Giambattista Vico

Critical Legal Studies in Contextual Historical Mode?

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Abstract

The original thought of Giambattista Vico can provide a different avenue of understanding international law departing from Critical Legal Studies (CLS) by way of making contextual history. According to Vico, history was a human creation upon which history moved in an orbit rather than a straight line to progress, as the Enlightenment proposes. Under such a Vichian perspective, the understanding of ideas, institutions, and civilizations should be judged as elements of their own time; with their own goals, symbols, rituals, art, languages, gestures, myths, social customs, and law. Thus, avoiding presentism and anachronism. Vico provides an alternative method to the understanding of international law through history.

Keywords: international law, history, Critical Legal Studies, Giambattista Vico.

> Over the past several days, I have been in close contact with my national security team to give them direction on how to protect our interests and values as we end our military mission in Afghanistan.
>
> – Statement by President Joe Biden on Afghanistan[1]

A Introduction

Giambattista Vico was an original thinker born in 1668 in Naples who began his law studies by happenstance. He came across a lecture at the royal university where a professor proposed the study of Hermann Vulteius as one of the best commentators of the *Institutes*, sparking his curiosity in the study of law. His erudition in law was later complemented with literature studies. By being appointed as the preceptor of the Marchese di Vitola's sons, he had access to a vast library, being crucial for his general knowledge. After completing his post as a preceptor, in 1694, he returned to Naples. He had unsuccessfully attempted to work for the

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1 *The White House*, 'Statement by President Joe Biden on Afghanistan' (2021).

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municipal government, but due to such unfruitful attempts, he sought a position at the University of Naples, and in 1697, he was appointed as professor of rhetoric.[2] As a lawyer, Vico pursued a position as a professor of civil law. However, such a position was never granted to him. Therefore, he went on to other pursuits while retaining his position as a professor of rhetoric. One of such pursuits is his most known work: *Scienza Nuova*. A work regarded ahead of its time.[3] Among other works, he authored the *Universal Law* (1722), the *First New Science (Scienza Nuova)* (1725), the *Second New Science* (1730) and the third edition of his *New Science Concerning the Common Nature of the Nations* (1744). *Scienza Nuova*,[4] or *New Science*,[5] was published in a semi-medieval age under the domination of the Spanish House of Aragon.[6] Given his line of work, Vico is considered the founder of the philosophy of history and the modern forms of intellectual autobiography.[7] Due to his particular view on history, he has been regarded as a counter-Enlighten and anti-utopian thinker.[8]

Vico's originality[9] emanates from his view of history as a philosophic-philological endeavour, to the extent of being regarded as the founder of the philosophy of history.[10] For him, history was a human creation in which there was movement in orbit rather than a straight line to progress.[11] History could be understood and discovered as a science through '*fantasia*',[12] or imaginative reconstruction. Due to this approach, he ran counter to the 'conceit of the philosophers'; he saw that Grotius, Selden, Hobbes and Pufendorf had a fixed view of history and, more specifically, a fixed view of the natural law of nations – one that is applicable

2 A. Robert Caponigri, *Time and Idea. The Theory of History in Giambattista Vico* (Chicago: Henry Regnery Company, 1953) at 13.

3 Michael Rafferty, 'Vico (1668-1744)', *in* John Macdonell and Edward Manson (eds.), *Great Jurists of the World* (The Continental Legal History Series, 2; Boston: Little, Brown, and Company, 1914), 345-389 at 345-350.

4 Donald Phillip Verene, *Giambattista Vico: Keys to the New Science. Translations, Commentaries, and Essays*, eds Thora Ilin Bayer and Donald Phillip Verene (Ithaca and London: Cornell University Press, 2009) at 1.

5 Giambattista Vico, *The New Science (Principles of the New Science of Giambattista Vico About the Common Nature of the Nations. In This Third Edition. Corrected, Clarified, and Notably Expanded by the Author Himself in a Great Number of Place)*, trans. Jason Taylor and Robert Miner (New Haven: Yale University Press, 2020b).

6 Rafferty, 'Vico (1668-1744)', at 345.

7 Verene, *Giambattista Vico: Keys to the New Science. Translations, Commentaries, and Essays*, at 1.

8 Isaiah Berlin, 'Vico and the Ideal of the Enlightenment', *in* Henry Hardy (ed.), *Against the Current: Essays in the History of Ideas* (2nd edn.; Princeton: Princeton University Press, 2013c), 151-163 at 154.

