II. YET ANOTHER RETURN TO VICO

Vico's *Ius Gentium*

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Abstract

Vico's *Universal Law* is, in essence, the first version of his *New Science*. In it, Vico interprets the *ius gentium* of Roman law as a form of actual natural law of the nations, in contrast to the ideal natural law of the philosophers. In the *New Science*, Vico transforms the static sense of *ius gentium* as it resides in Roman jurisprudence into his dynamic law of the ages of gods, heroes, and men that governs the cycle of "ideal eternal history," common to the life of all nations. This transformation of the *ius gentium* is what allows Vico to found his philosophy of history and, in so doing, to overcome the abstract conception of natural law held by the seventeenth-century natural-law theorists.

New Edition of the Universal Law

A new, highly readable English translation of Giambattista Vico's *Universal Law (Il diritto universale)* has recently been published in two volumes[1]. The Latin text is translated by John Schaeffer and the "Synopsis," Vico's Italian introduction to it, is translated by Donald Phillip Verene. This translation originally appeared in three issues of *New Vico Studies* between 2003 and 2006. The *Universal Law* originally appeared in Naples in the 1720s prior to the *New Science* (1725 and 1730/44) and is nearly three times

[1] Giambattista Vico, *A Translation of Giambattista Vico's Il Diritto Universale/Universal Law*, 2 vols., trans. John D. Schaeffer (Lewiston, NY: The Edwin Mellen Press, 2011).

the length of the definitive edition of the *New Science*. This new translation replaces the translation of George Pinton and Margaret Diehl published under the title *Universal Right* a decade ago.[2]

The appearance of this new translation invites a further look at the importance of Vico's doctrine of jurisprudence for the interpretation of his *New Science*. It is in the second book of the *Universal Law*, "On the Constancy of the Jurisprudent," that Vico presents a first sketch of the *New Science* – "Nova scientia tentatur" ("A New Science is Essayed")[3] – and it is in the first book, "On the One Principle and One End of Universal Law," that Vico states the principle that "*certum est pars veri*" ("the certain is part of the true'),[4] which, along with his famous principle of "*verum ipsum factum*" ("the true is the made"), guides the construction of the *New Science*.[5] Furthermore, it is in the third book of the *Universal Law*, the "Dissertations," that Vico advances his interpretation of the Homeric poems that became his "discovery of the true Homer" in the *New Science* and that incorporates his philosophy of mythology or doctrine of "poetic wisdom," upon which his philosophy of history of the common nature of the nations is based.

It is fair to say that the *Universal Law* is, in fact, the first version of Vico's new science realized through his interpretation of Roman law, which is subsequently formulated as the new science proper, in *First New Science* (1725) and revised and expanded into what is known as the *Second New Science* (1730/44).[6] Any reader of the *New Science* rapidly realizes that Vico's axioms, by which he forms knowledge of the civil things of the world of the nations, is derived from an interpretation of Roman law. But

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[2] Giambattista Vico, *Universal Right*, trans. Giorgio Pinton and Margaret Diehl (Amsterdam: Rodopi, 2000).

[3] Vico, *Universal Law*, bk. 2, pt. 2, chap. 1.

[4] Ibid., bk. 1, chap. 82, sec. 2.

[5] Guido Fassò, "The Problem of Law and the Historical Origin of the *New Science*," in *Giambattista Vico's Science of Humanity*, ed. Giorgio Tagliacozzo and Donald Phillip Verene (Baltimore, MD: Johns Hopkins University Press, 1976), 3-14.

