THE ROMANTIC ALLURE OF OLD EUROPE: PERTINENT QUESTIONS AND NON-RESPONSES

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INTRODUCTORY NOTE

Questioning the Foundations of Public Law (*QFPL*) – edited by Wilkinson and Dowdle (W&D) in 2017 – hosts a collection of probing essays on Martin Loughlin's formidable *Foundations of Public Law* (*FPL*) which appeared in 2010.[1] The review of the volume offered here is divided into three sections. Section I provides an overview of the questions put to Loughlin in *QFPL*. Section II turns to Loughlin's reactions to these questions. I use the word "reaction" here to suggest with no delay that Loughlin largely does not respond but only deflects – very astutely, no doubt – the questions put to him in *QFPL*. Section III engages with the key concerns that emerge from the exchange between Loughlin and his interlocutors in *QFPL.*

I. THE KEY QUESTIONS PUT TO LOUGHLIN

The essays in *QFPL* by and large amount to a multi-perspective critique of the key arguments that Loughlin puts forward in *FPL* regarding the foundations of public law. Public law, contends Loughlin, pivots on the concepts of "political right" and "political jurisprudence." These concepts emerged from a long tradition of European legal and political theory towards the end of the 19th and beginning of the 20th century and found eminent expression in the German approach to political and legal thinking known as *Staatslehre*. They suffered the fate of increasing demise as a result of the ascendance of a normative-positivism in legal thinking and legal institutions in the second half of the 20th century. Loughlin also links this ascendance of normative positivism to the rise of "the social" and the regulatory state. The normative positivism that he contemplates here concerns the conception of law as a coherent system of intrinsically validated and therefore valid legal norms (a system of norms *within* which each norm is adequately validated by another legal norm and thus requires no external source of validation). Law thus understood allows for the technical application of positive legal rules that demands little or no interpretive intervention from officials charged with the application and enforcement of law.

According to Loughlin, normative positivism constitutes one of the two ways in which late modern law responded to the global process of secularisation that he – following Marcel Gauchet – associates with the 18th century. This response to secularisation modelled itself on the natural sciences. *FPL* is an "exercise in retrieval" (*FPL*, p. 10). It seeks to retrieve the other major response to secularisation that increasingly fell into oblivion as a result of the ascendancy of the positivist approach to law and politics. This other approach, to which Loughlin refers as "the discourse of political right" (Ibid), concerned an epistemic discourse that one associates today with the historical and hermeneutic human sciences (stressed well

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

by Goldoni, also with reference to other writings of Loughlin, in *QFPL*, p. 167 – 168). The knowledge claims associated with these human sciences have from the beginning been fundamentally different from those of the natural sciences. The natural sciences were understood to pursue a-priori and ahistorical knowledge (unconditioned by contingent historical and social circumstances). The human sciences were understood to pursue interpretive understandings of cultural and social phenomena that remained self-consciously aware of the historical status of all knowledge pertaining to human, social and cultural phenomena. Loughlin's "exercise in retrieval" seeks to relocate the understanding of public law in this historical understanding of the human sciences. This relocation of public law demands a broader approach to legal knowledge that by and large erases the strict distinction between legal and political concerns associated with legal positivism. It requires a broader regard for politico-juridical knowledge that Loughlin calls "political right" and "political jurisprudence."

The *state* and the understanding of the state that Loughlin associates with the German *Staatslehre* tradition of the late 19th and early 20th century constitute another key concept in Loughlin's vision of political jurisprudence. The *Staatslehre* tradition pivoted on three key concepts: territory, the people and power. Together, these three concepts constituted a "scheme of intelligibility" that conditioned the specific human scientific knowledge pursued by political jurisprudence and public law (*FPL*, pp. 205 - 208).

A third foundational concept in *FPL* concerns Michael Oakeshott's distinction between *societas* and *universitas. Societas* concerns the normative arrangements that safeguard the individual concerns and interests of the participants who engage with one another in a social and communal framework of mutual collaboration. *Universitas* concerns the collective pursuit of a society or community as a whole. The distinction between *societas* and *universitas* suggests that these two sets of concerns are not the same according to Loughlin and a key line of argument in *FPL* stresses what it considers an inevitable tension between them. The management of this tension is the key task that Loughlin assigns to the art of government to which he refers as political jurisprudence (*FPL*, pp. 157 - 164).

The broad outline of Loughlin's project is surely rudimentary, but it suffices as a provisional sketch of the thoughts with which the essays in *QFPL* engage. Part I of *QFPL* contains introductory chapters by W&D and Loughlin. Parts II to V are structured with reference to four different critical approaches to *FPL*: the *methodological*, *normative*, *material* and *comparative critiques*. Part II is dedicated to the methodological critiques elaborated by Andrew Halpin, Panu Minkkinen and Jacco Bomhoff. Part III contains the normative critiques articulated by Hauke Brunkhorst, James Penner, Anna Yeatman and Neil Walker. Part IV contains the material critiques put forward by Bob Jessop, Marco Goldoni and Michael Wilkinson. Part V hosts the comparative critiques of Mark Tushnet, Mathew John and Denis Baranger. The distinctions between these four critical orientations are not categorical. There are conspicuous thematic overlaps between essays in one part with others in other parts.

