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*Audiuntur theologi*  
Legal Scholarship's claim on the 'Second Table'  
in Alberico Gentili's *De Nuptiis* (1601)

Alain Wijffels

*Hoc experimentum hominis, opus eius*<sup>1</sup>.

The main title of this brief contribution in honour of Professor Jan Hallebeek is taken from Alberico Gentili's *Disputationum De nuptiis Libri VII* (1601), where it appears as the heading of Chapter 6 of the fourth book<sup>2</sup>. "Audiuntur theologi" may seem a far cry from Gentili's most famous soundbite, his "Silete theologi..." exclamation which had appeared a few years earlier in *De iure belli* (1598)<sup>3</sup>. The "Silete" line, which few scholars writing about Gentili are able to resist quoting, is often mentioned as a short-hand for Gentili's endeavours to reduce the influence of theology in the areas covered by secular law scholarship<sup>4</sup>. As with Grotius's "Etiam si... non daretur" quote, historians are also quick to point out that Gentili's exclamation ought to be read in context<sup>5</sup>, while opinions differ whether or to what extent it expresses a more general view on the respective provinces of theological and civil law expertise, or even more generally on the autonomy of secular law. The present contribution's central theme is that Gentili's views expressed in *De nuptiis* fit in the author's attempts to argue in favour of an extensive understanding of the areas governed by civil law, without drawing entirely a definite borderline between the realm of civil law scholarship and that of theology<sup>6</sup>. Perhaps (but such speculation is beyond the theme of the present contribution) that as a native from San Ginesio, the very concept of Marches was also part of his intellectual identity and approach to the topics of his scholarly work<sup>7</sup>.

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<sup>1</sup> Albericus Gentilis, *De armis Romanis* (new edition, see hereafter, Fn. 15, p. 122).

<sup>2</sup> Albericus Gentilis, *Disputationum De nuptiis Libri VII*, Hanoviae (Apud Guilielmum Antonium) 1601, 399s.

<sup>3</sup> Albericus Gentilis, *De iure belli libri tres*, Hanoviae (Excudebat Guilielmus Antonius) 1598. For a comprehensive bibliography of Alberico Gentili's published (and some unpublished) work, the study of reference is I. Maclean, *Learning and the Market Place : Essays in the History of the Early Modern Book*, Leiden 2009, Ch. 11 : Alberico Gentili, his publishers, and the vagaries of the book trade between England and Germany, 1580-1614, 291-337.

<sup>4</sup> The quote has been used in recent years for the main title of two collections of essays : G. Minnucci, « Silete theologi in munere alieno ». Alberico Gentili tra diritto, teologia e religione, Milano, 2016, and M. Ferronato & L. Bianchin (a cura di), *Silete theologi in munere alieno*. Alberico Gentili a la seconda scolastica. Atti del Convegno Internazionale Padova, 20-22 novembre 2008, Padova, 2011. *De nuptiis* contains a few echoes of the « silete » exclamation : p. 25 (« Sileant theologi : nec alienam temnant temere disciplinam. *Aliae sunt leges Caesaris, aliae Christi. Aliud Papinianus, aliud Paulus noster praecipit...* ») ; p. 84 : « Sileant, qui negant aptam rationem a iurisdictione ad baptismum : quia iurisdictione in invitos exercetur. Iurisconsultus sane nec sileat hic, ubi sic audit theologum verbis iuris non bene uti ».

<sup>5</sup> N. Malcolm, Alberico Gentili and the Ottomans, in : Alberico Gentili. La salvaguarda dei beni culturali nel diritto internazionale. Atti del Convegno Dodicesima Giornata Gentiliana, San Ginesio, 22-23 Settembre 2006, Milano, 2008, 63-90.

<sup>6</sup> On *De nuptiis*, see G. Minnucci, « Silete theologi in munere alieno » (Fn. 4), Chapter 4, 181-222 ; G. Minnucci, La nuova metodologia di Alberico Gentili nel I Libro del 'De nuptiis' (1601), in : Alberico Gentili. L'uso della forza nel diritto internazionale. Atti del Convegno Undicesima Giornata Gentiliana, San Ginesio, 17-18 Settembre 2004, Milano, 2006, 399-432.

<sup>7</sup> As in several other works, Gentili also refers regularly to his former teachers and identifies them as his *praeceptores* : M.A. Eugenio, T. Nonio, Sforza degli Oddi, and (p. 659) G. Lancelotti. Some regional feeling may be recognised in the fact that when Gentili refers to both G.F. Ozeri and G.B. Caccialupi, he identifies them as *Piceni*. For a single page including references to his brother Scipione's *Parerga*, his own commentaries on *De*

The currently fashionable theme of the relationship between law and religion was bound to become an area of interest in Gentilian studies. Conversely, Gentili's work was bound to attract the interest of historians working on the law and religion theme. A brief preliminary historiographical survey may help to understand how that theme has drawn the converging attention of various currents of Gentilian scholarship.

### **A very short introduction to historiography on Alberico Gentili**

During the seventeenth and eighteenth centuries, Gentili's work was not entirely forgotten, but his books on the law of nations were overshadowed by the appeal of Grotius's *De jure belli ac pacis* as the standard work on the law of international relations. The relative decline in interest for Gentili was probably also determined by changing patterns in legal methods. Gentili had been the exponent of a wider transition in Western legal thinking. Educated at Perugia, he started his career as a legal scholar in the 1580s advocating the more traditional ('Italian') approach against the claims and demands of the legal-humanistic methods. By the late 1580s and early 1590s, however, Gentili's work had become more eclectic, incorporating many of the features of that legal-humanistic approach, while still relying on the 'bartolist' approach for much of his reasoning and arguments. However, whereas in his works on the law of nations, he may have adopted more resolutely the approach of the modern systematic treatise, in other works, he experimented with other formats. The flexible argumentative format of 'disputations' appears to have been a favourite model of Gentili. It may well have reflected the specific reasoning skills of a civil lawyer Gentili wished to highlight, but its less systematic features would not have contributed to make the resulting books easily accessible works of reference providing readily available authorities in a progressively more rule-based legal culture. In that respect, Gentili's works are a testimony of a legal scholar's sustained efforts to overcome the sixteenth-century divide between 'antiqui' and 'moderni'<sup>8</sup>, and to some extent (in international law) to work out a systematic subject-based approach. Beyond international law, however, his legacy did not point out to the early-modern systematic methods which were to prevail later on during the seventeenth century. Those early-modern methods would also gradually entail the obsolescence of the traditional late-medieval authorities which had remained a major source of reasoning in Gentili's books.