9 Joseph Mali, 'Berlin, Vico, and the Principles of Humanity', *in* Joseph Mali and Robert Wokler (eds.), *Isaiah Berlin's Counter-Enlightenment* (*Transactions of the American Philosophical Society*. Held at Philadelphia for Promoting Useful Knowledge, 93; Philadelphia: American Philosophical Society, 2003), 51-71 at 51.

10 Donald Phillip Verene, *Vico's New Science. A Philosophical Commentary* (Ithaca and London: Cornell University Press, 2015) ix, 284 at 3.

11 Berlin, 'Vico and the Ideal of the Enlightenment', at 156, Rafferty, 'Vico (1668-1744)', at 384.

12 Vico, *The New Science (Principles of the New Science of Giambattista Vico About the Common Nature of the Nations. In This Third Edition. Corrected, Clarified, and Notably Expanded by the Author Himself in a Great Number of Place)* at 295, Para. 699.

universally despite place and time. Instead, he proposed the '*vera narration*',[13] a poetical narration aiming at the authentic narration of the development of nations.[14] Likewise, his charge against presentism and anachronism can also be seen to counter German idealism and western Marxism, methodologies that are crucial to critical studies.[15] However, Vico's deep interest in language shares a common trait with critical studies, with Critical Legal Studies (CLS) new stream on the "interminability"[16] and "indeterminacy"[17] in international law. For Vico, as it is for critical theory in general, the main element is not to discover new facts but to ask new questions.

> Vico perceived a revolutionary truth when asserted, before Herder or Hegel or Marx, that each stage of social change there corresponds its own types of law, government, religion, art, myth, language, manners; that fables, epic poems, legal codes, histories express institutional processes and structures which are parts of the structure, and not of the 'superstructure' (in Marxist terms); that together they form a single pattern of which each element conditions and reflects the others; and that this pattern is the life of a society.[18]

Despite being a lawyer, and all the influence that can be traced back to Vico, there is little engagement with his work by either international law or international relations.[19] For this reason, in this article, we will explore Vico's sense of historical reconstruction, his interpreted anti-enlightenment stance, mainly against anti-utopian projects, and finishing with a claim of his historical approach as a possible way to critical studies in international law. Vico can be seen as a Critical theorist who departs from a contextual approach to history, opening the door possibly to a level of plurality in international law.[20] The contextual approach of Vico is of a remarkable and original character given its time and epoch. For him, ideas, institutions and civilizations could only be judged as elements from their own time, avoiding presentism, judging civilizations from the spectacles of current times. Human history is then a succession of collective conduct, patterns and responses to a communal human activity, with particular images of the world, with

13 *Ibid*., at 146. Para. 401.

14 Verene, *Giambattista Vico: Keys to the New Science. Translations, Commentaries, and Essays*, at 9.

15 Andrea Bianchi, *International Law Theories : An Inquiry into Different Ways of Thinking* (1st edn.; Oxford: Oxford University Press, 2016) at 138.

16 David Kennedy, 'A New Stream of International Law Scholarship', *Wisconsin International Law Journal*, 1/7 (1988), 1-49 at 39.

17 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006) at 62.

18 Isaiah Berlin and Henry Hardy, *Three Critics of the Enlightenment : Vico, Hamann, Herder* (Second Edition. edn.; Princeton: Princeton University Press, 2013) xxviii, 541 pages, at 111.

19 Richard Devetak, 'A Rival Enlightenment? Critical International Theory in Historical Mode', *International Theory*, 6/3 (2014), 417-453 at 420, Richard Devetak, *Critical International Theory: An Intellectual History* (Oxford, United Kingdom: Oxford University Press USA – OSO, 2018) at 109.

20 Although Mark Lilla claims that Vico cannot be conceptualized as a 'pluralist' in: Mark Lilla, 'G.B. Vico: The Antimodernist', *The Wilson Quarterly*, 17/3 (1993), 32-39 at 38.