Halpin takes Loughlin to task for constructing a uniform concept of public law that does not account for the multiple forms that public law takes in different contexts. According to him, Loughlin's uniform concept of public law constitutes a "skewed analytical portrayal" of

public law that ignores the "heteronomous" modes or forms of law required to resolve social conflicts and controversies. He elaborates the point as follows:

There are significant differences regarding the branches of government and with regard to the officers, institutions, and officials that populate these branches of government. The status of citizenship, with its entitlements and responsibilities, is far from uniform. The emergence of recognisable majorities and minorities, and the severity of tensions between them, differs enormously according to specific historical and cultural conditions. … [T]here are more than one set of possible relationships among these different elements …. meaning that there is a variety of blueprints for the modern state. The variety of states . . . exhibits a corresponding diversity of bodies of constitutional law, or public law. (*QFPL*, p. 37)

Halpin later extends this insistence on the diversity of state and law formation to the notion of the grammar of public law or of public law as a grammar (*FPL*, chapter 6). Understood as a grammar, public law allows for the correct interpretive use of concepts in different contexts (which distinguishes political jurisprudence from the mechanical application of legal concepts characteristic of positivism). By insisting on the capacity of this grammar of public law always to determine the correct use of concepts in different contexts, Loughlin stresses public law's capacity to determine and maintain the "correct ordering" of a society. There is an audible – and undoubtedly unwonted – echo of Dworkin's different conceptualisations that miraculously always comply with the demands of the one correct concept of law that everyone holds in common in all of this. Be it as it may, Halpin rejects this idea of single grammar of public law and stresses instead the many public law grammars reflecting the many forms of life that compete with one another whenever social conflicts require resolution. These competing forms of life, he contends, render Loughlin's notion of a single "correct ordering" fundamentally implausible (*QFPL*, pp. 46 – 47).

Halpin's observations regarding varying cultural-social conditions and competing forms of life are echoed in several of the other contributions to *QFPL.* This not only shows that the different critiques in the different parts of the book cannot be compartmentalised, as already mentioned above. It also shows that many if not all the contributions to *QFPL* are bothered by Loughlin's abstract vision of public law that claims to be "historical" but in fact remains rather out of touch with concrete historical realities.

Panu Minkkinen takes issue with the problematic methodological status of the dialectic mediation of the scientific and the political in Loughlin's idea of political jurisprudence. Referring to Loughlin's reliance on Lefort's well-known statement regarding the empty space of power that democracy seeks to keep empty, Minkkinen observes that Loughlin's vision of political jurisprudence itself risks filling and closing that space (*QFPL*, p.57). Loughlin's recourse to political jurisprudence is itself a polemical intervention that contends with other political interventions for the stakes of power, according to Minkkinen. It cannot meet the demands of the meta-politics contemplated by Lefort. This meta-politics does not intervene directly in the competition between multiple contenders for the stakes of power, but instead, incessantly seeks to remind all the different contenders of their inability to fill and close the empty space of power. According to Minkkinen, this meta-politics is more coherently reflected in Rancière's conception of a revolutionary politics that consistently registers the eternal surplus of the political that cannot be accommodated within any specified political intervention.

The end of Minkkinen's essay turns to Max Weber's view of the unbridgeable gap between the vocations of science and politics. The vocation of the scientist consists in a value-free pursuit of truth. She can therefore not engage in politics. Loughlin's political jurisprudence seeks to bridge this gap, contends Minkkinen. In this respect it seeks to do what cannot be done and therefore becomes a "tragic politics". Whether Loughlin's political jurisprudence is truly tragic, and not just comical or Quixotic, is a question that Minkkinen unfortunately does not explore. Not all impossible pursuits are tragic. Some are just comically and/or Quixotically deluded (stranded in a world that only exists in old books about former times) and the question whether *FPL* is one them should be considered pertinent. I return to it in at the end of section III.