The Oxonian legal scholar Thomas Erskine Holland is usually credited with launching the modern historiographical revival of Alberico Gentili's work<sup>9</sup>. Erskine Holland's lecture appealed to a more general sustained interest at the time for the (mainly, early-modern) historical roots of international law science. Thus, three of Gentili's books on international law topics were eventually incorporated in the canon of 'The Classics of International Law'<sup>10</sup>. Until recently, legal historiography associated Alberico Gentili mainly or exclusively with the history of international law. In 1937, even the most comprehensive monograph on Gentili, by the Dutch scholar Gesina van den Molen, displayed a bias for Gentili as an early representative of international law – albeit his religious opinions also played a non-negligible

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*verborum significationibus*, Ozeri and Eugenio : p. 473. On a few occasions, Gentili refers to his own family relations, but only, it seems, in England through his in-laws : pp. 518, 547.

<sup>8</sup> A. Wijffels, *Antiqui et recentiores: Alberico Gentili – Beyond Mos Italicus and Legal Humanism*, in: P. du Plessis & J.W. Cairns (eds.), *Reassessing Legal Humanism and its Claims. Petere fontes?*, Edinburgh 2015, 11-40.

<sup>9</sup> Th. Erskine Holland, *An Inaugural Lecture on Albericus Gentilis* delivered at All Souls College November 7, 1874, London, 1874.

<sup>10</sup> See [www.lawbookexchange.com/carnegie.htm](http://www.lawbookexchange.com/carnegie.htm) : Nos. 9 (*Hispanicae advocacionis Libri II*, 1921), 12 (*De legationibus Libri III*, 1924), and 16 (*De iure belli Libri III*, 1933).

role in Van den Molen's treatment of her subject<sup>11</sup>. In the same year, Guido Astuti published a monograph which would cast a long shadow over legal-historians' understanding of Gentili's work, pitting Gentili as a champion of the *mos italicus* against the challenges of sixteenth-century legal humanism<sup>12</sup>.

In recent times, a fresh view on Gentili originated with a monograph published in 1981 by Diego Panizza, professor at Padua and a scholar of early-modern political thought<sup>13</sup>. Panizza's studies paved the way to the creation of an international centre of Gentilian studies based in Gentili's native town. From its modest beginnings in the late 1980s, the Centre grew to become a significant meeting place at the biennial conferences organised in San Ginesio. Panizza, who played a pivotal role in the success of the Centre over more than two decades, established during the 1990s the principle that the Centre's conferences (and the ensuing proceedings) would bring together specialists in modern international law, speaking on current issues (but whose contributions did not address specifically or directly Gentili's work); scholars specialising in the history of (early-modern) political thought; and legal historians; in addition, historians from other fields, whose research touched upon Gentili, would also take part and enrich the discussions<sup>14</sup>. Yet, for all these interdisciplinary efforts, the contributions over the years of the two main interest groups of historians (viz. the history of political thought and the history of law) tended more often to diverge than to converge. As a participant and direct witness to most of those conferences, I long believed that this was due to essentially different perspectives: the historians of political thought would often present Gentili's concerns primarily as those of a political thinker, minimising or ignoring the specifically legal register of his work and arguments, whereas the legal historians would insist that Gentili was first and foremost a civil lawyer, whose writings had to be read as part of the legal-literary canon and tradition. As a result of those contrasting vantage-points, and in spite of the intensive discussions at the San Ginesio conferences involving all sides, two different figures of Gentili emerged, largely independently from each other, with only few cross-overs. As a legal-historian myself, I often wondered whether Gentili would indeed end up as a milestone of political thinkers, while his role as a legal scholar might eventually be obscured and forgotten. With hindsight, I look upon those developments during the 1990s and the first decade of our century differently. One of the reasons why historians of political thought and legal historians developed at the time relatively little common grounds, it seems to me now, is that on both scores, so many new grounds were being uncovered during those years. Both historians of legal thought and legal historians were in some way too preoccupied to reassess their own view of Gentili within their own discipline in the light of fresh readings of his work. A good example in the field of the history of political ideas is the growing interest, in the late 1990s, for a work which had received until then rather scant attention, *De armis romanis*. Within a few years, as a spin-off of the discussions at San Ginesio, an international initiative resulted in two companion volumes on *De armis romanis*, one comprising a modern edition of the text and an English translation, the other a collection of essays, in which the majority of contributions on topics of the law of nations appear to be addressing a broader scholarly

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<sup>11</sup> G.H.J. van den Molen, Alberico Gentili and the Development of International Law. His life, work and times. Academisch proefschrift, Amsterdam, 1937.

<sup>12</sup> G. Astuti, *Mos italicus e mos gallicus nei Dialoghi "De iuris interpretibus" di Alberico Gentili*, Bologna 1937.

<sup>13</sup> D. Panizza, Alberico Gentili, giurista ideologo nell'Inghilterra elizabetiana, Padova, 1981.