[6] Thora Ilin Bayer and Donald Phillip Verene, eds., *Giambattista Vico: Keys to the New Science; Translations, Commentaries, and Essays* (Ithaca, NY: Cornell University Press, 2009), pt. 1.

what is it in Roman law and Roman jurisprudence that provides Vico with the means to make his science of nations? If light can be shed anew on this question, much of the core of Vico's new science can be understood and, in so doing, will have been approached by his own principle that "doctrines must take their beginning from that of the matters of which they treat."[7] The seminal article on this subject is that of the co-translator of the *New Science*, Max Harold Fisch–"Vico and Roman Law"–and the reader may wish to consult this in relation to the remarks that follow.[8]

The Conception of *Ius*

The key work for the comprehension of Roman law is the compilation of it enacted by the Byzantine emperor, Justinian I (c. 482-565), known as the *Corpus Juris Civilis* or *The Digest of Justinian*. The key term, at least for the interpretation of Vico, is *ius*, for which there is no perfect English equivalent. Alan Watson, the translator of the *Digest* into English, is quite clear that *ius* "cannot be exactly translated from Latin into English."[9] A comment of Fisch's clarifies this point: "English uses the one word 'law' in two very different senses for which European languages have distinct and contrasting terms: Latin *ius* and *lex*, Italian *diritto* and *legge*, French *droit* and *loi*, Spanish *derecho* and *ley*, German *Recht* and *Gesetz*. The second term of each pair properly denotes enacted law, law which has been made by the authority of some lawmaking body, at some time and place; law, therefore, by will. The first term of each pair denotes the legal order, structure, or system, conceived as, ideally at least, a rational whole; law, therefore, by reason."[10]

The English word "right" may at first glance seem to parallel the first term of these pairs, but such a parallel is fundamentally mistaken. "Right" is not *ius* as Vico employs it. The title of the Pinton and Diehl translation of

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[7] Giambattista Vico, *The New Science of Giambattista Vico*, trans. Thomas Goddard Bergin and Max Harold Fisch (Ithaca, NY: Cornell University Press, 1984), par. 314.

[8] Max Harold Fisch, "Vico on Roman Law," *New Vico Studies* 19 (2001): 1-28.

[9] Alan Watson, ed., *The Digest of Justinian*, vol. 1 (Philadelphia, PA: University of Pennsylvania Press, 1998), bk. 1, n. 1.

[10] Vico, *New Science*, p. xxviii.

Vico's work, then, is misleading. "Right", from which modern "rights-theory" is generated, is an ethical or moral quality that constitutes the ideal of moral propriety and involves various attributes, such as adherence to duty, obedience to lawful authority, whether divine or human, and freedom from guilt. It is something morally just, or constant with the light of nature, such as a natural right or more specifically something to which one has a just claim, something to which one is justly or naturally entitled. One way to designate the two senses of the English "law" that Fisch distinguishes is to consider "law" in lower case as enacted law and "Law" in uppercase as what the human institution itself is. Vico's assertion of "Universal" as attached to "Law" makes this sense clear, since Law that is universal is not enacted by any lawmaking body but is presupposed by such a body, as the standard that governs its lawmaking activity and is a conception of the authority – the authority of divine or human reason or both – upon which its authority depends.

Vico's *New Science* is written against the views of the seventeenth-century natural-law theorists, principally those of Grotius, Pufendorf, and Selden and to an extent against Hobbes. The seventeenth-century natural-law theorists, according to Vico, fail in two fundamental respects: they adhere to a conception of natural law as an abstract ideal of reason and they have a false conception of the origin of human society. The first of these Vico calls "the natural law of the philosophers" (*ius naturale philosophorum*), which he contrasts with the "natural law of the nations or peoples" (*ius naturale gentium*)[11] and which will be described below. The second of these is adherence to some version of what Hobbes calls a covenant, such that for the primordial human condition, life is "nasty, brutish, and short" and to escape from a condition in which the individual lives in a "war of all against all," a contract or covenant is framed from which human society arises at once in one piece. Whether this view is intended to describe an actual state of affairs or whether it is intended as only a hypothetical or speculative way of regarding the origin of human society, it is, in Vico's view, a false conception of society and of natural law upon which it depends. For a proper conception of natural law, upon which

[11] Vico, *Universal Law*, bk. 1, chaps. 136 and 156.

the origin and completion of human society depends, we must look to Roman law. Roman law, Vico holds, is a complete system of civil wisdom in accord with divinely created human nature. What is truly in accord with human nature and human reason is a manifestation of divine nature and divine reason.