Jacco Bomhoff's contribution to QFPL also engages with the "un-occupiable" space of the political (*QFPL*, p. 82) that is central to Minkkinen's contribution. Bomhoff refers to this un-occupiable surplus of the social as an "exteriority" and "in-between space" which is both immanent and transcendent to public law. This space cannot be appropriated or assimilated without annulling it, argues Bomhoff, but it can be ritualised. Ritualization raises no referential or predicative claim that "accounts" for exteriority in the way predicative and referential discursive acts pretend to do. It simply acts as a placeholder that sustains the experience of the margin of all social, political and scientific discourses that always eludes predication and reference. It is therefore a mistake to ignore the role of religion – one of society's principal and most effective sites of ritualization – when one seeks to sustain the "openness" of political jurisprudence in the way Loughlin does, argues Bomhoff. No doubt, many religious traditions have burdening reputations of having claimed for all too long to be the principal site of reference and predication that effectively and accurately accommodates its own exteriority (and the ultimate exteriority of all other discourses). The merit of the secular age surely concerns the extent to which it managed to silence such predicative and referential religious discourses. Bomhoff nevertheless takes Loughlin (and Gauchet) to task for adhering to a too simplistic secularisation thesis that ignores the way in which all discourses – secular discourses included – only sustain their force as long as they manage to invoke their own margins through practices of ritualization. Bomhoff's suggestions are profound and I also return to them towards the end of section III.

The significance of Bomhoff's argument becomes the more evident the more the inability of *FPL* to sustain the power-endowing exteriority of political jurisprudence becomes apparent, as it all too clearly does under James Penner's deconstruction of Loughlin's and Oakeshott's distinction between *societas* and *universitas*. An observation of Niklas Luhmann in his early work *Grundrechte als Institution* makes clear what is at stake here. According to Luhmann, the modern distinction between the state and civil society replaced the theological legitimation on which premodern politics relied. No longer able to rely on theological sources of legitimacy, modern societies generated their legitimacy by instituting an organisational scheme in terms of which the state had to justify itself to civil society. In the passage where Luhmann makes the point, he also notes that the Hegelian inversion of the scheme – in terms of which civil society had to justify itself to the state – was largely ignored.[2]

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[2] See Niklas Luhmann, *Grundrechte als Institution* (Berlin: Duncker & Humblot, 2009), 27.

Loughlin's identification of the *universitas-societas* distinction as the essential locus of political legitimacy in the age of secularisation clearly echoes Luhmann's invocation of the *state-civil society* distinction as the unique way in which modern societies regenerated their legitimacy in the wake of secularisation. It is also clear, however, that Loughlin's recourse to this legitimation scheme evidently harks back to the Hegelian inversion of the scheme which, according to Luhmann, never received a significant following. Now, it may well be true that the Hegelian scheme never received adequate resonance in Europe, neither in the 19th nor in the 20th century (not to mention the first years of the 21st). And this may well explain both the destruction of the state by totalitarian movements in the first half of the twentieth century,[3] and the tendency of a totalitarian market imagination to destroy it again in the second half of the century.[4] I return to Wilkinson's engagement with these developments below. Suffice it for now to just observe that the Hegelian version or inversion of the modern legitimacy scheme was not quite so ubiquitously dismissed as Luhmann suggests. The New Deal revolution in the United States can be considered a case in which something akin to the Hegelian scheme survived at the very moment that it fell apart catastrophically in parts of Europe. It was surely a case, however short-lived, of the state bringing civil society to its senses, and not vice-versa.

The legitimacy scheme that Loughlin invokes is therefore certainly not devoid of historical substance. But its historical substance ultimately remains scant and Penner's contribution to *QFPL* explains why. It shows that the *universitas-societas* distinction, and the concomitant *potentia-potestas* and ethics-morality distinctions, cannot be drawn as firmly as Loughlin's notion of political jurisprudence suggests. In the modern liberal state, argues Penner, the ideals of *universitas* (pursued by *potentia*) can hardly deviate substantively from the demands of *societas* (secured by *potestas*). The moment they do so, the state becomes illiberal and un-modern. Only under circumstances in which a critical degeneration of *societas* and of the private morality on which it turns becomes evident – of which the New Deal years were a clear example – does *potestas* require a conspicuous *potentia* supplementation to guide morality back to the collective ethics pursued by *universitas*. Where such a critical degeneration of *societas* is not at stake, the liberal state has no business in imposing a *universitas* on a *societas* that is not already endorsed by that *societas* itself. The state's educational role – a key element of *universitas* duly emphasised by Loughlin – cannot exceed the demands of *societas* in any significant respect in the case of the modern liberal state (*QFPL*, pp. 107 – 113). This is also the essence of the Hegelian scheme, as Joachim Ritter pointed out well in his profound essay on Hegel and the French Revolution,[5] and Penner correctly traces it all the way to Kant (*QFPL,* pp. 102 – 103), for it is indeed from Kant that Hegel drew his inspiration for the scheme.