<sup>14</sup> For an overview of the series of proceedings, see Alberico Gentili. Giustizia, guerra, impero. Atti del Convegno XIV Giornata Gentiliana. In occasione della presentazione dell'edizione inglese del *De Armis Romanis – The Wars of the Romans*, San Ginesio, 24-25 settembre 2010, Milano 2014, on the two pages preceding the title-page, and [www.giuffre.it](http://www.giuffre.it) (altogether 16 volumes, 1988-2014, and, in addition, the Italian translation of *De jure belli*). The *Collana* has since then been continued as *Studi Gentiliani*, published by the Edizioni Università di Macerata : two volumes at the time the present article was written, see [eum.unicm.it](http://eum.unicm.it)).

audience interested in the history of international relations and early-modern political thought on an increasingly globalised world than traditional legal history<sup>15</sup>. That traditional legal history, however, was undergoing its own transformations, although along different lines of scholarship. In that context, Giovanni Minnucci's unrelenting flow of innovative articles and monographs has fundamentally changed the legal-historical view on Gentili. Apart from editing previously unpublished work by Gentili, Minnucci has convincingly repositioned Gentili in the superseded *mos italicus* and *mos gallicus* divide<sup>16</sup>, suggesting how Jean Hotman's disparaging campaign against Gentili in the 1580s should be linked to the latter's revision of his own dismissal of the benefits of legal-humanistic expertise to civil law reasoning, and a gradually more extensive use of the humanists' philological and historical repertoire in his own writings<sup>17</sup>. Even more fundamentally, Minnucci has also argued that Gentili's adoption of the legal-historical repertoire – combined with his continuing adherence to essential features of the late-medieval 'Italian' method – reflects a gradual transformation of Gentili as a lawyer, expressed by Minnucci as Gentili's quest for a model of *interpres iuris*, the latter expressing the civil lawyer's ambition to have the capacity to deal with the entirety of legal norms – and their purpose in the polity –, not only with the texts of the *corpus iuris civilis*<sup>18</sup>. Minnucci developed this new perspective on Gentili by widening the scope of legal-historical studies to other writings than those on international law, in particular to writings and publications which had previously been largely neglected and dismissed as *opera minora*, not only in the canon of late-sixteenth and early-seventeenth legal literature, but in Gentili's work as well. At that stage, Minnucci became interested in the controversy which had opposed in 1593-1594 Gentili (regius professor of civil law at Oxford since 1587) to the Oxford theologian John Reynolds, a controversy which had already retained the attention of Panizza in his earlier work. As in the case of the Hotman-Gentili quarrel in the 1580s, Minnucci was able to draw on partly unpublished correspondence in order to establish, beyond the at times virulent personal attacks against Gentili, that the controversy challenged the legitimacy of civil law learning in areas of interests where theologians such as Reynolds claimed that their expertise ought to prevail<sup>19</sup>. The bitterness of the controversy appears to have deeply impressed Gentili, who, as Minnucci has shown, would still in his later work occasionally refer to some of the attacks he had experienced during the early 1590s. This was still true in 1600, when he was about to publish *De nuptiis*.

The enhanced attention for Gentili's contributions to both political and legal scholarship reached its high-water mark in 2008, on the occasion of several commemorations of Gentili's death in 1608. By that time, partly along the lines of 'law and religion' as a renewed area of

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<sup>15</sup> B. Kingsbury & B. Straumann (eds.), *Alberico Gentili, The Wars of the Romans. A Critical Edition and Translation of *De armis Romanis** (D. Luper, transl.), Oxford 2011; B. Kingsbury & B. Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, Oxford 2010.

<sup>16</sup> G. Minnucci, *Alberico Gentili tra mos italicus e mos gallicus : l'inedito commentario Ad legem Juliam de adulteriis*, Bologna 2002.

<sup>17</sup> G. Minnucci, « Silete theologi in munere alieno » (Fn. 4), Chapter 1, 25-82 (with references to the author's previous studies on the Gentili-Hotman relationship).

<sup>18</sup> G. Minnucci, *Alberico Gentili iuris interpres della prima Età moderna*, Bologna 2011; for a synthesis: G. Minnucci, *Per una rilettura del metodo gentiliano*, in: F. Treggiari (a cura di), *Alberico Gentili, la tradizione giuridica perugina e la Fondazione del diritto internazionale*, Perugia 2010, 29-56; G. Minnucci, *Diritto canonico, diritto civile e teologia nel I libro del *De nuptiis* di Alberico Gentili*, in: U.-R. Blumenthal, K. Pennington, A. A. Larson (eds.), *Proceedings of the Twelfth International Congress of Medieval Canon Law*, Washington D.C., 1-7 August 2004, Città del Vaticano, 2008, 423-445.

<sup>19</sup> G. Minnucci, « Silete theologi in munere alieno » (Fn. 4), Chapter 3, 129-180 (including the edition of some unpublished correspondence).

interest in legal studies<sup>20</sup>, partly as a result of increased interest in the connections between the theologies of the Reformation and Counter-Reformation, and of the ‘second scholastics’, both in international law and in private law, several contributions around the quatercentenary discussed the relations between legal and religious normativity in the works by Gentili and his contemporaries<sup>21</sup>.

### *De nuptiis*

The structure of *De nuptiis* is a subdivision in seven books, in which a topic of the law of marriage is discussed through a sequence of chapters<sup>22</sup>. Some chapters are more specifically related to the specific substantive law on a specific subject, others are more focused on specific issues around a particular subject. As in some of the other (later) works by Gentili, this book reflects the transition between the traditional late-medieval method, which did not operate on the basis of a systematization of the law by subject-matter, to the systematized presentation of later early-modern legal literature. *De nuptiis* thus offers a more organised presentation of the law of marriage than what may be found in the late-medieval commentaries on civil (and even canon) law, and the purpose of discussing specifically the law of marriage in a single treatise mirrored as such the author’s will to move to a new format of legal literature. Yet, it falls short of providing a comprehensive systematic outline (or detailed presentation) of the substantive law of marriage as one may find in later early-modern treatises. Moreover, Gentili’s purpose was not, as in later early-modern legal literature, to merge civil law with the particular law of one or more jurisdiction<sup>23</sup>. Although he mentions at an early stage that he addresses an English audience (a claim which may well have been true at an earlier stage of the work’s preparation, if he presented these disputations to his students in Oxford), references to English law or other particular laws appear only

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<sup>20</sup> The second conference in San Ginesio (in 1987) had already dealt with the theme of politics and religion : D. Panizza (a cura di), Alberico Gentili. *Politica e religione nell’età delle guerre di religione*. Atti del Convegno Seconda Giornata Gentiliana, San Ginesio, 17 Maggio 1987, Milano, 2002.

