

—————BOOK REVIEW—————

Alberico Gentili, *The Wars of the Romans. A Critical Edition and Translation of De armis Romanis*, ed by Benedict Kingsbury & Benjamin Straumann, translated by David Luper (Oxford: Oxford University Press, 2011).

Benedict Kingsbury & Benjamin Straumann, eds, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2011).

Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010).

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Oxford University Press has recently released three books that, as their titles indicate, explicitly address the “foundations” of law. *Foundations of Public Law* is penned by Martin Loughlin;<sup>1</sup> it builds on and deepens his earlier work, particularly *The Idea of Public Law*.<sup>2</sup> It seeks to provide an account of the emergence and the characteristics of “public law”, the modern successor to the medieval “fundamental law”; this “public law” constitutes, according to Loughlin, the “code” of an “autonomous public sphere” tied to the “intrinsically modern idea of the state.”<sup>3</sup> Jointly edited by Benedict Kingsbury and Benjamin Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* emerges from the History and Theory of International Law Program at NYU Law School. By way of the work of Alberico Gentili, its fifteen contributions consider “the extent to which early modern thinking about the law of nations and imperialism was influenced by the ideas and the historical record of the Roman Empire.”<sup>4</sup> The work is accompanied by the

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<sup>1</sup> Martin Loughlin is a professor of law at the London School of Economics.

<sup>2</sup> Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004).

<sup>3</sup> Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010) at 8.

<sup>4</sup> Benedict Kingsbury & Benjamin Straumann, eds, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2011) at xiii. This is the description given by the editors themselves.

first English-language translation and critical edition of Gentili's *De armis Romanis*.<sup>5</sup>

To inquire into “foundations” is to inquire into things we take for granted but without which we could not live in the world as we do. Most often, inquiring into foundations requires that we rethink how we live, how we talk about how we live, and the relationship between the two, the relations between our practices and our discourses. Loughlin explicitly casts his long, dense historical and theoretical project<sup>6</sup> in relation to “recent developments in the British system” that require that the British “reconnect with the mainstream European tradition of public law” to address “foundational questions”.<sup>7</sup> The questions he is most interested in reviving are “questions of ‘right’ relating to the conferral of authority and legitimacy on modern governmental ordering”—these being the proper subject of “fundamental” or “public” law.<sup>8</sup> In particular, he claims that the British must revisit the standard belief that “following the Revolution of 1689 ... the concept of fundamental law was abandoned and replaced by the claim that there is only one true concept of law: the ordinary law proclaimed by Act of Parliament, to which all allegiance is owed.”<sup>9</sup> Indeed, he is keen to resist the equation of fundamental law with “the ordinary (common) law,” which “leads inexorably down the path towards judicial supremacism—the conviction that, as authoritative interpreters of ordinary law, the judiciary must also act as guardians of fundamental law.”<sup>10</sup>

The unfortunate result of the conflation of ordinary and fundamental law is the gradual obscuring of what is truly “fundamental” about fundamental law. That is to say, any consideration of “law as an expression of the constitutive principles of right-ordering”<sup>11</sup> is effectively bracketed out in favour of a positivistic conception of law for which the “authority of ... constitutional arrangements [remain] unquestioned”<sup>12</sup> and “beyond the boundaries of juristic knowledge.”<sup>13</sup> Accordingly, Loughlin conceives of his

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<sup>5</sup> Alberico Gentili, *The Wars of the Romans: A Critical Edition and Translation of De armis Romanis*, ed by Benedict Kingsbury & Benjamin Straumann, translated by David Luper (Oxford: Oxford University Press, 2011). Note that David Luper is also a contributor to Kingsbury & Straumann, *ibid*.

<sup>6</sup> Loughlin's book counts 515 pages, including the index.

<sup>7</sup> Loughlin, *supra* note 3 at 6.

<sup>8</sup> *Ibid* at 2.

<sup>9</sup> *Ibid* at 3-4.

<sup>10</sup> *Ibid* at 6.

<sup>11</sup> *Ibid* at 9.

<sup>12</sup> *Ibid* at 5.

<sup>13</sup> *Ibid* at 4.

project as, at least in part, an “exercise in retrieval”:<sup>14</sup> his introduction is fittingly titled “Rediscovering Public Law”.<sup>15</sup> His exercise in retrieval requires that we identify and call into question certain of our own habits: the inability (at least in English) to distinguish *droit* from *loi* (and *lex* from *ius*); disciplinary fragmentation and the related shrinking of the “legal” universe; the (positivist) tendency to avoid questions of authority in preference to those of validity; and the (liberal) tendency to conceive of law as a limit on power.