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their own given goals projected in symbols, that of rituals, art, language, gestures, myth, social custom and law, in sum "the entire affective life of men".[21]

B Vico's Fantasia and Sensus Communis

Vico's *Scienza Nuova* is a balancing act between classical and modern authors; on one side, there was Plato and Tacitus, and on the other, Bacon and Grotius.[22] They were his source of inspiration and dissent.[23] Admittedly, there is a fifth thinker that serves as a foundation for his dialectical readership, Augustin of Hippo.[24] Vico implemented a kind of dialectic to understand Natural Law. His study centres on the Roman Empire to discover and interpret institutions through history, myth and figures of speech,[25] a method that is framed as *fantasia*.[26] As a result, he divorced himself from the Enlightenment's rationalistic proposal. He understood the original contract through history instead of reason.[27]

Hence, new laws are expressions of the new ways of life that come to be, pointing towards a more liberalist view.[28] However, even if Vico appears to propose movement in natural law, he had a monist approach, recognizing a type of 'immutable natural law' – *fas*, a law shared with animals, being the right given by God to protect their lives and to propagate their species. In contrast, the 'posterior natural law' came from *ius*, an impulse to the equity stemming from social conflicts out of which more equitable arrangements among the different societies emerged, thus, mutability and change of the law.[29] The class struggles[30] were also religious ones.[31] Under this rhetorical project, the law is created not to prevent violence but to administer violence by the strong to the weaker, not a contract between seemingly equals, but from superiors to inferiors.[32] In his assessment of the posterior natural law, he divided the natural law of the peoples and the second one, the natural law of the philosophers, a particular dialectic, the natural law of the peoples affected the natural law of the philosophers. The natural law of the people comprised the *ius gentium* and *sensus communis*. For Vico, the *ius gentium* was a

21 Isaiah Berlin, 'Corsi E Ricorsi', *The Journal of Modern History*, 50/3 (September 1978), 480-489 at 488.

22 Verene, *Giambattista Vico: Keys to the New Science. Translations, Commentaries, and Essays*, at 8.

23 Isaiah Berlin, 'The Divorce between the Sciences and the Humanities', *in* Henry Hardy (ed.), *Against the Current: Essays in the History of Ideas* (2nd edn.; Princeton: Princeton University Press, 2013a), 101-139 at 130.

24 Giuseppe Mazzota in Giambattista Vico, 'Introduction', *The New Science* (New Haven: Yale University Press, 2020a) at xviii.

25 John D. Schaeffer, *Giambattista Vico on Natural Law: Religion, Rhetoric and Sensus Communis* (Abingdon and New York: Routledge, 2019a) 131 pages, at 23.

26 Berlin and Hardy, *Three Critics of the Enlightenment: Vico, Hamann, Herder*, at 168.

27 Schaeffer, *Giambattista Vico on Natural Law: Religion, Rhetoric and Sensus Communis*, at 4.

28 Berlin and Hardy, *Three Critics of the Enlightenment: Vico, Hamann, Herder*, at 132.

29 Schaeffer, *Giambattista Vico on Natural Law: Religion, Rhetoric and Sensus Communis*, at 23-25.

30 Robert W. Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory', *Millennium: Journal of International Studies*, 10/2 (1981), 126-155 at 132).

31 Schaeffer, *Giambattista Vico on Natural Law: Religion, Rhetoric and Sensus Communis*, at 26.

32 *Ibid.*, at 36-37.

series of values and practices shared by most societies, constantly developing due to social change, and in which there can be conflict and even violence.[33] Negotiations took place at political and religious levels, creating the *sensus communis*, a consensus of values, meanings, institutions and language constructed out of such *sensus communis* served for reflection on the 'natural law of the philosophers', accordingly the posterior natural law can never be static; the *ius gentium* and the *sensus communis* sparked change.[34]

Vico's scheme differs from Aristotle and Aquinas's teleology, and proposes a different route to natural law, instead of the reason, is history, diverging from Hobbes, Locke, Grotius, Pufendorf, Selden and Kant.[35] All of them offered

> a fixed, universal human nature, from the needs of which it is possible to deduce a single set of principles of conduct, identical everywhere, for everyone, at all times, and constituting therefore the perennial basis of all human laws.[36]

In other words, what Vico called the 'conceit of the philosophers'. Instead, he proposed history as a 'movement in orbit'. A counter-Enlightenment standpoint or a different vision of the Enlightenment.[37] For Vico, the true natural law, the *sensus communis*, served as harmonization of various laws of a nation, without one nation following in exact terms another nation.[38] For him, this is the true natural law, not that natural law of the philosophers.[39] The evolution of the law can be rooted in using the language, 'philologically'[40] however, without a stark division with philosophy, a connection between philology and philosophy.[41]

C Against the Enlightenment?