The *Digest* preserves the distinction between *lex* and *ius*. *Lex* is a statute passed on the authority of one of the Roman republican assemblies; it can also apply to any piece of imperial legislation. It goes back to the earliest document of Roman law, the Law of the Twelve Tables (*lex duodecim tabularum*), which Vico interprets as arising piecemeal from agrarian law.[12] The *Digest* distinguishes between three kinds of *ius* – *ius naturale*, *ius gentium*, and *ius civile*. *Ius civile* is the body of laws directly applicable only to Roman citizens and in a wider sense it is used to mean the law as peculiar to any people or nation, i.e., positive law. *Ius naturale* is spoken of only once at the beginning of the *Digest* and is defined there as "that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals – land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing. So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law."[13]

Those in political philosophy today, immersed in the conception of natural law that Vico calls "the natural law of the philosophers," will, perhaps, be astounded to find this definition of natural law in the text that underlies the whole tradition of Western jurisprudence. What is quoted here is the complete statement of it given at the beginning of the *Digest*, which then is left aside. Natural law or *ius naturale* is common to all animals. It appears to be that which governs the continuation of the species – the drive to procreate and rear young. By implication, it may also refer to the individual animal's or group's drive to sustain, protect, and defend itself against the adversities of existence. Marriage as a human institution reflects this natural drive and is the only example the *Digest* gives of it. Marriage is

[12] Fisch, "Roman Law," 5-9.
[13] Watson, ed., *Digest*, bk. 1.1.

also one of Vico's three "principles of humanity" in the *New Science*. The other two–religion and burial–would not be shared with the animals as they neither engage in worship or rites of augury or sacrifice, nor do they bury their dead. Marriage, as one of Vico's principles, would appear to fulfill more than its conception in the *Digest* as connected to *pudore* (modesty and shame) and is as Vico says the first friendship in the world. Viewed in a wider sense in the *Digest*, *ius naturale* can mean that a rule or principle in question can be thought to be based on everyday experience in the sense of "natural reason" (*naturalis ratio*). Thus, on Vico's view, it would be rooted in the *sensus communis* of humankind. But as Watson firmly points out: "Sometimes it refers [in the *Digest*] to the justice or fairness of a rule, but the view of natural law as a universal ideal order in any way contrasted with positive law is almost entirely absent."[14]

The *Digest* is predicated on the view that what the Greeks call *philosophia*, the Romans call *jurisprudentia*. The Greek love of wisdom is in this assertion taken in a Socratic sense as directed toward *phronēsis* or civil wisdom in the sense that, as Cicero in his famous statement says, Socrates brought philosophy down from the heavens and into the cities and homes of men. *Phronēsis*, or *prudentia* in Latin, for the Romans, is not to be sought in the *elenchus* but is realized in the law. Prudence is already there in the law and is discovered by consulting and interpreting it. What might be for the Greeks a matter of philosophical inquiry is for the Romans transferred into the activity of the jurisconsult, understood in a broad sense, as one who interprets the law in particular cases. Prudence in a particular case is derived from the knowledge of jurisprudence. In this activity, eloquence, the subject matter Vico taught, plays a crucial role. The truth to be sought is not something transcendent or speculative but something that applies with great plausibility to a particular situation or act, and which can serve as a guide in it.

Ius Gentium and *Storia Ideal Eterna*

Watson points out that at times *ius naturale* was merely a synonym for

[14] Ibid., p. xxxiii.

ius gentium.[15] It is this synonymous sense that Vico plays on in his formulation of the *ius gentium* as "the natural law of the *gentes* or peoples", which he opposes to "the natural law of the philosophers." The *ius gentium* was likely to have been originally applied to laws covering commercial dealings with non-Roman citizens who could not function in accordance with civil law. It came to be expanded to a more philosophical sense of the law common to all peoples or nations. It was that part of Roman law that was held in common with all other systems of law. Thus the *ius gentium* is that sense of the law that is present in the *sensus communis* of humanity, that is universal and that makes the human, human.[16] It allows one nation with its own total body of laws to recognize the laws of another nation, although perhaps fundamentally different in character, nonetheless to be laws. The *ius gentium* is not an ideal conception of law; it is the idea of an actual natural law–the sense in which all systems of law are actually part of each other because they are extensions or reflections of human nature itself. As far as the Romans are concerned, of course, what constitutes the *ius gentium* is determined from what is written Roman law. But philosophically, the *ius gentium* is the master key to unlocking the "common nature of the nations."

