

Chapter 2

THE LEGAL PHILOSOPHY OF HUGO GROTIUS

2.1. Introduction

The legal philosophy of Grotius is complex, complicated, and (above all) *eclectic*: It fuses strands which might (independently) constitute a *jurisprudentia*. Since Grotius was an “Arminian” Calvinist who was horrified by the hyper-Calvinist notion that God simply makes justice by an “absolute decree,” he was an antivoluntarist in both law and theology; and that is why he Platonizingly says that “even if we were to say [*etiamsi daremus*] that there is no God,” there would still be uncreated natural justice (which is as natural as the truth of $A = A$ or $2 + 2 = 4$) (Grotius 1964, Prolegomena, pars 11; see Grotius 1925). In this sense Grotius is a Platonic-rationalist “natural lawyer” much revered by the greatest early-modern Platonist, Leibniz. But Grotius added to this rationalist, antivoluntarist notion of quasi-mathematical natural justice a theory of natural human *sociability* which is more Ciceronian than it is anything else, so that for the great Dutch jurisconsult natural justice and natural sociability reinforce each other.¹ But Grotius also, in a kind of proto-Montesquieuian way that foreshadows *De l'esprit des lois*, took a deep interest in the concrete, empirical details of existing positive law, and especially in the *jus gentium* (Montesquieu 1989, *passim*).² These three strands—“Platonist,” “Ciceronian,” and “proto-Montesquieuian”—converge in Grotius’s greatest single contribution to legal philosophy, *De Jure Belli ac Pacis* (1625).

The best course, then, will be to examine these three strands individually, and also in combination; and after that it will be helpful to show how Leibniz—clearly the greatest German philosopher and jurisconsult before Kant—developed Grotius’s Platonic-rationalist idea of quasi-mathematical “natural law” into something broader and fuller than anything imagined by Grotius himself. (Leibniz always called Grotius “the incomparable,” but thought that the great Dutchman had only sketched a demi-Platonic jurisprudence which stood in need of amplification and “demonstration.”)

¹ Cf. above all Cicero, *De Finibus Bonorum et Malorum* (*passim*), and *De Natura Deorum*, Book I (against the Epicureans).

² See the view of Isaiah Berlin (1982a) that there is really no connection between the Platonic-rationalist “natural” jurisprudence of Book I and the rest of *Lois*. (Voltaire had said much the same thing, as had David Hume.)

2.2. Origin and Genesis of Grotius' Thought

The importance of Grotius in the history of legal philosophy depends not on a theory of the state (*à la* Bodin or Hobbes), or on anything that he had to say about public-constitutional law, but rather on his idea of a law regulating the relations between “sovereign” states—on what had earlier been called the *ius gentium*. The practical importance of re-conceiving and re-stressing the “law of nations” in the early seventeenth century can hardly be over-emphasized: The relations between independent political powers had become steadily more chaotic with the breakdown of the (always feeble) restraints which the medieval Church had fitfully applied; and the rise of absolute monarchies recognizing no authority above or beyond themselves had increasingly made sheer force the arbiter in the dealing of states with each other.

To this must be added the effects of the religious wars which followed the Reformation, “bringing to international relations the intrinsic bitterness of religious hatred and affording the color of good conscience to the most bare-faced schemes of dynastic aggrandizement, and the exploitation of newly discovered territory” (Sabine 1937, 256–7). There were ample reasons why Grotius should have believed that the welfare of mankind required a comprehensive and systematic treatment of the rules governing the mutual relations among states—in a modernized version of the Roman *ius gentium*:

Such a work is all the more necessary because in our day, as in former times, there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name. (Grotius 1964, Prolegomena, pars 3)

The contribution of Grotius to “international law” is beyond the scope of a general history of legal philosophy; with respect to this latter his importance lay in the philosophical principles upon which he sought to found his special subject and which he set out especially in the Prolegomena to his greatest work. In the 17th century it was a foregone conclusion that he should appeal to the generally admitted idea of a fundamental law, of a law of nature, lying behind the civil law of every nation, and binding, because of its intrinsic justice, upon all peoples and upon subjects and rulers alike. In the long tradition of Christian political thought no writer had denied, or even doubted, the validity of such a law.

