
Contexts of Early Modern German Legal Imagination: On Transformations of German Natural Law – Governing the State-Machine

Chapter 11: A Science of State-Machines

Ere Nokkala*

1 Introduction

The leading political and legal historiography of early modernity is mainly built on Anglophone discussion. The lack of attention to German politics and history has led to accounts that get the formation of the modern state wrong. Martti Koskenniemi's book offers significant correction to the situation. He highlights the German natural lawyers' role as a group, which significantly contributed to the formation of early modern political and legal vocabulary. Koskenniemi devotes a whole chapter of his new book to an analysis of the transformations of German natural law from the beginning of the 16th century to 1758, to the publication of Emer de Vattel's *Droit des gens* in the middle of the Seven Years' War (1756–1763).

Universities were the institutional discursive domain where natural law mutated. Koskenniemi argues that the German Enlightenment was 'an academic business'.¹ One could argue with Hans Erich Bödeker and Martin Gierl that '[t]he other side of the Enlightenment, beyond discourse, was that of the institution'. That is, institutions such as the university were the *Lebenswelt*, the lived reality, of the Enlightenment.² Be that as it may, Koskenniemi argues that a significant shift took place from state sciences that were concerned with connecting governing with piety to sciences of state, which supported governing according to the principles of utility. He studies the empirical-utilitarian approach to state governance from Samuel Pufendorf to Christian

* University Researcher, Department of Philosophy, History and Art Studies, University of Helsinki, Helsinki, Finland. Email: ere.nokkala@helsinki.fi. This article was funded by the Academy of Finland.

¹ M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (2021), at 798.

² Bödeker and Gierl, 'Einleitung', in M. Gierl and H.-E. Bödeker (eds), *Jenseits der Diskurse: Aufklärungspraxis und Institutionenwelt in europäisch komparativer Perspektive* (2007) 11, at 11.

Thomasius and Nicolaus Hieronymus Gundling. Except for Pufendorf and Vattel, these authors were active at the University of Halle founded in 1694.³

Koskenniemi's book on legal imagination reflects on law in the context of power. This is in the context of the power of law as language. Koskenniemi considers legal imagination as 'a form of institutional action that takes place in the context of controversy through the authoritative use of language'.⁴ He is particularly interested 'in legal imagination as it operates in relationship to the use of power in contexts that we would today call international'.⁵ He explores the rise, flourish and dismissal of authoritative legal languages. The reason German natural law is so important for Koskenniemi's book is that the legal imagination, as it operated in the institutional context of the Holy Roman Empire used by German natural lawyers, came to dominate in theorizing the law of nations. International law is essentially a German discipline that got its grammar from centuries of constitutional quarrels within the Holy Roman Empire. These struggles had to do with the sovereignty of the princes vs. the overriding legal order of the Empire. According to Koskenniemi, the 'German problem' was to find out how power could be extended over sovereign states in the form of an international organization. From the end of the 15th century onwards, German thinkers had started to either justify or question the power of the Emperor, which was relying on Roman law. Writers critical of Habsburg rule ('Caecerean imperialism') such as Boguslaw von Chemnitz ('Hippolyte a Lapide', 1605–1678) defended the rights and freedoms of provincial Estates. Hermann Conring (1606–1681) argued for a break with Empire and questioned Roman law as justification of the power of the Empire. As Koskenniemi notes, the conflict was not resolved by the Treaty of Westphalia (1648). This continuing political and legal struggle is the context in which the rise and flourish of the language of natural law are best interpreted. This is where the debate over the meaning of authoritative words such as sovereignty and state took place.

2 The Rise and Flourishing of Natural Law as an Authoritative Language: Pufendorf and Beyond

In the context of natural law, it is interesting to note that the reception of Grotius was slow in the Holy Roman Empire but was warmer in the 1660s and 1670s. Nevertheless, Grotius's work provided an important framework for the authoritative use of language at German universities. The appropriation of Grotius's work coincided with the relative rise of politics related to ethics. In the 16th century, natural law established itself as the practical discipline of statecraft taught at German universities. Around 1700, it had become the standard; this is to say, the ruling ideology in the

³ Another major site of the German Enlightenment was the University of Göttingen, which was founded in 1734. Koskenniemi discusses the natural law and other academic disciplines taught at the University of Göttingen in the subsequent chapter that deals with the end of natural law. The chapter that I am commenting on focuses on the rise and flourishing of natural law as an authoritative discipline.

⁴ Koskenniemi, *supra* note 1, at 8.

⁵ *Ibid.*, at 1.

