in W. Werner, M. de Hoon and A. Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (2017) 39.

¹² Koskenniemi, *supra* note 8, at 27.

¹³ Oakeshott, *supra* note 10, at 178. For a convincing argument that the rule of law is consistent with redistribution, see Dyzenhaus, ‘Dreaming the Rule of Law’, in D. Dyzenhaus and T. Poole (eds), *Law, Liberty and State* (2015) 234; see also J. Waldron, *The Rule of Law and the Measure of Property* (2012).

theory taken from someone who wrote in pre-industrial material conditions.¹⁴ One might also quibble with some of the empirical claims that Koskenniemi makes about inequality¹⁵ or with his suspicion that the rule of law is ‘complicit’ with ‘ever-growing inequality’.¹⁶ But it seems to me that it is in fact possible and fruitful to bring Grotius’ thought in dialogue with problems such as inequality and that the concept of the rule of law implicit in Grotius’ writings may well contain some however limited resources in answer to such problems; Grotius, after all, did elaborate on use rights arising in cases of necessity and on how such rights condition, as part of the natural law ‘hard core’ of legality (that is, the normative rule of law), property rights.¹⁷ To my mind, the problem with Koskenniemi’s approach lies at a deeper level – namely, with the fact that Koskenniemi never squarely addresses the gap between Grotius’ normative notion of the rule of law – the conditions of legal order carefully laid out by Grotius – and his own sociological view. It is almost tautologically true that the rule of law, if understood merely sociologically as a ‘structural bias of elites’, cannot have much in the way of critical normative purchase. The structural bias of China’s politburo, for example, simply does not exhibit any continuity with a normative notion of the rule of law. It seems to me that this is the central problem with the argument.

One way of approaching the difference between Grotius and Koskenniemi might be to look at it through the lens of the tradition with which Grotius himself was engaging. Grotius, following Cicero closely, thought that the purpose of the state consisted in enjoying law (*iuris fruendi causa*), where the law was understood to derive its validity from an underlying natural law or moral realism. Cicero had understood the state as a legal order by defining it as an agreement (*consensus*) about (constitutional) law (*ius*).¹⁸ Cicero developed his argument in opposition to the rhetorically gifted Greek

¹⁴ Grotius never addressed inequality of material goods as a problem *per se* as opposed to hunger and absolute poverty. During the Thirty Years’ War, when Grotius wrote, important cities experienced big drops in inequality, but these were due to war and plague; for the well-documented case of Augsburg, see W. Scheidel, *The Great Leveler* (2017), at 335–341.

¹⁵ Global income distribution has in fact become less unequal in the last few decades; the Gini coefficient of global inequality dropped from 69 in 2003 to 65 in 2013. T. Hellebrandt and P. Mauro, ‘The Future of Worldwide Income Distribution’, Peterson Institute for International Economics Working Paper no. 15–7 (2015), available at <https://ssrn.com/abstract=2593894>. This is consistent with increasing inequality within some countries. For a convincing, if pessimistic, empirical assessment of attempts at levelling, see Scheidel, *supra* note 14.

¹⁶ Complicity is simply asserted, perhaps because vocal advocacy for rule of law and increased inequality within some countries happened at the same time. Analogously, one could come to believe that the rule of law was complicit in the more than 70 per cent reduction of the share of people living below the poverty line worldwide, from 35.9 per cent to 10 per cent between 1990 and 2015 or from 1.9 billion people to 736 million. See M. Cruz *et al.*, *Ending Extreme Poverty and Sharing Prosperity: Progress and Policies*, 15 March 2015, available at <http://pubdocs.worldbank.org/en/109701443800596288/PRN03Oct2015TwinGoals.pdf>.

¹⁷ Meeting the needs of the poor, however, is but a side constraint on Grotius’ theory of property; there is no theory of distributive justice in Grotius for he developed his doctrine for the state of nature, where there is no distributing agent; this is a problem that Koskenniemi risks inheriting.