But with the breaking up of Christian unity and the decline of Christian authority the grounds of this validity called urgently for reexamination. Neither the authority of the church nor the authority of Scripture, in fact, no form of religious revelation, could establish the foundation of a law binding alike on Protestant and Catholic peoples, and governing the relations between Christian and non-Christian rulers. It was natural that Grotius, with his background of humanistic education, should turn back to the even older, pre-Christian tradition of natural law which he found in the writers of classical an-

tiquity. And so he chose, as Cicero had done before him, to put his examination of the grounds of natural law into the form of a debate with the skeptical critic of the Stoic philosophy, Carneades.³

The point of Carneades's refutation of natural justice lay in the argument that all human conduct is motivated by self-interest and that law is, in consequence, merely a social convention which is generally beneficial and supported not by a sense of justice but by prudence. Grotius's answer was, in brief, that such an appeal to utility is inadequate, since men are inherently social beings. As a result the maintenance of society itself is central, and not to be measured by any private benefits (other than the satisfaction of their sociable impulses) accruing to individuals. (Sabine 1937, 256–7)

As the eminent Grotius-scholar Richard Tuck translates Grotius' *Prolegomena* in *The Rights of War and Peace*:

When he [Carneades] undertook the critique of justice (which is my particular subject at the moment), he found no argument more powerful than this: men have established *jura* according to their own interests [*pro utilitate*], which vary with different customs, and often at different times with the same people: so there is no natural *jus*: all men and the other animals are impelled by nature to seek their own interests: so either there is no justice, or if there is such a thing, it is the greatest foolishness, since pursuing the good of others harms oneself. We should not accept the truth in all circumstances of what this philosopher says, nor of what a poet said in imitation—"never by nature can wrong be split from right." For though man is an animal, he is one of a special kind, further removed from the rest than each of the others species are from one another—for which there is testimony from many actions unique to the human species. Among the things which are unique to man is the desire for society [*appetitus societatis*], that is for community with those who belong to his species—though not a community of any kind, but one at peace, and with a rational order [*pro sui intellectus modo ordinatae*]. Therefore, when it is said that nature drives each animal to seek its own interests, we can say that this is true of the other animals, and of man before he comes to the use of that which is special to men [*antequam ad usum eius, quod homini proprium est, pervenerit*]. (Tuck 1999, 97)

When Grotius speaks of sociableness or an *appetitus societatis* in "Stoic" thought, he is thinking above all of Cicero—who defended Stoicism in *De Finibus* and in *De Natura Deorum*, but without actually being a "full" Stoic. Grotius must especially have relished the remarkable page in *De Finibus* in which the great Roman juriconsult insists that

in the whole moral sphere of which we are speaking there is nothing more glorious nor of wider range than the solidarity of mankind, that species of alliance and partnership of interests and that actual affection [*caritas*] which exists between man and man, which, coming into existence immediately upon our birth, owing to the fact that children are loved by their parents and the family as a whole is bound together by the ties of marriage and parenthood, gradually spreads its influence beyond the home, first by blood relationships, then by connections through marriage, later by friendships, afterwards by the bonds of neighbourhood, then to fellow-citizens and political allies and friends, and lastly by embracing the whole of the human

³ Grotius must have derived his information from the fragments of Cicero's *De Republica* preserved by Lactantius—since the Vatican MS (palimpsest) of *De Republica* came to light only in 1818 (and is still radically incomplete).

race. This sentiment, assigning each his own and maintaining with generosity and equity that human solidarity and alliance of which I speak, is termed Justice; connected with it are dutiful affection, kindness, liberality, good-will, courtesy and the other graces of the same kind. And while these belong peculiarly to Justice, they are also factors shared by the remaining virtues. For human nature is so constituted at birth as to possess an innate element of civic and national feeling, termed in Greek *politikon*; consequently all the actions of every virtue will be in harmony with the human affection and solidarity I have described, and Justice in turn will diffuse its agency through the other virtues, and so will aim at the promotion of these. For only a brave and a wise man can preserve Justice. Therefore the qualities of this general union and combination of the virtues of which I am speaking belong also to the Moral Worth aforesaid; inasmuch as Moral Worth is either virtue itself or virtuous action; and life in harmony with these and in accordance with the virtues can be deemed right, moral, consistent, and in agreement with nature. (Cicero, *De Finibus Bonorum et Malorum*, Book V, XXIII)⁴

For Grotius, as instructed by Roman jurisprudence, and especially by Cicero, the preservation of a peaceful social order is itself an intrinsic good, and the conditions required for that purpose are as binding as those which serve more strictly private ends. As Grotius argues,

This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have received from it, the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts. (Grotius 1964, Prolegomena, pars 8)

For Grotius, then, there are certain minimal conditions or values which must be realized, human nature being what it is, if an orderly society is to persist. Specifically these are, in the main, the security of property, good faith, fair dealing, and a general agreement between the consequences of men's conduct and their deserts. These conditions are not the result of voluntary choice or the product of convention but rather the reverse; choice and convention follow the "natural" necessities of the case.