Holy Roman Empire. Natural law became a discipline that was taught widely, and all topics that dealt with societal questions were discussed using the shared language of natural law. Natural law had become ubiquitous.⁶ In its mature form, it encompassed both international and domestic action to search for security and welfare. According to Koskenniemi, '[i]ts ambition was to produce a total view of how the state-machine was to be operated; the Holy Roman Empire, after all, had been both domestic and international'.⁷

Koskenniemi is not alone in emphasizing the importance of studying the German discourse of natural law to understand the formation of the modern concept of the state. In recent years, Samuel Pufendorf's contribution to the rethinking of the concepts of state and sovereignty has been highlighted.⁸ In addition, Pufendorf has been increasingly recognized as a thinker who had interesting things to say on matters 'international'.⁹ As Koskenniemi argues, Pufendorf was successful in formulating a post-confessional natural law, which did not require theology's approval. Pufendorf's natural law had universal validity, while making society a foundational category. It also combined rudimentary ideas of individual freedom with princely authority. In sum, it provided a non-confessional basis for society and was remarkably realistic in relation to the contemporary fiscal-military state. It also provided a naturalist construction to justify positive law.¹⁰

Much of the recent scholarly debate on Pufendorf has concentrated on the question of whether the content of his natural law was deduced from the necessity of individual self-preservation or the concept of sociability. Koskenniemi emphasizes that Pufendorf regarded men as self-loving and weak, and therefore they needed to leave civil society behind to form a political state. The formation of the state could be received from an argument about self-love, weakness and the ability to reason.¹¹ Koskenniemi's account of Pufendorf is inspired by Istvan Hont's interpretation, which highlights the middle ground Pufendorf finds between Grotius' natural sociability and the enmity of Hobbes. Between these two, there was 'the history of civil society, within which there was a gradually deepening commercial culture'.¹² This interpretation is clearly in line with the aim of Koskenniemi's book to study the gradual rise of economic argument into predominance: the migration of authoritative concepts from one discipline to another. Pufendorf's view on the rising commercial culture can be interpreted

⁶ Haakonssen, 'Enlightenment and the Ubiquity of Natural Law', 27 *Jahrbuch der Österreichischen Gesellschaft zur Erforschung des 18. Jahrhunderts* (2012) 45.

⁷ Koskenniemi, *supra* note 1, at 866.

⁸ B. Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Politics* (2017).

⁹ T. Christov, *Before Anarchy: Hobbes and His Critics in Modern International Thought* (2015).

¹⁰ Koskenniemi, *supra* note 1, at 832. By arguing that Pufendorf provided a naturalist construction, Koskenniemi joins Pufendorf's interpreters who have emphasized Hobbesian elements in Pufendorf's thought. See especially F. Palladini, *Samuel Pufendorf Disciple of Hobbes: For a Re-Interpretation of Modern Natural Law*, trans. D. Saunders (Brill, 2020). This differs from those interpreters who emphasize Pufendorf's debt to Spanish scholasticism. See Holland, *supra* note 8.

¹¹ Koskenniemi, *supra* note 1, at 825, 827.

¹² *Ibid.*, at 833.

in the context of the transformation of natural law into ‘economics’, which is one of Koskenniemi’s books’ main topics. This reading suggests that Pufendorf’s natural law carried the seeds of its future decline.

As mentioned, a key argument of Koskenniemi’s chapter is that early modern natural lawyers accomplished a step from piety to utility. Pufendorf’s account was a historically reliable, pragmatic approach to the post-confessional state. He had managed to formulate an empirical-utilitarian political science. The political state was in service of the *salus populis*, which could be externalized to foreign policy. Pufendorf’s utilitarian orientation was picked up and further developed by Thomasius and Gundling at the University of Halle, an important centre of the early German Enlightenment. Thomasius emphasized the role of history in helping to generalize natural law. According to Koskenniemi, Thomasius’s *ius gentium* as part of *decorum* was diplomatic propriety understood as a type of prudence. In the context of Thomasius’s utilitarianism, it would have been interesting to hear how Koskenniemi assesses Thomasius’s proposal to establish a chair of cameral sciences (‘economics’) at the University of Halle. Usually, Christian Wolff is credited as ‘the philosopher of the cameralists’, but as some recent research suggests, Thomasius’s natural law and his considerations on ‘economics’ were a model for many cameralists. It is even worth asking whether Thomasius himself was not himself ‘the first cameralist in Halle’.¹³

Gundling argued in the footsteps of his mentor, Thomasius, that the only point to study *ius gentium* was utility, whereby attaining outer peace had a central role. According to Koskenniemi, Gundling regarded ‘law as government of the state-machine’. He combined several disciplines to reach a systematic understanding of the workings of the state-machine with a focus on institutions of commerce, diplomacy and war. Natural law had become a technique of European diplomacy with a special emphasis on historical and practical aspects.