Loughlin’s work, in my words, aims to show an ontological priority—in modern times—of a “prudential ... discourse of *political right*”<sup>16</sup> to positive law narrowly understood. Indeed, he frames his project with the help of Marcel Gauchet’s *The Disenchantment of the World: A Political History of Religion*<sup>17</sup> and identifies the disentwining of the political from the religious (however imperfect) as the condition precedent for both modernity and the emergence of political right in early modern European discourse. As the “political realm” comes to be seen as an autonomous sphere, medieval fundamental law is transformed into modern public law. To see public law as merely an aspect of positive law (e.g., the branches of administrative or constitutional law) is thus to forget the important transformation to the political discourses and forms we now take for granted and to ignore the enduring relevance of the “juristic thought that flourished from the late-sixteenth to the early-nineteenth centuries.”<sup>18</sup> In this light, Loughlin’s book is one for jurists, rather than simply lawyers; accordingly, it draws on an extensive and impressive array of thinkers. Such figures as Bodin, Hotman, Rousseau, Kant, Fichte, and Hegel figure prominently in his account of the origins and formation of public law.<sup>19</sup> They also find their way into his account of its fundamental concepts: state, constitution, and government, in which we also find many other thinkers in the Anglo-American and German traditions (e.g., Schmitt, Heller, and Jellinek).<sup>20</sup>

Whereas the sixteenth through eighteenth centuries appear foundational of our times for Loughlin, the contributors to *The Roman Foundations of the Law of Nations* turn to Roman law as the place where “the writers of sixteenth, seventeenth, and early eighteenth centuries [sought]

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<sup>14</sup> *Ibid* at 10.

<sup>15</sup> *Ibid* at 1.

<sup>16</sup> *Ibid* at 11 [emphasis added].

<sup>17</sup> Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion*, translated by Oscar Burge (Princeton, NJ: Princeton University Press, 1997).

<sup>18</sup> Loughlin, *supra* note 3 at 9.

<sup>19</sup> *Ibid* at Parts I-II.

<sup>20</sup> *Ibid* at Parts III-V.

the legal maxims and methods, the principles governing treaties or embassies or jurisdiction or property, and the broader ideas of justice in the inception, fighting, and conclusion of war, which they built into a law of nations of enduring importance.”<sup>21</sup> Their book is explicitly concerned with the “foundations” of the (early modern) law of nations and not with those of (contemporary) international law. Indeed, unlike Loughlin’s framing of his project, theirs makes little reference to today’s world despite the ongoing pertinence of many of the themes explored, such as making sense of sovereignty, just war, and preemptive strikes. Nevertheless, the volume as a whole can be grasped as revisiting what one contributor, Martti Koskenniemi, calls “[t]he mythical origin of modern international law.”<sup>22</sup>

If Loughlin’s work is a univocal<sup>23</sup> and sustained exercise in the retrieval of “political right”, the Kingsbury and Straumann book is a multivocal<sup>24</sup> lesson on the importance, the difficulties, and the promise of exercises of retrieval. As the editors explain, their book aims “to enrich the existing scholarship on ideas about just warfare and empire in this [sixteenth to early eighteenth century] period by extending it beyond the dominant lines of recent analysis of early modern theories of natural law and natural rights.”<sup>25</sup> Accordingly, the very choice of Gentili as a focal point signals an effort to retrieve a thinker and a body of work usually passed over in favour of (or at least neglected relative to) the likes of Grotius, Hobbes, and Pufendorf. The various contributors disagree about how novel Gentili was, about how close he is to us, and about the kind of work we must do to understand him. As a result, they also disagree about the usefulness of certain categories and distinctions, such as that between humanists and scholastics, in the exercise of properly understanding and retrieving Gentili.

However, the *Roman Foundations of the Law of Nations* is not simply about the importance, the difficulties, and the promise of retrieving Gentili and other early modern thinkers; it also, and crucially, problematizes our own exercises in retrieval by reminding us that the sixteenth to eighteenth century thinkers we turn to as our intellectual and existential “foundations” were themselves engaged in their own exercises of retrieval.

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<sup>21</sup> Kingsbury & Straumann, *supra* note 4 at 1.

<sup>22</sup> *Ibid* at 297. See Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001) at 2 (where Koskenniemi locates the so-called origins of international law in the late nineteenth century).

<sup>23</sup> It is “univocal” because it has a single author, but certainly not because it is oblivious to the diversity of historical voices.

<sup>24</sup> It is “multivocal” because it has multiple authors.

<sup>25</sup> Kingsbury & Straumann, *supra* note 4 at 18.

This problematization emerges both in the *Roman Foundations of the Law of Nations*, particularly in its first part on the “Roman Model” of “A Just Empire”<sup>26</sup> but also, and especially, in the welcome translation of Gentili’s *De armis Romanis*. As Kingsbury and Straumann explain in their introduction to David Luper’s translation, *Der armis Romanis*, first published in 1599, is comprised of two books, one prosecuting Roman imperialism and one defending it, each written in different voices. As they emphasize, “[t]he contentions between the prosecutor of Book I and the defender of Book 2 are frequently framed not as disagreements about what norms apply; rather, the disagreement is often empirical, about historical events and the trustworthiness of certain historians and other authors.”<sup>27</sup> Gentili, then, appears to self-consciously thematize the difficulties of his own exercise of retrieval.

Both volumes reveal how early modern thinking about law, either within or between newly emerging sovereign states, cannot be divorced from an inquiry into what it means to “see like a state,”<sup>28</sup> and hence into the historicity and contingency of politics, law, and political and legal forms. Relatedly, they show how an unwillingness to acknowledge this historicity and contingency can cause us to be unaware of our “foundations” such that we misconceive what *our own* “foundational questions” might be. While written from different points of view, they are very complementary.

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<sup>26</sup> *Ibid* at 19.

<sup>27</sup> Gentili, *supra* note 5 at xii.

<sup>28</sup> The reference is to James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Conditions Have Failed* (New Haven, CT: Yale University Press, 1998).