There are significant signals in *FPL* that Loughlin is not quite content to let things lie with this Hegelian scheme. He does not seem content to consider *universitas* nothing more than a public safeguard for a healthy and well-functioning *societas.* His dismissal of the contemporary regulatory state as an impoverished reduction of political jurisprudence and

[3] See Chris Thornhill "Towards a historical sociology of constitutional legitimacy" (2008) 37 *Theory and Society* 161, 188 – 195; *A Sociology of Constitutions* (Cambridge: Cambridge University Press, 2011) 252 – 326.
[4] See Supiot, *L'esprit de Philadelphie. La justice sociale face au marché total* (Paris : Seuil, 2010).
[5] Joachim Ritter, "Hegel und die französische Revolution" in *Metaphysik und Politik* (Frankfurt a.M: Suhrkamp, 2003, especially at 223 – 224.

political right underlines this. Anna Yeatman notes Loughlin's veritable "pessimism" and "melancholy" in this regard (*QFPL,* p. 131). Yeatman points out that the theoretical contemplation of modern sovereignty was from its very beginnings – from Bodin and Hobbes onwards – an anti-feudal and anti-patrimonial concern with the common-wealth or *civitas*, the common-wealth being nothing more and nothing apart from the sum-total of common societal interests. It was never contemplated as something apart from or in conflict with the concerns of "all citizens." In other words, Yeatman highlights the fact that the scheme of modern political legitimacy outlined above is not only traceable to Hegel and Kant, but all the way to the earliest theorists of modern sovereignty (*QFPL,* pp. 116 – 123). The reduction of political power to the regulatory powers of the state is fully in line with this modern scheme of legitimate sovereignty. Loughlin's rejection of this reduction as an impoverishment of political jurisprudence betrays a sentiment that is, therefore, not reconcilable with modern political legitimacy. His pessimism about the liberal regulatory state is linked to a melancholic sense of loss, and this loss concerns something that exceeds the parameters of modern political legitimacy.

What exactly is the source or cause of Loughlin's "melancholic pessimism"? Hauke Brunkhorst's response to *FPL* offers an instructive answer to this question. According to Brunkhorst, Loughlin – at least sometimes – appears to use Gauchet's secularisation thesis in support of a top-down sovereignty that is at liberty to lay down its own foundations according to the maxim *auctoritas non veritas facit legem*. In other words, Loughlin appears to contemplate a sovereignty that is untethered by considerations of rightness or rationality (a *voluntas* unhampered by *ratio*). This unconstrained sovereign liberty is precisely what is lost when the power of the regulatory state becomes limited to serving the rational interests of citizens. When this happens, citizens are no longer subject *to* sovereignty, but subjects *of* sovereignty, that is, active agents that articulate and dictate to the state (or *as* the state) their rational concerns. This transformation of sovereignty, argues Brunkhorst, allows for a bottom-up conception of the maxim *veritas non auctoritas facit legem* in which *ratio* and *voluntas* are no longer irreconcilable but indeed dialectically linked and mutually constitutive (*QFPL*, pp. 92 – 94). It must also be noted that Brunkhorst (relying on significant recent medieval studies) recognises more support for this patently Habermasian understanding of political legitimacy in medieval theological discourses than Loughlin's secularisation thesis does.

According to Brunkhorst, Loughlin's idea of political right and jurisprudence is nevertheless not exhausted by his melancholic attachment to the maxim *auctoritas non veritas facit legem* and to the existentially unconstrained sovereignty that this maxim presupposes. He also finds signs of a radical democratic (bottom up) concern with popular or democratic sovereignty in the reflexive concept of sovereignty that Loughlin develops with reference to Hans Lindahl's ontology of collective consciousness. Loughlin appears to "alternate" between these two conceptions of sovereignty, suggests Brunkhorst (*QFPL*, p. 96-98). It is doubtful, however, whether Loughlin's turn to Lindahl's concept of reflexive sovereignty can save him from the melancholic pessimism that Yeatman attributes to him. I return to this point in section III. Suffice it here only to observe the unlikeliness of any constructive debate or exchange between Loughlin and scholars whose work is focussed on contemporary developments and predicaments of public law, as long as Loughlin's melancholy constrains his scope of inquiry. Neil Walker alludes to exactly this point when he suggests that no

significant exchange will take place between national state-centred scholarship and scholarship that engage with new trans-national forms of government as long as one or both of the parties to such an exchange remain stuck in their own starting premises (*QFPL*, p. 135). If Loughlin's state-centred vision of public law is indeed a result of a melancholy that leaves him lost in a vision of a more glorious epoch of public law, the "trans-nationalists" or "post-nationalists" will indeed have to wait for a very long time before he will join them in a serious discussion. One may well also be touching here on the reason why the collection of superb interrogations of *FPL* in *QFPL* ultimately failed to elicit a constructive and interested response from Loughlin, as I show below.