3 The Expansion of Natural Law and Law of Nations: Wolff and Vattel

Christian Wolff did the most to build a coherent system out of natural law. Wolff wrote his systematic treatises on natural law and the law of nations when the modern university-based disciplines were beginning to take shape. At that time, the German academe tended to equate ‘theory’ with ‘system’.¹⁴ Building a coherent system out of natural law was necessary for its authority because, ‘[i]f a discipline was to have an authoritative voice despite the centrifugal pulls of an ever-expanding public sphere of knowledge, it had to have two properties: tight borders to ward off adulterating intrusions, and a self-generated and self-evident foundational principle, unique to

¹³ Kühnel, ‘Der “erste Kameralist” der Universität Halle: Christian Thomasius als Lehrer der Ökonomie’, in E. Grunert and A. Rüdiger (eds), *Politische Klugheit und Recht – Staat bei Christian Thomasius* (forthcoming 2022).

¹⁴ La Vopa, ‘Epilogue’, in E. Nokkala and N. B. Miller (eds), *Cameralism and the Enlightenment. Happiness, Governance and Reform in Transnational Perspective* (2020) 302, at 305.

itself, from which all of its other truth claims derived their validity'.¹⁵ And this is what Wolff aimed for. Koskenniemi argues that, for Wolff, '[n]atural law was to become a coherent system to assist the prince to bring about the perfection of the nation that would coincide with the perfection of its subjects'.¹⁶ Whereas Pufendorf had been pessimistic and pragmatic, Koskenniemi characterizes Wolff as someone who was philosophical and optimistic.

Wolff built a system out of natural law, but Emer de Vattel beyond doubt contributed the most to the expansion of German natural law and law of nations beyond the German-speaking region and Europe. Vattel provided for the European contemporaries 'an accessible guide to justify and systematize what they already knew about European affairs'.¹⁷ Vattel defended 'Europe as a politico-diplomatic system with intricate, historically developed rules to govern it'.¹⁸ Koskenniemi points out that the constructive ambivalence of Vattel's law of nations is moderated once situated within the framework of 18th-century German works on natural law. This is also the reason why we find a Swiss writer writing in French from a chapter dealing with German natural law and *ius gentium*. Vattel used Wolff's technical notions to 'provide a realistic description of modern European politics'.¹⁹

Wolffian elements were not the only traces of German natural law in Vattel's works. He blended several variations of natural law that were reciprocally porous. Koskenniemi emphasizes that the different approaches borrowed so much from each other that they became indistinguishable. This was especially the case with Vattel.²⁰ Koskenniemi's book indicates implicitly that it was the rhetorical culture that made blending possible. However, behind this laid the logic of utility. The logic of utility was the shared normative logic common to all the blended elements. It sustained a sea change from religious to secular norms for endowing human beings with moral value.

According to Koskenniemi, the key to Vattel's success was his conception of the voluntary law of nations as between necessary law of nations and arbitrary law of nations:

Situating between the perfectionist morality of necessary natural law and fully consent-based arbitrary law, voluntary law produced a double feat: it took realistic account of the nature and needs of the states-society while still not having to defer to the consent of each and every state. Between the utopia of necessary natural law and the apology of arbitrary law, it offered a reasonably stable basis for allowing each state to pursue its policies relatively undisturbed by others.²¹

Koskenniemi states several times that Vattel above all 'described' and justified European politics as they were known to the contemporaries. A recent volume on Vattel sees him as an advocate of change and suggests convincingly that there was a further

¹⁵ *Ibid.*, at 305.

¹⁶ Koskenniemi, *supra* note 1, at 857.

¹⁷ *Ibid.*, at 861.

¹⁸ *Ibid.*, at 869.

¹⁹ *Ibid.*, at 861.

²⁰ *Ibid.*, at 800.

²¹ *Ibid.*, at 864.

explanation for the success of Vattel's work. Namely, his success was based not only on his writings as a diplomat and natural lawyer but on the way he was able to discuss the improvement of small states and analyse the rising commercial rivalry within the context of the Seven Years' War (1756–1763).²² Consequently, Vattel's thought was particularly attractive for small and even more so for new states. This viewpoint offers a further explanation of his success in the British American colonies. Vattel was not simply defending the status quo. He was a staunch supporter of improving and perfecting the smaller states. Interpreted in this way, Vattel's advocacy for change becomes perceivable.