As a matter of Roman jurisprudence, the *ius gentium* is a static principle, a standard by which one could interpret or confront systems of law. Vico's aim in the *Universal Law* is to understand Roman law in relation to the development of the Romans as a nation, to seek out the original meanings of the legal terms and customs out of which Roman law as a system of civil wisdom arises. In the *New Science*, Vico presupposes that if he has rightly understood how the Romans develop as a nation, he has rightly understood the principles by which any people comes into being and develops as a nation. Vico's new science is a philosophy of history using Rome as its model. But the new science is also a science of the civil world, capable of standing as a counterpart to the new science of nature made by Galileo and Newton. In fact, the science of the civil world is truly science

[15] Ibid.

[16] Thora Ilin Bayer, "Vico's Principle of *Sensus Communis* and Forensic Eloquence," *Chicago-Kent Law Review* 83 (2008): 1137-43.

because, since human beings have made the things of the civil world from their own nature, they can in principle and in fact make a knowledge of what they have made – a *scienza*. But the science of the natural world cannot convert its objects into a complete knowledge, because the objects known are not made by the knower and are thus different in kind from the knower. The science of nature is actually a *coscienza* or a very exact form of "witnessing consciousness." This inability in principle to penetrate the object known by the knower is the reason the new science of nature of Newton and Galileo rests upon experiment and why experiment is the secret of its success. In experiment, the knower comes as close as is both practicable and possible to making the object to be known.

As mentioned earlier, Vico's science not only depends upon the principle of *verum ipsum factum*, it also depends upon the principle of *certum est pars veri*. This is the legal principle that the certain, which is a particular legal action or case, must be connected to a law that displays what is true of it. In the broader jurisprudential sense, this means that any positive law made by a legislative authority must rest not merely on the power of such authority; this authority must coincide with reason as the form of law itself. Otherwise 'might' in itself would simply make 'right' and, in such a case, 'right' would not carry the authority of being a manifestation of universal law. In the *New Science*, Vico employs the principle of the certain as part of the true to establish the philological-philosophical bond that he claims is the methodological basis of his science. All attempts at a science of the civil world have failed because of the pursuit of one side of this dichotomy over the other. Philology offers a knowledge of the 'certains' of the civil world, of the languages, customs, and deeds of nations at war and at peace.[17] Philosophy offers a knowledge of the 'trues' of the civil world, the universals of human nature. Past attempts at a science of civil things have always failed by half, by placing one approach over the other.[18] By incorporating the philological into the philosophical, Vico claims that he, in the *Universal Law* and later the *New Science*, completes the project begun by Pico della Mirandola in his *Oration on the Dignity of Man* and the

[17] Vico, *New Science*, par. 7.
[18] Ibid., par. 140.

Conclusions it was designed to introduce.[19]

What is left for Vico, having overcome the "natural law of the philosophers" through the "natural law of the peoples," is to replace the mistaken idea of a covenant as the origin of human society and government with a true account of the origin of the world of nations. To accomplish this and then fully to dismiss the views of seventeenth-century natural-law theory, Vico transforms the *ius gentium* into his doctrine of "*storia ideal eternal*," "ideal eternal history."[20] Taking the idea of three ages from Varro, as reported in a passage in the little-known *Natal Day* book of Censorinus,[21] Vico conceives the idea of *ius gentium* as a law of the common development of nations. All nations originate through a *corso* through an age of gods, in which all things are full of gods, to an age of heroes, in which human actions are governed by the virtues embodied in the figures of heroes, to an age of men, in which the imagination (*fantasia*), necessary to the formations of gods and heroes, wanes and is replaced by reflective and abstract modes of thought and society is governed by laws, the meaning of which is whatever they can be made to mean by those who can manipulate them.[22]