Bop Jessop's rich contribution to *QFPL* is again highly representative of the many contributions to *QFPL* that consider *FPL* caught up in an abstract conceptualisation that remains insulated from material developments of law and the state in currently actual historical contexts. One might repeat here with regard to Loughlin what both Schmitt and Böckenförde observed with regard to Savigny: notwithstanding his emphasis on the historical development of law, his jurisprudence was actually profoundly unhistorical.[6] That this observation is also pertinent with regard to Loughlin's emphasis on political jurisprudence as a historical process becomes particularly clear in Jessop's interrogation of *FPL*, but also in Goldoni's and Wilkinson's, to both of whom Jessop refers expressly. He writes:

Goldoni and … Wilkinson discuss material constitution as 'a field of juristic knowledge […] whose content is both dynamic and continually contested in its internal relation to the formal constitution'. … The key point here is the need to supplement formal analysis (whether simply juridical or juridico-statal with analysis of material factors that shape the substance of a constitutional or statal order. (*QFPL*, p. 158).

Jessop's description of the material analysis that he envisages not only echoes considerations already clearly present in Halpin's contribution to *QFPL*, but also anticipates points that especially Wilkinson makes in his contribution. "[E]xisting state formations appear as polyvalent, polymorphous crystallisations of rival principles of societal organisation", notes Jessop in a passage that distinguishes between "hegemonic … principles" that "vary across long periods" and shorter "sub-periods or phases." Among the former he counts developments such as "industrialisation, nation-building [and] revolutionary transformation." Among the latter he lists "the rise of monopoly capitalism … [and] popular struggles for universal suffrage." To these first two categories of material historical temporalisation he adds a third: "specific responses to acute crises or …urgent situations" such as "financial crises and specific threats to national security". When one adds to all of this the state's frequently inconsistent responses to historical exigency, it becomes all too clear that an abstract conceptual construction of public law as a historical jurisprudential negotiation between the concerns of *societas* and *universitas* entails a long-distance vision that blurs and erases details. It does not come close to the history that this historical jurisprudence claims to address (*QFPL*, p. 157).

Jessop's concern with the concrete temporalisation of "socialisation principles" is clearly echoed in Wilkinson's descriptions of the crises of the political that became evident during

[6] Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954* (Berlin: Duncker & Humblot, 1958) p. 417 fn. 37, Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht* (Frankfurt a.M: Suhrkamp, 2016) 13.

the Weimar Republic and the construction of the EU. Wilkinson expressly takes issue with Loughlin's rather unhistorical contentions regarding the "primacy" and "autonomy" of the political. Loughlin's idea of political jurisprudence is the product of a "conceptual *stipulation*", he writes (his emphasis). It is devoid of "historical reconstruction" (*QFPL*, p. 182). Wilkinson's own engagement with Weimar and the post-war development of the EU is exactly aimed at demonstrating how concrete historical developments tend to make a mockery of abstract theoretical visions of the primacy and autonomy of the political. The examples of Weimar and the EU not only show up the emptiness of these notions, they also demonstrate the precariousness of more realistic democratic concerns with the "relative autonomy" of the political vis-à-vis the economy and economic reasoning.

Goldoni's contribution to *QFPL* gives Loughlin more credit for recognising the historical and concrete material basis public law. Like Brunkhorst, he finds evidence of a more "material" approach in the reflexive understanding of public law that Loughlin develops with reference to Lindahl (pp. 170-172). In the end, however, Goldoni also observes the inadequate regard for material conflict and concrete historical subject-formation in Loughlin's vision of public law. As he puts it:

[FPL] hints at the material dimension of [institutions and political subjects], but never develops the thread of subjectivity. … A possible explanation for the relative absence of the role of subjects and their material conflicts might be found in the historical reconstruction of the rise of the state's sovereignty. The lineage adopted by Loughlin … privileges the type of modern political thought expressed in the philosophies of Bodin, Hobbes, Spinoza, Rousseau and Hegel. (QFPL, p. 179)

A greater regard for conflict becomes apparent in works where Loughlin turns to Machiavelli, concedes Goldoni, given Machiavelli's insistence that political order is not an effect of political unity, but rooted instead in the "inexhaustible conflict between antagonists" (*QFPL*, p. 179). This Machiavellian regard, suggests Goldoni, is unfortunately largely displaced in *FPL* by the vision of the "correct political ordering" that results from the idea of the "grammar of public law".

The contributions of Mark Tushnet, Mathew John and Denis Baranger are presented as the "comparative critique" of *FPL*. Tushnet's contribution pivots on the observation that no US-based legal scholar would write a book like *FPL*. US scholars, he says, simply do not "feel the itch" that *FPL* sets out to scratch. They take the US Constitution as the foundation of US law and do not feel the need for elaborate engagements with the essential foundations of public law that motivates Loughlin. The driving concern in *FPL* is a British concern, suggests Tushnet. It reflects the existential concerns of the UK in the face of "pressures of centralisation and de-centralisation", both inside the UK, and in the UK's relation to the EU. John likewise largely exempts the jurisprudential context in India from the concerns raised in *FPL*. The history of post-independence Indian jurisprudence, he points out, reflects an endeavour to establish a national community in India. Key to this endeavour has been a jurisprudential strategy aimed at the transformation of the divisive colonialist concept of religious minority rights into a concept of minority concerns that addresses the historical disadvantages imposed on some groups as a result of the caste system. This history, John contends, differs markedly from the pedagogical and disciplinary project envisaged by Loughlin's vision of public law. As such it surely gives one a glimpse of significant "limits of the public law tradition that Loughlin outlines." (*QFPL*, p. 233). Baranger's comparison of