<sup>21</sup> In addition to several contributions published in the proceedings of various conferences commemorating the quatercentenary, see also V. Lavenia ( a cura di), Alberico Gentili. *Diritto internazionale e Riforma*. Atti del convegno della XVI Giornata Gentiliana, San Ginesio, 19-20 settembre 2014, Macerata 2017 ; and D. Pirillo, *Filosofia ed eresia nell’Inghilterra del tardo Cinquecento*. Bruno, Sidney e i dissidenti religiosi italiani, Roma, 2010, *passim*.

<sup>22</sup> Liber I is titled *De interprete*. Liber II *ad Definitiones*, dealing with forms of engagements (*sponsaliae, nuptiae*), consent, conditions, representation. Liber III *De errore et metu*, Liber IV *De filiisfamilias*, Liber V *De aetate et gradibus*, Liber VI *De repudiis et secundiis nuptiis* (including several chapters on separation and divorce), and Liber VII *De probationibus*. The book is 853 pages long, is preceded by an *Epistola dedicatoria* to Thomas Egerton, Keeper of the Great Seal ; at the end of the volume follows an 11-page long *Epistola apologetica ad lectorem*.

<sup>23</sup> *Iura propria* are mentioned only occasionally and in passing, without any attempt to incorporate systematically substantive rules of particular law in the argument. Recurrent references to ‘Italian’ or ‘German’ *consilia* are sometimes linked to regional practices, but sometimes as authorities similar to other *consilia*-collections. For other references, see e.g. p. 188 (on kisses as a form or evidence of consent, or not, in Italy, France, England) ; p. 232 (on married women exercising trade on behalf of their husband’s business, in Italy and in the Low Countries) ; p. 361 (on paternal authority in Brittany, England, France, and « utut sit aliquod in totaque receptum Europa », see also p. 401. Gentili also refers to a disputation by him on the marriage of Philip III of Spain (537-538). In addition, oblique references to foreign cases appear through Gentili’s use of foreign legal literature, for example cases of the Paris Parliament reported by Papon (pp. 277 and 427). In the first book (p. 37), Gentili had already argued that the real subject-matter of jurisprudence could not be restricted to a specific legal system, not even Roman law : « ... quoniam ius aliquod iurisconsulto dare oportet. Neque enim dicere sive Romanum, sive Anglicanum, sive aliud potes tale ».

rarely throughout the seven parts of *De Nuptiis*<sup>24</sup>, and the publication in Hanau suggests that a more cosmopolitan readership was targeted when Gentili decided to proceed to its publication.

The books 2 to 7 of *De nuptiis* nonetheless follow a sequence and are on the whole expressed in a legal style which would have been easily recognisable to contemporary lawyers familiar with mainstream practical legal literature. The work also illustrates how Gentili constantly combined traditional and legal-humanistic authorities and methods. The focus on discussing the *rationes* of the civil law rather than the substantive law itself means that as the book does not fit in the genre of practical works of reference on the subject which would eventually prevail. The lack of any index at the end of the work almost seems to confirm that the author's aim was not to provide a ready-to-use practical manual for a reader seeking directly applicable positive rule on any specific issue.

Book 1 (and at the very end of the volume, the 'apology' to the reader) follows a different format and expresses a different register. In a more polemical tone, Gentili justifies his treatment of the law of marriage on the basis of civil law. The polemical justification appears to gainsay claims from theologians who would seek to subordinate – or perhaps even neutralise – the civil lawyers' expertise in that area of the law<sup>25</sup>. In the course of that counter-blast, canon law becomes a collateral target for Gentili's arguments championing the necessity to consider the law of marriage by civil law standards.

## The Second Table

A substantial part of the arguments in *De nuptiis* is intended to justify the claims of civil lawyers to deal with the book's topic – indeed, throughout the book, even the more technical discussions of various aspects of the law of marriage tend to justify the need to use legal authorities according to the standards of civil law reasoning. Gentili's specific argument with regard to marriage is based on a broader argument about the civil lawyers' areas of expertise. Arguably, Gentili's concept of the *interpres iuris* at the time was already transcending that of the civil lawyer as a legal scholar or professional trained in the study of the *corpus iuris civilis*. In one famous passage, Gentili answered the criticism (possibly going back to the Oxford controversy with Raynolds) with regard to his refusal, in his first published work, *De iuris interpretibus dialogi sex* (1582), to broaden the expertise of civil lawyers to the scholarship required by legal humanists. In *De nuptiis*, he appears to introduce a distinction between the civil lawyer who focuses his interest and craft on the law in Justinian's compilations, and the jurisprudential expert, whose aim is to transcend the understanding of

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<sup>24</sup> *De nuptiis*, p. 112-113 (on the need to consider also canon law : « ... quod magna ex parte scriptum est ad Anglos meos »). However, specific references to English law and practice only appear rarely throughout the book. For example on p. 122 (the English practice that a woman is being presented to be married to her future husband) ; p. 329 (Gentili's criticism on the English law of wardships) ; p. 549 (from a reference by Petrus de Ancharano ?) ; 563 (from a reference by Angelus Perusinus ?) ; p. 615 (criticism on wedding-related social practices) ; and several references to the issues around the marriages of Henry VIII : pp. 528 (opinions « in omnibus academiis Europae »), 536 (Wittenberg theologians, including Luther and Melanchton, and a suggestion of their political calculations), 545, 654 (Catharine Howard). More intriguing are references made to an English case in which Gentili was asked to submit a legal opinion (on the issue whether a putative husband could be held liable for debts on behalf of the woman whom he believed was his wife), apparently decided in 1599-1600, pp. 262-264 ; and an unidentified case in which Gentili expresses with great emphasis his unwillingness to express a personal or professional opinion , p. 710. In other passages, Gentili refers briefly to the Anglican Church (e.g. p. 80, 88, 363, 582)..