The *corso*, having begun in a barbarism of sense, ends in a barbarism of reflection through which things collapse and, in a providential pattern, each nation can rise again in a *ricorso*, with stages of ideal eternal history analogous to those of the original *corso*. History itself is a nightmare in which, as Vico states in his axiom sixty-six: "Men first feel necessity, then look for utility, next attend to comfort, still later amuse themselves with pleasure, thence grow dissolute in luxury, and finally go mad and waste their substance."[23] This terror of history, like the terror of thunder that the proto-humans feel, who wandered the great forest of the earth following the biblical universal flood, is relieved only by the consolation of providence as

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[19] Giambattista Vico, *The Autobiography of Giambattista Vico*, trans. Max Harold Fisch and Thomas Goddard Bergin (Ithaca, NY: Cornell University Press, 1990), 156-57.

[20] Vico, *New Science*, pars. 7 and 349.

[21] Ibid., par. 52 and Censorinus, *The Birthday Book*, trans. Holt N. Parker (Chicago, IL: University of Chicago Press, 2007), sec. 21.

[22] Vico, *New Science*, par. 31.

[23] Ibid., par. 241.

the terror of thunder is relieved only by the realization that it is the presence of Jove. What is this consolation of providence? The realization that the ideal eternal history is a providential order is the realization that there is a jurisprudence of the human race. Vico's providence is not the eighteenth-century conception of a providential order in history in which there is a progression toward a norm. Vico is also not a historicist. Human beings do not simply make history. What they make is always governed by the *corso* and *ricorso* of ideal eternal history, which is not made by them but is impressed on them as a production of providence.

Vico's Narrative of Western Culture

Every nation proceeds through its *corso* and *ricorso* at its own rate. The 'certains' of the life of each nation differ, but the true in them–the pattern of ideal eternal history–remains the same from nation to nation, just as each nation's positive law is its own, yet part of its legal system is common to all nations as *ius gentium*. Vico has a narration of the *corso* and *ricorso* of Western culture. He separates sacred history from gentile history. The history of the ancient Hebrews is not subject to ideal eternal history. God appears and acts directly in the events of the life of the ancient Hebrews. God is not indirectly manifest as providence in the order of their national life as is the case with the gentile nations. The gentile nations arise after the universal flood as the great forests of the world dry out over two centuries and as the offspring of the sons of Noah increase physically, from the normal stature of the Hebrews to the size of giants, and disperse themselves throughout the regions of the earth. These *giganti* or *bestioni* are proto-humans, with very little power of memory and thus no culture, because culture depends on memory. They live in a state of sensuous immediacy in which, as Vico says, "they regarded every change of facial expression as a new face."[24] They have lost the power of language and the institution of family, allowing their offspring to be feral.

As the world finally becomes dry, these proto-humans suddenly confront a new phenomenon–thunderous sky and lightning. Until this new event, they have only experienced fear in the sense of *timore*, that is, fear

[24] Ibid., par. 700.

that is directed to some specific danger at the terrestrial level of the trackless great forest. Thunder as a phenomenon of a different order instills in them a fear of a different order – *spavento*, terror. This terror pervades their very existence and their bodies shake as the sky shakes above them and they perceive the sky as itself a great body just above the tree tops.[25] To relieve this terror, they utter the first word, Jove, which they pronounce onomatopoeically as *pa!* then doubled as *pape!*.[26] This first word generates memory in them, for they grasp that each roll of thunder and flash of lightning is the appearance of a single being – Jove. One moment of thunder is remembered and joined with the next to form the name. The power of the name takes them out of the pure immediacy of sensation and they name all the flora and fauna in their environment as gods. Once one thing can be named, everything can be named. The primary passion that humanizes the proto-humans is the terror of their own existence. This feeling is distinctively human, as it is not shared with animals, because animals have no such awareness of their own existence.

This terror is accompanied by the second distinctively human passion – modesty. This passion causes the first humans to flee into caves and form marriages between men and women and to procreate out of the direct presence of Jove. Juno is the goddess of marriage. Modesty is distinctively human, as animals are immodest and thus procreate openly. Not all the *giganti* or proto-humans respond to thunder as the Jove experience. Those who do, however, become the fathers of families and learn to take the auspices of Jove's actions in the heavens. From the founding of families arises Vico's third principle of humanity – burial of the dead. Burial establishes place as well as time, as through it the families create ancestors and lineage. The families create clearings in the forest and later found cities. Those giants who are not initially able to respond to thunder as Jove seek safety and, by attaching themselves to the families, they become *famuli*. In this way, social classes are formed.