For the very nature of man, which even if we had no lack of anything would lead us into the mutual relations of society, is the mother of the law of nature. (Ibid., pars 16)

And at one further remove, moreover, this natural law gives rise to the positive law of states; the latter depends for its validity upon the underlying grounds of all social obligation and especially upon that of good faith in keeping covenants (the notion that *pacta sunt servanda*):

For those who had associated themselves with some group, or had subjected themselves to a man or to men, had either expressly promised, or from the nature of the transaction must be understood impliedly to have promised, that they would conform to that which should have

⁴ A passage also cherished by Leibniz in his 1689 Rome commentary on Cudworth's *True Intellectual System of the Universe* (Leibniz 1948b).

been determined, in the one case by the majority, in the other by those upon whom authority had been conferred. (Ibid., pars. 15)

Grotius believed that, within the framework of natural law, there was ample room for considerations of utility, which may very well vary from people to people, and which also may dictate practices looking to the advantage of all nations in their international dealings. But certain broad principles of justice are natural—that is, universal and unchangeable—and upon these principles are erected the varying systems of municipal law, all depending upon the sanctity of covenants, and also international law, which depends upon the sanctity of covenants between rulers.

Grotius accordingly gave the following definition of natural law:

The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or conjoined by the author of nature, God. (Ibid., Book I, chap. I, pars x, 1)

This reference to the command of God is only negatively important: As Grotius was at pains to make clear, it added nothing to the definition and implied nothing in the way of a religious sanction. For the law of nature would enjoin exactly the same if, by hypothesis, there were no God. Moreover, it cannot be changed by the Calvinizing “will” of God. The reason for this is that God’s power does not extend to making true a proposition that is inherently self-contradictory; such a power would be not strength but weakness, or—as Leibniz would soon say—“tyranny.”

Just as even God, then, cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil. (Ibid., Book I, chap. I, pars x, 5; cf. *Prolegomena*, pars 11)

According to Grotius, there is nothing arbitrary in natural law, any more than there is in arithmetic. The dictates of right reason are whatever human nature and the nature of things imply that they must be. Will enters as one factor into the situation but the *sic volo, sic iubeo* of God or man does not create the obligatory nature of the law. Referring to the authority of the Old Testament, Grotius distinguished carefully between commands which God gave to the Jews as a chosen people and which therefore depended merely upon divine will, and the evidence which it, along with other important documents, affords of natural relationships. Nothing could show more clearly his independence of the system of divine sovereignty implicit in Calvinism—as will soon be seen in comparing Grotius with the anti-Calvinism of Leibniz.⁵

⁵ Above all in Leibniz’s *Unvorgreifliches Bedencken* (1698–1701)—treated ahead in Section 2.4. See also Sabine 1937, 258ff.

2.3. Grotius on “Demonstrative” Natural Law

The great importance of this theory of “modern” natural law was not due to the content which Grotius attributed to it, for in this respect he followed the familiar trails of the ancient lawyers. Good faith, substantial justice, and the sanctity of covenants had been at all times the rules to which a natural origin was attributed. The importance was methodological: It provided a rational, and what the 17th century regarded as scientific, method for arriving at a body of propositions underlying legal arrangements and the provisions of the positive law. It was essentially an appeal to reason, as the ancient versions of natural law had always been, but it gave precision to the meaning of “reason” such as it had not had in an equal degree in antiquity (except for Plato). The references which Grotius frequently makes to mathematics are significant. Certain propositions in the law, like the proposition two times two equals four, are axiomatic; they are guaranteed by their clearness, simplicity, and self-evidence. No reasonable mind can doubt them, and once they are accurately understood and clearly conceived, they form the elements of a rational insight into the fundamental nature of reality. Once grasped they form the principles by means of which systematic inference can construct a completely rational system of theorems. The identity of this method with what was supposed to be the procedure of geometry is obvious; it is a form of geometrizing “Platonic rationalism” (as in *Meno* and *Phaedo*). This is why Ernst Cassirer is so correct when he says that in Grotius’ *De Iure Belli ac Pacis*, “the Platonism of modern natural law is most perfectly expressed” (Cassirer 1955, 240).

This quality was exactly what commended it to Grotius. He stated specifically that, like a mathematician, he proposed to withdraw his mind from every particular fact. In short, he intended to do for the law just what, as he understood the matter, was being done with success in mathematics or what Galileo was doing for physics.