4 On Metaphors: State-Machine

One of the most exciting developments in the field of intellectual history during the past years has been the rapprochement between conceptual history and metaphor history. The chapter under scrutiny is more decisively conceptual history than many others in Koskenniemi's new book. This could be simply a result of the fact that much of his German secondary literature is inspired by conceptual history. However, Koskenniemi has stated elsewhere that 'legal history is almost automatically *Begriffsgeschichte* in the sense of descriptions of how lawyers have used well-recognized, authoritative words to attain their objectives'.²³ He asks, 'what else is legal change than the outcome of struggles over the meaning of authoritative words?'.²⁴ To him, '[l]egal history is a history of rhetoric, a narrative about how legal concepts have gained and lost authoritative meanings'.²⁵ After having read Koskenniemi's chapter, it was clear to me how he practised conceptual history in terms of concepts of state, sovereignty and property. However, what remained a bit unclear to me was his account of the metaphors, especially the preconditions for the analysis of the metaphors.

Koskenniemi states that his book 'is also a history of the power of the state, and the language of statehood, and all that belongs to it'.²⁶ The state-machine metaphor belongs to the language of statehood. Natural law was the science used to govern the state-machine. It is to Koskenniemi's great merit that he uses a lot of textual evidence taken directly from his protagonists, and the state-machine metaphor comes from the sources. However, at times it is difficult to know whether the used concepts and metaphors are projections of Koskenniemi and to what extent they are from the source itself. One also needs to ask what is the significance of the fact that the studied authors used metaphors such as the state-machine metaphor. What is the function of the state-machine metaphor in Koskenniemi's analysis? To avoid using too many quotations, Koskenniemi

²² Stapelbroek and Trampus, 'The Legacy of Vattel's *Droit des gens*: Contexts, Concepts, Reception, Translation and Diffusion', in K. Stapelbroek and A. Trampus (eds), *The Legacy of Vattel's Droit des gens* (2019) 1, at 2.

²³ Koskenniemi, 'Legal History as *Begriffsgeschichte*?', in C. Wiesner, E. Roshchin and M.-C. Boilard (eds), *In Debate with Kari Palonen: Concepts, Politics, Histories* (2015) 63, at 66.

²⁴ *Ibid.*, at 63.

²⁵ *Ibid.*, at 66.

²⁶ Koskenniemi, *supra* note 1, at 958.

has minimized the use of quotations marks.²⁷ This makes the text easier to follow and aesthetically more pleasing. As he says, he relies on the reader's understanding that it is still the source that speaks and not Koskenniemi himself. Yet, sometimes it is unclear whether Koskenniemi is talking about state-machines as a metaphor used in his sources or as his own interpretative category. Can we talk about 'Vattel's state-machine'²⁸ other than as an interpretative category of the researcher? Did Gundling consider 'law as the government of the state-machine' in those exact words? The complex relationship between natural law and the state-machine metaphor is further complicated when one considers that in German it was most actively used by Johann Heinrich Gottlob von Justi (1717–1771), the main advocate of cameral sciences, with whom Koskenniemi deals when writing about the end of natural law by economics in the final chapter of his book. In sum, it is not always clear if Koskenniemi is using metaphors as background metaphors or if they are the concrete language of the sources. This unclarity might limit the reception of the state-machine chapter among conceptual and metaphor historians.

This choice of conventions does not necessarily compromise the strength of Koskenniemi's arguments concerning the state-machine metaphor. Koskenniemi persuasively argues that

[T]hinking of the state as a machine and viewing the international world as a balance turned attention away from the interminable casuistries of scholasticism and the confessional conflict. Instead of speculations about justice or the ends of human life, the metaphors pointed backwards into the causes of political phenomena that needed to be learned in order to control and manage them. Things were not moved by teleology but by causality, and mastering the latter might finally enable controlling political events in the way Frederick suggested – 'knowing everything in order to judge and foresee all'.²⁹

Koskenniemi has written an important chapter in the history of the law of nations, which will help scholars in several fields to expand their legal and historical imagination. I hope Koskenniemi's study will help scholars in several fields to analyse the use of mechanical vocabulary within the discourses of international relations and the law of nations. After all, it is known that in the 18th century the international system was widely comprehended in a model of a machine, a machine that was meant to remain in balance. Even the praxis of the potentates followed this conception. In the theory of international relations, the metaphors of machine and balance were intervened. The frictionless motion of the machine and the balance were seen as necessary preconditions of stability and peace. The balance conception was based on the metaphor of the machine. This way of conceptualizing international relations was mainly restricted to Europe since the goal outside of Europe was not to stabilize regions but to expand the *dominion*. Asia, Africa and America did not belong to the same system/machine as Europe. Only after humanity began to be understood as a unity did it become increasingly difficult to maintain the distinction between the European and 'global order'.³⁰

²⁷ *Ibid.*, at 14.

²⁸ *Ibid.*, at 862.

²⁹ *Ibid.*, at 799.

³⁰ H. Kleinschmidt, *Geschichte der internationalen Beziehungen: ein systemgeschichtlicher Abriss* (1998), at 166–171, 193, 198.