English and French administrative law also suggests that neither of them reflects something akin to Loughlin's political jurisprudence. They are both too narrowly focused on the textual authority for administrative decisions. In France, as a result of the influence of the work of Georges Vedel, this focus on textual authority effectively became – similarly to that which Tushnet points out with regard to the US – a concern with the written constitutional foundation of administrative law. Baranger nevertheless endorses Loughlin's "political jurisprudence" vision of public law, and suggests it is high time that UK administrative law begins to understand itself in this way. This endorsement, however, does not detract anything from the fact that not only Tushnet's and John's but also Baranger's "comparative critique" of *FPL* underline the reality that concrete histories of public law hardly attest to the idea of public law and political jurisprudence that Loughlin contemplates.

II. LOUGHLIN'S NON-RESPONSES

Part VI of *QFPL* is presented under the heading "The Response." By and large, however, the contribution that Loughlin makes under this heading constitutes no real response. It constitutes an ensemble of deflections through which Loughlin communicates the message that none of the engagements with *FPL* outlined above are adequately pertinent for the project that *FPL* pursues. In other words, Loughlin dismisses his interlocutors for reasons of pursuing different ends that are not his. Halpin's criticisms are "devastating", but "pitched against a thesis that is entirely of his creation", he writes (*QFPL,* p. 257). "Jessop overestimates my ambition," he continues, [t]he objective of *Foundations* is not to offer and account of the historical development of state and law" (p. 259). "Jessop's other questions … are questions of a sociological nature that lie beyond my objective" (p. 260). Bomhoff's intervention suffers the same fate: "Bomhoff's argument … does not respect the conceptual nature of the claim I make. Had I been writing a book about law in modern society his arguments might have force, but this was not my aim … Like Jessop, he is raising empirical questions with respect to a conceptual argument" (p. 263 – 264). And so does Minkkinen's: "The French thinkers Minkkinen invokes … conflate rhetoric and polemic … for revolutionary political purposes. … They are exercises in utopian abstraction that provide no practical guidance of how the political world is to be instituted. …I cannot see what they contribute to the understanding of public law" (p. 265). Brunkhorst is next in line: "Brunkhorst wrongly assumes that by state I mean, as sociologists generally conceived it, *Staatsgewalt*. [T]hat is not what I mean by the term" (p. 266). Yeatman's turn: "This is a rather different type of exercise." Wilkinson earned himself a particularly sharp rebuff: "Much of [his] essay is a sketch of the sort of book he thinks should be written. … [That book] would add to the pile of books that tell us a great deal about the contemporary crises of the state and economy, a little about positive public law as a concrete order, and almost nothing about the modern *idea* of public law" (p. 267).

I have not listed Loughlin's reactions to all the contributions to *QFPL*. It is hardly possible, however, not to notice the deflective mode of non-engagement in each of them. Goldoni would seem to be the one exception, but he too, at best receives a number of recognitions for having understood *FPL* better than the other contributors to *QFPL*. A closer look makes clear that the questions Goldoni raises also receive no real response. The dismissal that runs through the whole of Loughlin's reply is underlined by his final remarks and "thank you" note. The foundations are not about the things that they have been talking about, he

concludes, but he takes responsibility for the misunderstanding and is grateful to all of them for making it clear to him that he should articulate his ideas more precisely in future.

III. THE ROMANTIC ALLURE OF OLD EUROPE AND THE FUTURE OF THE POLITICAL

Perhaps some readers of *QFPL* will feel that I omitted a reference to Loughlin's response to Penner because it does not fit into the general assessment of dismissiveness that I expounded above. Loughlin writes: "Penner's contribution poses an interesting question. …[It] is of particular value because it explains the difficulties of presenting a moral justification of political authority from the analytical tradition." But it also has other merits, contends Loughlin further:

> In *Foundations* I did not present any definitive account of the relationship between *potestas* and *potentia* and his analysis clarifies that relationship. His article shows how it may be possible to build a bridge between the interests of analytical and political jurists.

The gap between analytical and political jurists that Loughlin invokes here concerns the former's insistence that public law is underpinned by morality, and the latter's claim that public law is informed by the more complex understanding of morality that Hegel called *Sittlichkeit* or *ethics.* Quoting his own citation of Hegel in *The Idea of Public Law*, Loughlin suggests that analytical jurists subject political authority to a "superficial morality" which, by implication, does not reflect the profound complexity of the *Sittlichkeit* on which political authority is based according to Hegel.