<sup>25</sup> *De nuptiis*, p. 89.

those texts in pursuing a higher ideal of justice and scholarship<sup>26</sup>. Gentili's willingness to include the scholarship required by legal-humanistic methods fitted in his strategy aiming at securing a central position for civil lawyers in public governance. In England, the status of the common law and its professionals from the Inns of Court restrained the prospects of civil lawyers much more than on the European continent, where non-academic legal professionals did not (except where legal scholars failed to prevail) easily gain access to the decisive institutions of government and justice. Gentili therefore appears to have avoided challenging the common lawyers on their own turf. In areas where civil law (including canon law) scholarship was still considered a necessary expertise – such as the law of marriage –, he tried to strengthen the grip of the civil law. In *De nuptiis*, the main directions of his efforts were twofold: on the one hand, he confronted the concurrent claims of theologians and therefore argued that (the law of) marriage was primarily a matter to be dealt with by jurists trained in civil law; on the other hand, he also acknowledged that in order to buttress their claims (in marital affairs but also more broadly in areas of governance), civil lawyers had to step up their expertise beyond the study of Roman law.

The general argument in contrast to the theologians relies on the distinction between the two tables of the Decalogue. The essence of the argument consists in claiming the civil lawyers' competence in the areas covered by the Second Table. Referring to Giacomo Zabarella, Gentili identifies theology and jurisprudence (*iurisprudencia*) as both sciences and arts<sup>27</sup>. They differ from each other as sciences because of their respective subjects, God in the case of theology, human actions in the case of legal science. They also differ as arts because of their respective finality, which Gentili defines as divine law for theology, human law for jurisprudence. The division he operates on that basis is that the theologian should deal with the commandments of the first table, the jurist with those of the second table. At that stage, Gentili takes care to define human law: whereas, he argues, civil law (*ius civile*) is the law which a polity produces for its citizens, and the law of nations (*ius gentium*) which natural reason establishes between all people (*inter omnes gentes*), human law is the law which applies between men, and founded in the community of human beings (*in generis humani societate*). Divine law, in contrast, is essentially the law which applies in the relation between God and man. Among the theological authorities Gentili mentions to back up the distinction, he refers to both Philip Melancthon and Corneille Bertram.

An obvious objection against Gentili's claim of the Second Table's precepts on behalf of the jurist is that as both tables are the expression of God's will, they belong to divine law, as the Decalogue is included in the sacred texts. Gentili nonetheless persists in maintaining what he sees as a clear distinction between divine and human affairs<sup>28</sup>. Human law, he argues, is such, whoever enforced it, wherever it has been written down or recorded. Not the source of the law (whether its author or the instrument through which it is conveyed) is decisive, but its nature

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<sup>26</sup> *De nuptiis*, pp. 91-92 (« ... Et de iuris Iustinianici interprete illic [viz. in *De interpretibus*] egi, non simpliciter de interprete iuris »). Compare with what Gentili wrote in the same Book I, pp. 58-59 : « Ea scientia claudi libris Iustiniani non potuit : cum et novae indies emergant species, quibus novae aptandae sin leges ... », a remark which may be linked to an obiter Gentili expresses in a different context, p. 708 : « Sic est autem potestas regia, ut, quod lex scripta videre nequit per dies, videat lex viva casus, qui sub generalitate scripti iuris possunt non concludi : et eosdem sua definiat aequitate ». My argument is that Gentili's concept of jurisprudence informed and inspired by civil law studies aims precisely at providing the ruler with the expertise required for advising and assisting the policies of public governance.

<sup>27</sup> *De nuptiis*, p. 37. A little further, Gentili questions the status of theology as science or art, but sees it as a *sapientia* (p. 41).

<sup>28</sup> *De nuptiis*, p. 41 : « ... nam et multa loquitur Deus, quae non pertinent ad theologiam ».



as it has been defined<sup>29</sup>. Somewhat implicit in Gentili's argument seems to be his reliance on theology and jurisprudence as distinct established disciplines (as 'sciences and arts'), which therefore need to be allocated to distinct areas. The argument appears to pave the way to some overlapping: not according to 'subject' or 'finality', but because each other's areas of interest may be expressed in various authorities. Thus, the theologians' inquiries are not restricted to the sacred books<sup>30</sup>, and jurists may also recognize their areas of expertise in human law in other authorities than the law books<sup>31</sup>. Such overlapping of the sources both experts use, however, does not warrant any overlapping of the object of their respective studies: lawyers should stand by the law that governs relations between men, theologians to the norms that govern the relation between man and God.

### **The imperfect congruence between God's purpose and Roman law**

Gentili was aware that the severance between the two tables entailed the risk, at least in theory, of severing the whole normativity of social life from the Christian religious norms. To some extent, he anticipated the objection by extolling the virtues of the civil law. Allowing for the many cases where, apparently, the civil law seems to be more tolerant towards sinful behaviour than religious norms would allow, Gentili argues that the three fundamental rules of the civil law (live honestly, do not harm your neighbour, give to everyone his due)<sup>32</sup> cover whatever may otherwise qualify as a sin. In several chapters, Gentili deals with various accusations levelled at the civil law on issues where it is said to allow or condone sinful actions (such as usury, acquisitive prescription, lawful killing, extra-marital relations and 'other lewd conduct'). Gentili's analysis of these topics tends to show that the accusations are ill-informed, unfounded, inaccurate, and that a closer analysis of the textual and doctrinal authorities of the civil law do not sanction sinful behaviour.