¹⁸ Cicero, *The Republic and the Laws* (New York: Oxford University Press, 1998), bk. 1, sec. 39; see Straumann, *supra* note 1, at 55–61, 83–102. Note that this is not a voluntaristic view; agreement does not constitute *ius* but is the consequence of justice.

sceptic Carneades, who had argued, in a sophistic vein, that legal orders merely reflected calculations of interest or utility, not justice. Carneades premised his account on an egoistic anthropology. From this descriptive egoism, Carneades drew strong normative conclusions: humans should break the rules that ensure the advantage of a society. Adhering to them is irrational if punishment can be escaped. Cicero's reply to Carneades pointed out that the existence of normative rules of justice and our epistemic access to such rules was in no way undermined by Carneades' psychological or motivational argument. Rather, such norms of natural law can be shown to underlie a variety of parochial legal systems, a variety that Carneades had taken to be evidence in favour of his own relativism.¹⁹

Cicero's normative account of legal order had in turn provoked the scepticism of Augustine, who reacted, not unlike latter-day sceptics about the rule of law, by denying the legal nature of the state, elevating instead some descriptive common aim to the definitional criterion of the commonwealth.²⁰ Augustine had famously compared states with robber bands, despairing of finding criteria to differentiate between the two (at least in the absence of Christianity). But Cicero, and Grotius with him, believed that, once there is law in the required normative sense, the demands of legality might import aspects of juridical morality even into robber bands and that it is the use of the agreed law that potentially transforms them into legal orders or states.²¹ Koskenniemi seems undecided between these argumentative poles. Seduced by a Carneadean penchant for rhetoric, Koskenniemi issues a call for 'bricolage' and seems to suspect that authority lies in persuasion only, but there is also a palpable desire to argue, like Grotius and against Carneades, for a moral legal order.²² Sociology and bricolage are normatively inert; they may stoke suspicion or sympathy, it is true, but suspicion and sympathy, to be warranted, have to be normatively earned. It would be important to learn more about where Koskenniemi stands – whether he thinks of himself as a moral cognitivist and to what substantive view of global justice he commits.²³

Koskenniemi apparently agrees with Samuel Moyn that human rights – which he sees as of a piece with the rule of law – are 'not enough'. He closes his article with a rhetorical question, asking whether 'the capacity to file a human rights complaint suffice[s] to offset the afflictions of life in an underclass targeted by unending austerity'. But this is a sophism and an odd piece of accounting. It is not just that the rule

¹⁹ On Carneades, Cicero and Grotius, see Straumann, *supra* note 1, at 55–61, 83–102.

²⁰ Augustine, *City of God*, translation by John Healey (New York: E.P. Dutton and Company, 1945), bk. 19, ch. 24.

²¹ Lack of legality indicates for Cicero that there is no constitutional order and, hence, no state. This amounts to a juridical morality with substantive normative assumptions associated with the rule of law built into it, such as substantive due process (*provocatio*) and the prohibition of bills of attainder (*privilegia*). See Straumann, *supra* note 1, at 170–206, especially 196–200; for Cicero, see Straumann, *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution* (2016), at 149–190.

²² Koskenniemi, *supra* note 8, at 24, 28.

²³ There is no attempt in Koskenniemi's article to bring the insights gained from Grotius in conversation with philosophers who currently think about global justice, such as Peter Singer, Thomas Pogge, Charles Beitz, Thomas Nagel, A.J. Julius and others.

of law and human rights (to the extent that they are indeed of a piece with the rule of law) are usually thought of as necessary, not sufficient, conditions for just political orders.²⁴ Most importantly, European austerity could well be criticized on rule-of-law grounds as an arbitrary exercise of political power by a largely unaccountable power within the Union – this criticism, however, would require a normative, not merely a sociological, notion of the rule of law. The structural bias of the Berlin elites who prescribed austerity for southern Europe seems clearly at odds with the requirements of a normative rule of law such as generality, impartiality, predictability and non-arbitrariness. In sum, Koskenniemi is right to suggest that, for the rule of law to find its ‘normative voice’, Grotius may well be of help. But, for this normative voice to make itself heard, it will have to rise above the sceptical reduction of the rule of law to normatively inert sociological facts. Koskenniemi should therefore side with Grotius and Cicero against Carneades and Augustine.

²⁴ If issues of distributive justice and austerity do not appear to be politically alive, the reason might rather be sought in the lack of European sovereignty and the political individualism of European nation-states, not in an alleged complicity of the rule of law with sinister ‘global’ expert governance.