Penner's deconstruction of the *societas-universitas* distinction indeed constitutes a kind of "bridge" between the morality that Loughlin associates with analytical jurists and the *Sittlichkeit* that he associates with political jurists. But that "bridge" results from the crumbling of the distinction that takes place in Penner's deconstruction. It is important to notice, however, that this crumbling of the distinction already takes place significantly in Hegel's *Grundlinien der Philosophie des Rechts.* The *Grundlinien* pursues a synthesis between procedural Kantian morality and substantive Aristotelian ethics that proscribes any rigid distinction let alone separation between them. And this proscription has a very far-reaching impact on Hegel's understanding of law and the state that is not well reflected in Loughlin's engagement with him. The modern state that Hegel describes as the realisation of freedom, is very much the state that is reduced to a system of rights that sustains the principle of Kantian moral autonomy. That is why the modern state has lost the "heroic" quality of pre-modern politics. There is no place for heroes in the modern state, claims Hegel. Heroes belong to a time in which politics still allowed for action that was not yet subject to the constraints of law as an elaborate system of rights.[7] Loughlin's understanding of political jurisprudence does not seem content to accept this grey end of grand history signalled by the modern reduction of the state to a system of rights which Hegel himself announces with such melancholy in the preface to the *Grundlinien*.

Perhaps it is this very same melancholy that Yeatman observes in Loughlin's position. But Loughlin's melancholy is much more obsessed than the melancholy to which Hegel gives

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[7] See G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* in *Werke in 20 Bänden* (Frankfurt: Suhrkamp, 1970) volume 7, p. 180 (§ 93 Zusatz).

voice in the preface to the *Grundlinien*. Later in the *Grundlinien*, Hegel also succumbs to stronger bouts of melancholy that move him to entertain a more triumphant conception of *Sittlichkeit*.[8] But the preface of the *Grundlinien* rests content with restricting its melancholy to *elegy*, that is, to the elegiac acceptance that the modern state will no longer reflect its glorious history and history of glory. It is important to stress that it was Hegel's empirical and sociological regard for the material reality of modern societies that informed this acceptance,[9] an empirical and sociological regard for materiality that Loughlin's interlocutors in *QFPL* skilfully invite him to consider, but which he by and large sidesteps with a series of deflections that are undoubtedly equally skilful. Loughlin's apparent engagement with Penner ultimately constitutes just another skilful deflection, for had he really engaged with him, he would have had to concede that Penner's deconstruction of the *societas-universitas* distinction is shaking the core of the foundations contemplated in *FPL*. Penner's engagement cannot be waved-off as "external critique." It is internal critique that demands a fundamental rethinking of the *FPL* project, a rethinking that may well benefit from commencing with the realisation that Hegel did not draw the morality-ethics distinction as consistently or as incisively as Loughlin's reliance on the *societas-universitas* distinction would seem to demand.

There are conspicuous reasons why Loughlin's conceptual framework can hardly be expected to be as resigned as Hegel's with regard to the unheroic juridical status of the modern state stipulated by the the material, empirical and sociological realities of modern societies. The most conspicuous of them is the central role that Schmitt's concept of sovereignty plays in *FPL*. This concept of sovereignty is saturated by a melancholic longing for a time in which the sovereigns of Europe (the *magni homines* of old Europe, then still the sacred centre of the world[10]) could indulge in a healthy heroic appetite for the contests of strength that the *jus publicum Europaeum* and its key concepts of *justum bellum* and *justus hostis* afforded them.[11] This is the historical context that Schmitt contemplated when he articulated his theory of sovereignty in terms of the existential unity of the political and the people that results from the decision that draws the line between the friend and the enemy.[12] Schmitt, also deeply enamoured with Hegel, may have found some authority for this understanding of sovereignty in Hegel's essay on natural law,[13] but this authority is surely no longer available in the *Grundlinien*. Loughlin, remarkably, finds support for this understanding of sovereignty in French existentialism (rather confoundingly quoting Maurice Merleau-Ponty as his source – see *FPL*, p. 219).

According to Brunkhorst Loughlin appears to "alternate" between this Schmittian conception of sovereignty and the concept of reflexive constituent power that he draws from Lindahl's "ontology of collective selfhood." He commends him for at least sometimes taking leave of the former for purposes of endorsing the latter, given the latter's concern

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[8] See Johan van der Walt, *The Concept of Liberal Democratic Law* (London: Routledge, 2019) 156 – 159.
[9] See Ritter, "Hegel und die französisiche Revolution" 217 – 219.
[10] See Schmitt, *Der Nomos der Erde* (Berlin, Duncker & Humblot, 1997[1950]), 114 – 115, 190, 199.
[11] See Ibid, 123 – 143.
[12] See Schmitt, *Verfassungslehre* (Berlin, Duncker & Humblot, 2003[1928]), 3; *Der Begriff des Politischen* (Berlin, Duncker & Humblot, 1996[1932]), 39.
[13] See Hegel, *Über die wissenschaftlichen Behandlungsarten des Naturrechts, seine Stelle in der praktischen Philosophie und sein Verhältnis zu den positiven Rechtswissenschaften* in *Werke in 20 Bänden* (Frankfurt: Suhrkamp, 1970) volume 7, pp. 492.