The issue of the Second Table reappears in this context, as Gentili refers to a controversy with a theologian who had argued that civil lawyers were disqualified to deal with that table because the civil law permitted having a concubine and other indecent practices. In rebutting these allegations, Gentili makes two points. First, that the Second Table belongs to a greater degree ('more') to the sphere of jurists than that of theologians (the word *magis* being enhanced by full capitals, perhaps in order to highlight that Gentili at that point did not mean to exclude theologians altogether from dealing with the Second Table's precepts)<sup>33</sup>. The

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<sup>29</sup> De nuptiis, pp. 40-41.

<sup>30</sup> De nuptiis, p. 66 : « Audimus theologos in ecclesia etiam tractantes secundam tabulam ».

<sup>31</sup> De nuptiis, p. 82: « Atque haec ut ita sint, pertinent tamen et ad nos, quae etiam sunt primae tabulae, et ea sic nos tractavimus. Scilicet qua agitur de publici status disciplina, et de salute, et de quiete publici, privatique, sic illa statuit legislator » ; p. 88 : Atque haec satis sunt, de quibus intelligas, quomodo potest Ictus tractare etiam primam tabulam. Sic tractat saepe de blasphemia, periurio, ceteris, pro re civitatis, et singulorum ».

<sup>32</sup> This is expressed at the outset of his defence of the civil law : « Iuris enim civilis praecepta sunt, *Honeste vivere, alterum non laedere, suum cuique tribuere*. In quibus praeceptis ratio vertitur omnis peccati. Et a quibus sane non discedit ius nostrum, dum post descendit ad omnes species definitionum ; aut discederet nimis turpiter a fundamentis suis » (De nuptiis, p. 6). Throughout *De nuptiis*, Gentili turns back to these principles, especially the precept of *honestas* and *honeste vivere* : see e.g. p. 47 (identifying the Second Table's essential precept as the *suum cuique tribuere* ; however, in another passage, Gentili asserts that « Leges omnes secundae tabulae comprehendendi verbo hoc, *Diliges proximum* » (De nuptiis, pp. 60-61).

p. 389, p. 565, p. 571s., p. 715.

<sup>33</sup> Thus, the distinction remains relative, which Gentili in different passages expresses by using the word 'more' in capitals : « ... et opinor etiamnum, pertinere [secundam] tabulam ad nos MAGIS, quam ad theologos » (De nuptiis, p. 21) ; « Et igitur quia hanc artem legum periti MAGIS tenent, propria scilicet, quam theologi : propterea periti legum sunt peritiores in secunda tabula. Nescio, si audeat quisquam negare, legum peritos magis

sacred texts, says Gentili in this argument, are a common source for theologians and jurists – though at this stage, he falls short of explaining to what extent it may allow the former to enter into the realm of the Second Table. The second point is that the theologian opposing Gentili wrongly asserted that civil lawyers will provide from the *corpus iuris civilis* doctrines on matters governed by the Second Table. Gentili counters that charge by explaining that, precisely because jurists will consider the Second Table, they will avoid drawing the wrong principles from the civil law. Moreover, on the issue of keeping a concubine and authorising indecent acts, he refers to his previous analysis showing that these are not allowed by the civil law.

That does not mean that human law can reach the same perfection as God's law<sup>34</sup>. The essential purpose of human law is to secure peace among men (*pax humani generis*)<sup>35</sup>. Human law may therefore refrain from prohibiting or repressing types of behaviour which God's law will punish. Whereas human law is thus less perfect than God's law, it cannot be contrary to it. Several discriminations which are unknown to God, appear nevertheless necessary in the polity (in relation to marriage law, Gentili refers to discriminatory regulations in secular law between men and women, freemen and serfs or freedwomen, legitimate and illegitimate children, natives and aliens, individuals of different political status or social class). Gentili here introduces a general consideration of public policy: although the general principle of *honeste vivere* implies that dishonest actions are prohibited, not all that is illicit will be treated as an offence by the law, because that would burden the state (*res publica*) with countless proceedings<sup>36</sup>.

The theologian's attacks on Justinian's compilations prompted Gentili to develop counterarguments from different positions. On the one hand, Gentili argued on the basis of the evolving character of the civil (including ecclesiastical) law over the centuries, with its improvements, but also its corruptions<sup>37</sup>. On the other hand, he also developed a more ideological argument, stating that the most eminent Roman jurists, even though they were pagan, had been capable of recognising the (natural) principles which God has instilled in any human being, and that insight was expressed in the civil law they had developed in their reasoning. As a result, although these pagan jurists did not seek any direct inspiration in Christianity, their work expressed nonetheless a Christian spirit<sup>38</sup>.

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tenere propriam illam legum artem. Et igitur magis nos pertinet secunda tabula : qui illic periti MAGIS » (De nuptiis, p. 54). See also on p. 83 and pp. 88-89 : « de secunda tabula visi sumus eam pertinere ecclesiasticos MINUS, at ad nos MAGIS. Idque ratione subiecti, finis, exquisitoris interpretationis, ceterorum, quae dicta sun. Et itaque doctores nostri scribunt, quod si theologi quid tradunt de his, quae sunt extra articulos fidei, et spectant ad civilem, et moralem philosophiam, puta de matrimoniis, usuris, id genus aliis, curandi sint nihil. Aut in illis standum magis esse doctoribus iuris, quam theologis... ».

<sup>34</sup> De nuptiis, p. 21. On the other hand, the focus of the jurist on the Second Table will ensure that his jurisprudence will acquire a greater degree of perfection (p. 55s.).