Our knowledge of the first two ages, those of gods and heroes, of the *corso* of the West, comes from Homer, who is the consciousness of the

[25] Ibid., par. 712.
[26] Ibid., par. 448.

Greek peoples themselves. After Homer, the philosophers arrive and with the philosophers arises reason as the guide to action and with it, written law. Society is no longer governed by the power of *fantasia* to form its institutions as gods or to direct the conduct of individuals by the virtuous actions of heroes. Society sublimates the poetic wisdom necessary to these forms of life and commences government by decrees and legislations. With the weakening of the power of *fantasia*, a rational madness sets in, a barbarism of reflection in which the pursuit of wit creates a solitude of spirit and will and the bonds of the *sensus communis* unravel.[27]

With the fall of Rome and the ancient world, there is a return of the populace to the forests. There are not the trackless forests after the flood, but the cities and families dissolve and become isolated. The *ricorso* begins with a return to religion and to the necessities of life. Religion is a reaffirmation of, but not a recreation of, the original Jove experience and its general implications. The *ricorso* is not simply a repetition of the *corso*; it is a re-enactment of its ages of ideal eternal history in new but analogous terms. The return to simple religious consciousness gives way over centuries to the heroic society of the feudal order of knights and kings of the High Middle Ages. At the end of this period, Dante appears as the "Tuscan Homer" to summarize in his poem the first two ages of the *ricorso*.[28]

After Dante, arise the philosophers of what is now called the Renaissance. Philosophy recasts itself by recollecting and reconstructing the humanism of the ancients and merging it with the doctrines of Christianity and the Judeo-Christian tradition. Vico, as mentioned earlier in relation to Pico, sees himself as part of this Italian humanism. He is part of the third age of the *ricorso* of the West and his new science is a reaction to its barbarism of reflection. Vico does not regard the *ricorso* as progress over that of the *corso*. His presentation of the providential order of *corso* and *ricorso* allows us to grasp our own nature in history. The result is a doctrine of prudence that derives from the perception of providence in history. From the perspective of the new science, the individual can grasp that all in the human world is a cycle such that what is and what is to come is the result of

[27] Ibid., par. 1106.
[28] Ibid., par. 786.

what was. With this wisdom, the individual can act with prudence in the civil world, but the individual cannot change the providential order of history. This ability to base prudence on providence is the normative dimension of Vico's science; it is its *pratica*.[29] Like Vico's own temperament, the conclusion of the new science is melancholic, but aims to reflect accurately the nature of human events. And, as Vico declares in the final sentence of the *New Science*, this wisdom requires piety. Piety, like wisdom, is the ability to accept things as they are. The civil world, like the natural world, has an order that Vico's science has discovered.

Summary

In summary, my question has been to find what in essence Vico has taken from Roman law in order to make his new science. This can be determined by attending to the origination of the *New Science* in Vico's *Universal Law*. To arrive at his conception of ideal eternal history that is at the basis of his philosophy of history, Vico confronts seventeenth-century natural-law theory with a new conception of natural law by transposing the *ius gentium* of Roman jurisprudence into a conception of natural law as actually present within the world of nations and, by so doing, Vico projects a new comprehension of the origin of the world of nations and their individual development that determines their commonality. This new science of the civil world stands alongside the new science of the natural world that had taken shape in the preceding century. Looking forward, Vico is the founder of the modern philosophy of history, and with his poetic wisdom, the founder of modern philosophy of mythology and with these, taken together, the founder of modern philosophy of anthropology.

[29] Alain Pons, "Prudence and Providence: The *Pratica della Scienza nuova* and the Problem of Theory and Practice in Vico," in *Giambattista Vico's Science of Humanity*, ed. Giorgio Tagliacozzo and Donald Phillip Verene (Baltimore, MD: Johns Hopkins University Press, 1976), 431-48.