with a radical democratic constituent power that is constantly open to a historical self-questioning and re-articulation. Lindahl's ontology of collective selfhood is, however, not a helpful starting point for contemplating the status and dynamic of public law and constituent power in the context of the state as we know it today, assuming the state contemplated here is one of those that still consider themselves "liberal democratic." It is a fine study of the temporality that conditions the self-formation of relative homogenous political groups, but the political reality of the contemporary state cannot be understood accurately in terms of such homogenous groups. The contemporary state cannot be understood in term of the example of Vittorio Agnoletto and the European Social Forum that Lindahl uses to describe the formation of collective selfhood.[14] It is not the stage in which someone takes or re-takes the initiative to say "who we are" so that others can reflexively accept or reject that proposal as to "who we are" in the course of time. It is much rather the platform where any effective or enduring proposal as to "who we are" is met by the response, "indeed, that may well be who *you* are, but that is not who *we* are." The contemporary liberal democratic state is the scene of an encounter between different "we positions" that generally do not engage in reflexive interaction with one another. They just end up as more or less antagonistic minority-majority constellations that vary with the vicissitudes of real historical, sociological and empirical circumstances. For purpose of understanding this scene, several of the essays in *QFPL* offer better starting points than Lindahl's ontology of collective selfhood.

The attentive reader will notice that Loughlin commends Goldoni several times for understanding his position well, but he himself never comes around to respond to Goldoni's question regarding the absence of any regard for concrete political subject-formations in *FPL*. Seen from the perspective outlined here, Loughlin does engage with subject-formation, but he does so from the understanding of the state as one unitary overarching subject that he draws from both Schmitt and Lindahl. That is why he cannot contemplate the multiple and conflicting subject-formations *within* the state that Goldoni contemplates. Like Dworkin's (another unwonted resonance, no doubt), Loughlin's theory is premised on a personification of political and legal community that ultimately considers, not only *universitas* (see *FPL*, p. 161), but the political as such, an instantiation of one person.

Loughlin views Lindahl's vision of reflexive subject-formation as a process of necessary "renewal" (*FPL*, p. 229 – 230). Had the preface to the *Grundlinien* made a stronger impression on him, he may well have preferred to avoid this term, for it is there that Hegel considers the modern state and modern law a form of life that has grown old and which no longer has the power to renew itself.[15] When one takes this gloomy observation seriously, one may well conclude: the future of the political can hardly be expected to consist in the renewal of the political forms of old Europe. But this gloomy observation need of course not be the last word. Were one to take the current wave of populist endeavours to renew the political forms of old Europe as the sign of the times into which we are heading, the alleged tension between *societas* and *universitas* – and *potestas* and *potentia* – that underpins Loughlin's understanding of political jurisprudence may again become a significant political

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[14] Hans Lindahl, "Constituent Power and Reflexive Identity: Towards and Ontology of Collective Selfhood" in Martin Loughlin & Neil Walker (eds) *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2007) 17 – 21.

[15] Hegel, *Grundlinien der Philosophie des Rechts* 28.

reality, much more significant, in any case, than it can ever be in states that consider themselves liberal democratic.

If this is indeed where we are heading in the years to come, Loughlin's abstract conceptual framework of public law and political jurisprudence may well receive the empirical and material substantiation that many contributors to *QFPL* currently find lacking in it. Whether this is a more or a less gloomy prospect than the one Hegel announced in the preface to the *Grundlinien*, and whether Loughlin would want to receive this kind of historical substantiation for his theory of political jurisprudence, are questions that I need not address here. Suffice it to conclude with this observation: If Hegel's resigned acceptance of the modern liberal state as the grey end of history burdens the human fascination with existential renewal with too heavy a demand, anyone with no appetite for any of the proposals for such renewal currently on offer would be well be well advised to consider Jacco Bomhoff's call for the ritualization of the "un-occupiable surplus or exteriority of the political" an alternative option. This un-occupiable surplus or exteriority of the political all too frequently translates into grand yearnings for existential renewal. Effective ritualization of these yearnings may well serve to sublimate and appease them, at least for a while. Attributing such a ritualization to the "exercise in retrieval" articulated in *FPL* may in fact be the best way to make sense of this exercise. If Loughlin would consider such an attribution a misunderstanding of *FPL*, if he would indeed prefer his readers to take it seriously as an act of reference and predication, *FPL* would have to be considered at least somewhat Quixotically lost in a bygone past for as long as history does not repeat this past in ways that he may or may perhaps not come to welcome.