<sup>35</sup> De nuptiis, p. 22. For a specific application (the *pax domestica*), p. 228.

<sup>36</sup> De nuptiis, p. 24.

<sup>37</sup> De nuptiis, pp. 28, 37.

<sup>38</sup> De nuptiis, p. 31: « Dicam autem, et quidem audenter, ius Iustinianum esse huiusmodi, ut non rectius, non honestius, non sanctius universa theologorum omnium schola rogare, atque sancire valuerit. Fuerunt maximi illi iurisconsulti (ut de his notem solis, quos iuris nostri licet nunc primos nominare auctores) ethnici quidem fere omnes : sed qui naturae vocem secuti, et legis eius, quam insculpsit Deus animis nostris, sua hic conscripserunt, ut nec unguiculum a recto tramite iustae omnis legislationis aberrarint. Sunt, qui contulerunt libris integris Mosaicam, et Iustinianam sanctionem : et qui adfirmant vere, quod si Christianum nomen iurisconsulti illis non Christianis deferat, Christiana omnia in eis facile deprehendes ».

## ***De nuptiis*, Books 2-7: legal business as usual?**

If, after reading the first book, the reader may have feared or hoped to find the same polemical tone in Gentili's treatment of the law of marriage in the following books of *De nuptiis*, these books will not, for better or for worse, entirely meet his expectations. Gentili's acerbic style and comments – a regular feature in several of his other works – is not absent, especially when he criticises an argument or opinion he disagrees with. However, his position towards theology and canon law is much more moderate than one would have anticipated after reading the first book of *De nuptiis*. Canon law, which in Book I Gentili had thrown on a bonfire in one of his characteristic expletive outbursts<sup>39</sup>, provides many arguments throughout the work, according to the conventional standards of civil law literature in general. Critical assessments<sup>40</sup> often do not step beyond the sound genre of *differentiae*<sup>41</sup>, and the canonists' literature is a main source of references<sup>42</sup>. In general, however, and in line with Gentili's main purpose, canon law is subordinated to the civil law-inspired standards of jurisprudence<sup>43</sup>. Gentili refers in *De nuptiis* to a wide range of theologians. Some theologians are referred to recurrently, others only exceptionally. Precise references refer to specific authors and works, but Gentili's argument also often refers to theologians, or groups of theologians (e.g. the 'Sorbonne theologians'<sup>44</sup>). Without surprise, protestant theologians receive more praise than Roman-Catholics, but in neither camp is a theologian's opinion beyond praise or above criticism<sup>45</sup>. Among the Protestants, Théodore Bèze is a favourite authority (though occasionally censured), while among the catholic theologians, Cardinal Bellarmino figures most often as Gentili's *bête noire* (being the target of the more insulting epithets, richly sprinkled with superlatives; yet, even his opinions may at times meet Gentili's approval)<sup>46</sup>. Contemporary politically committed Roman-catholic theologians will not find much favour, as in the case of Gilbert Génébrard<sup>47</sup>. On controversial issues such as the admissibility of divorce, the religious fault-lines also appear to divide the legal scholars' opinions<sup>48</sup>. On other controversial issues, which may not be as sensitive to religious beliefs, such as the admissibility of marriage by old people, Gentili seems to muster a more commonly held opinion beyond the confessional divisions<sup>49</sup>. In any case, not all the issues discussed in *De*

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<sup>39</sup> *De nuptiis*, p. 112: « At ego haec etiam recito : Flammis, flammis libros spurcissimos barbarorum, non solum impiissimos Antichristi. Flammis omnes, flammis, ut Lutherus magnus facere docuit bonos omnes, ipse in medio foro flammis delens eos omnes libros... ».

<sup>40</sup> For an example of a more sustained criticism, see Ch. 7 of Book V, p. 516s. : « Sed non inepta tantum est canonica computatio, iniqua etiam est. Quae concedit nuptias in gradu quinto... ».

<sup>41</sup> For example, in *De nuptiis*, p. 179s. on the possibility to marry through a proxy. Conversely, on the status of 'common (or customary) law' wives, Gentili notes that « vix differant civilistae a canonistis » (p. 724).

<sup>42</sup> Even when critical of the canon law's provisions, Gentili occasionally admits that the (positive) law of marriage is governed by canon law, e.g. *De nuptiis*, p. 382 ; and occasionally, he suggests that he follows a particular canon law principle (e.g. p. 576).

<sup>43</sup> What may appear an eclectic use of authorities is therefore consistent with Gentili's emphasis on analysing arguments on their own merits, irrespectively of the area or 'school' of scholarship they belong to : see e.g. *De nuptiis*, p. 474, where Henricus de Segusio's (Hostiensis) opinion is preferred to that of Cujas.

<sup>44</sup> *De nuptiis*, p. 519.

<sup>45</sup> The text is nevertheless clearly that of a committed protestant author, who regularly attacks the 'papists' and 'popery' as instruments or figures of the Antichrist (see e.g. *De nuptiis*, p. 228, 328, 440 – « papistae hi iam peiores sunt diabolis » -, 446, 779. See also p. 588, a jibe at the « phanatica ecclesia Graeca »).

<sup>46</sup> For a contrast between « optimus Beza » and « pessimus Bellarminus », see e.g. p. 590.

<sup>47</sup> *De nuptiis*, p. 67: « Nam illa Genebrardi canis ridicula : theologos esse Phariseis pares, canonistas scribis. Et itaque theologos penitus cum Phariseis scrutari mysteria legis : canonistas cum scribis eandem legem secundum corticem interpretari ... » (with reference to Th. Bèze).

<sup>48</sup> *De nuptiis*, p. 686s. ; see also, p. 533s. (on affinity as an impediment).