I have made it my concern to refer the proofs of things touching the law of nature to certain fundamental conceptions which are beyond question, so that no one can deny them without doing violence to himself. For the principles of that law, if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses. (Grotius 1964, Prolegomena, pars 39)

Because of the prevalence of this idea of good method, the 17th century became the era of “demonstrative” systems of law and politics, the purpose being to assimilate all sciences, the social as well as the physical, as much as possible to a form which was believed to account for the certainty of geometry; this was broadly true for thinkers as different as Hobbes and Leibniz (both of whom revered Euclid).

The distinctive character of Grotian jurisprudence has been best understood, perhaps, by Guido Fassò—in his magisterial *Storia della filosofia del diritto*:

This *rational* and *social* nature of man is, for Grotius, the source of law proper, by which is meant precisely *natural* law as it derives from the essential and specific traits of human nature, to whose realization and preservation such law is devoted. Its fundamental principles consist in respecting that which belongs to others, returning to others their property and any profit deriving from it, keeping promises, and holding others accountable for any crimes they commit; but as we have observed, there stands above these specific principles the general principle, the source of all legal obligations, encapsulated in the motto *stare pactis*.

So, as something immanent in man's very nature, or essence, natural law cannot not in any case be modified by any will: "All that we have said so far," Grotius now comments in words that have since become celebrated, "would somehow equally subsist even if we granted—which cannot be done without committing the most serious impiety—that God did not exist or did not care for humanity" (*etiamsi daremus, quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana*). In this proposition was detected, as early as with Grotius's own contemporaries, an audacity bordering even on impiety, since by its claim that God's natural law is independent, it appears to destroy all transcendent, theological, religious bases of morality, thereby founding morality on human nature alone and consequently upholding its absolutely immanent, rationalist, laic character. (Fassò 1966–1970, vol. 2: 100–1)

And then Fassò goes on to say, in a splendidly helpful page, that

in fact this Paragraph 11 of the *Prolegomena*, with which their philosophical part is essentially brought to a conclusion, seems to support just such an interpretation—for it appears that an anti-theological and laic conception of natural law is expressed by Grotius even in some passages of Book I of *De iure belli ac pacis*. In these passages, which properly begin the discussion of the law of peoples, with Grotius turning to the question of the legitimacy of war and the concept of just war, natural law is described as "a norm of right reason, enabling us to know whether an action is morally necessary or immoral depending on whether or not it conforms with our rational nature, and enabling us to know as well what consequence God, nature's author, prescribes or prohibits for such an action." It is also claimed that "the actions this norm refers to are in themselves obligatory or illegitimate, and for this reason must necessarily be understood as prescribed or prohibited by God," and that "natural law is immutable, so much so that even God cannot change it [...]. Just as God cannot make it so that two and two does not give four, so He cannot make it so that that which by its intrinsic essence is bad should not be bad."

We will see later what significance and what scope Grotius meant these propositions to have. No doubt, they immediately were perceived as indeed audacious and innovative; and while they drew from the Catholic church a condemnation of *De iure belli ac pacis*, they also elicited from some contemporaries, such as Pufendorf, as well as from commentators somewhat above his rank, such as Thomasius and Barbeyrac, a judgment which would then become received wisdom, namely, that the theory of natural law begins with Grotius. (Ibid.)

2.4. Grotius' Influence on Leibniz

While Guido Fassò is quite right to stress the influence of Grotian "modern" natural law on Pufendorf, Christian Thomasius, and Barbeyrac, he does not mention the enormous weight which *De Jure Belli ac Pacis* had for Leibniz; and Leibniz was the philosopher of the first rank which Pufendorf, Thomasius, and Barbeyrac were not. It is therefore worthwhile to show how and why Leibniz claimed to have brought to "demonstration" (Platonic) truths which Grotius had only "advanced."

<http://www.springer.com/978-90-481-2963-8>

A Treatise of Legal Philosophy and General
Jurisprudence

Vol. 9: A History of the Philosophy of Law in the Civil Law
World, 1600-1900; Vol. 10: The Philosophers'
Philosophy of Law from the Seventeenth Century to Our
Days.

Editor-in-chief: Pattaro, E. - Canale, D.; Grossi, P.;
Hofmann, H.; Riley, P. (Eds.)

2009, XXXVII, 752 p. In 2 volumes, not available
separately., Hardcover

ISBN: 978-90-481-2963-8