<sup>49</sup> *De nuptiis*, p. 485s., where the argument partly depends on theological expertise in interpreting passages from the Old Testament. Scholarly expertise nevertheless does not appear to be a decisive factor in Gentili's arguments. One exception seems to be the Flemish scholar Johannes van den Driesche (Drusius), with whom

*nuptiis* refer with the same intensity to theological opinions. Book VII on evidence contains little input from theology. Book IV, Ch. 8, which looks into canon law and divine law on parental consent, in spite of the reference to the divine will, discusses only few theological opinions. Chapters where theological authorities play a much more significant part are those on the impediment of different religious beliefs<sup>50</sup> or on fraudulent statements made when contracting a marriage<sup>51</sup>.

Gentili's discussion of the law of marriage in *De nuptiis* reflects a much more elaborate repertoire than he displayed in his early work<sup>52</sup>. Yet, *De nuptiis* is more than an exercise in dealing with the multi-normativity of civil law, canon law, divine and natural law. As the contentious First Book makes clear, the whole work is intended to display the specific expertise drawn from civil law in order to deal with matrimonial issues. The key-word throughout *De nuptiis* is that of *ratio*. The word may have different (partly non-exclusive) meanings, and the meaning of 'ground', 'justification', 'reason (why)' certainly plays a prominent part<sup>53</sup>. However, *rationes* in such a sense necessarily also implies a reasoning, a reasoning brought to its conclusion, and these forms of reasoning present the distinctive feature of *De nuptiis*. Gentili's purpose is to show that the civil lawyer's ability to confront different lines of reasoning, drawing from (but at the same time transcending) his civil law expertise based on his understanding of Roman law texts, is the superior scholarly expertise to deal with the law of marriage as a mainly secular (in the sense of: human) institution. The civil lawyer's aim is to assess different lines of reasoning leading to a specific answer to issues on marriage. The *interpres iuris* commands therefore a meta-juristic method which will enable him to work out not only the best answer, but also the better reasoning which supports that answer<sup>54</sup>. That is perhaps why *De nuptiis* (books 2-7) does not turn up as a systematic proto-positivistic treatise on marriage in the fashion of early-modern legal literature. It does not provide so much a survey of the positive law on marriage (with due account of its controversies and uncertainties), but reasoned arguments towards diverging answers proposed to various issues, whereby Gentili champions as a rule a particular civil law reasoning he favours. One might sum up his approach as a science of legal reasoning rather than a science of normative statements or positive rules: "Lex est ratio, non oratio"<sup>55</sup>.

The exercise has its limits. Gentili, as it has already pointed out, avoids including (apart from a few obiter references) the municipal laws, at least explicitly. One may wonder, for example, to what extent his position on the requirement of paternal or parental consent to the marriage of a father's or parents' child may have been informed by wide-spread social and political concerns in England and elsewhere in Europe. Yet, the general policy considerations behind those concerns are included in the more abstract *rationes* he defends in favour of paternal

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Gentili appears to have been on friendly terms at the time, regularly deferring to his expert opinion on Hebrew texts and history, in *De nuptiis* and in other works (here, see e.g. p. 645s., 779).

<sup>50</sup> *De nuptiis*, p. 219s.

<sup>51</sup> *De nuptiis*, p. 279s. (including a characteristic criticism – uncharacteristically, directed at an argument from Bèze – on the way a theologian has on this issue to borrow his *rationes* from the civil law : p. 283).

<sup>52</sup> See for example the (much shorter) treatment on issues of matrimonial law in Albericus Gentilis, *Lectio[n]um & Epistolarum quae ad ius civile pertinent Liber I[-IV]*, Londini (Excudebat Iohannes Wolfius) 1583, Book III, Ch. 7-8 (*De patris consensu, qui in nuptiis filiorum requiritur*).

<sup>53</sup> «Mihi in perpetua reiectum sint, quae rationem non habent» (*De nuptiis*, p. 532).

<sup>54</sup> *De nuptiis*, p. 566, with an emphasis on the relevance of the *ratio* of a law for the individual's conscience: "... et quod insipida est conscientia, quae rationis, et scientiae salem non habet. Nimis scrupulosa: quam sequi haud oporteat: quia deceat informare conscientiam ex iuribus, et se informare conscientiae legis: cum sint leges per ora principum divinitus promulgatae, et quod non debet quis sibi de eo facere conscientiam, quod non potest explicare secundum rationem veri, et perfecti, et constantis iudicii..."

<sup>55</sup> *De nuptiis*, p. 342s.

consent, but they are mostly supported by civil law based arguments. The author's point is to show that the civil lawyer's reasoning is generally valid, and more sustainable than that of, on such an issue, the theologian or canonist.

Gentili's claim of the Second Table on behalf of the civil lawyers therefore fits in his strategy to give an unimpeachable authority to the civil lawyer's expertise transcending Justinian's laws. At the same time, he emphasises that the spirit of the great Roman jurists met the essential standards set out in the Second Table. In different words, those Roman jurists had already expressed the fundamental vocation of the *interpres iuris* when they coined the phrase identifying the jurist's science as of fostering what is 'good and fair'<sup>56</sup>. That, arguably, was in Gentili's time all over Europe the 'Great Game' among scholars within and beyond the established areas of scholarship: which science was, in the reallocation of political powers, to play a decisive role in the exercise of public governance?

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<sup>56</sup> De nuptiis, p. 57 ("... ita nostra philosophia Iustinianismus non est, sed ars boni, et aequi, cuius merito quis nos sacerdotes appellet. Iustitiam namque colimus: et boni, et aequi notitiam profiteamur ... Corruptus ille est usus disciplinae nostrae: qui non istam artem aequi, et boni, sed legum Iustinianicarum notitiam solam profiteatur ..."); p. 93 ("Sic tamen teneo cum doctissimo Molinaeo, neque civilistae, hoc est Iustinianico, competere ius supradictum, neque canonistae, sed iurisperito. Quem humanarum, et divinarum rerum scientem, ad iusti, et iniusti, aequi et boni interpretationem definio, et definivi").