Vico was somewhat wary of a final solution and departed against the Enlightenment's ideal of progress. As said above, history moved in cycles.[42] Such movement in cycles

33 *Ius gentium* was defined as *ius violentiae*, divided between *ius maiorum gentium* and *ius minorum gentium*, see further Verene, *Giambattista Vico: Keys to the New Science. Translations, Commentaries, and Essays*, at 21.

34 John D. Schaeffer, *Giambattista Vico on Natural Law : Religion, Rhetoric, and Sensus Communis* (Abingdon, Oxon and New York: Routledge, 2019b) at 2.

35 Schaeffer, *Giambattista Vico on Natural Law: Religion, Rhetoric and Sensus Communis*, at 3.

36 Berlin and Hardy, *Three Critics of the Enlightenment: Vico, Hamann, Herder*, at 116-131.

37 Which relates with the 'interminable procedural present' as signalled by David Kennedy in Kennedy, 'A New Stream of International Law Scholarship', at 2.

38 Vico, *The New Science (Principles of the New Science of Giambattista Vico About the Common Nature of the Nations. In This Third Edition. Corrected, Clarified, and Notably Expanded by the Author Himself in a Great Number of Place)* at 79, Para. 146.

39 Berlin and Hardy, *Three Critics of the Enlightenment: Vico, Hamann, Herder*, at 132.

40 *Ibid.*, at 134.

41 Vico, *The New Science (Principles of the New Science of Giambattista Vico About the Common Nature of the Nations. In This Third Edition. Corrected, Clarified, and Notably Expanded by the Author Himself in a Great Number of Place)* at 74, Para. 119, Verene, *Giambattista Vico: Keys to the New Science. Translations, Commentaries, and Essays*, at 13.

42 Berlin and Hardy, *Three Critics of the Enlightenment: Vico, Hamann, Herder*, at 106.

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is what is called his *storia ideale eterna*, offering a doctrine upon which societies move in cycles, closely connected to what Peter Turchin calls *cliodynamics*, secular cycles, upon which history follows some types of laws, that is, a type of a regular mechanism in human activity.[43] Even if it is not settled whether Vico was part or not of the Enlightenment, Mark Lilla suggests instead of counter-Enlightenment and the Enlightenment, it is preferably better to talk about the 'Enlightenments'.[44] The four qualities upon which the Enlightenment is associated[45] – uniformity, undifferentiation, homogeneity and monolithic vision – are contested. The Enlightenment can be regarded as a "self-conscious 'project' conceived to transform human existence",[46] a project oriented to the future "to the point of seeming impossibly utopian",[47] differentiating itself from the scholastic philosophy and religion. Yet, to John Gray, the Enlightenment is just a chapter in the history of religion,[48] in line with David Kennedy, who claims that law repeats in a 'secular key' dividing the sacred and the profane, "seems the most central concern of religion itself".[49]

If it is admitted that the Enlightenment is at least teleological, it has certain traits that can be associated with Socrates or Plato, similarly to theological paths with Jewish, Christian and Muslim traditions,[50] and in a more modern secular tone than that of Kant, Bentham, Mills, Hegel and Marx,[51] which feed teleological projects, as Communism, the whole project for universal democracy and even the formulations of a global free market for a 'better world'. In John Gray's words, such projects entail 'apocalyptic beliefs' merged with utopian projects that then transform into 'religious myths', which end up being violent faith-based projects,[52] that "[i]nternational law [...] should not be thought of as founded upon one moral purpose to the exclusion of others".[53] Religion started as a social force, then

43 Peter Turchin, 'Toward Cliodynamics: An Analytical, Predictive Science of History', *in* David C. Krakauer, John Lewis Gaddis, and Kenneth Pomeranz (eds.), *History, Big History, & Metahistory* (Santa Fe, New Mexico: The Santa Fe Institute Press, 2017), 235, 59, at 245.

44 Mark Lilla, 'What Is Counter-Enlightenment', *in* Joseph Mali and Robert Wokler (eds.), *Isaiah Berlin's Counter-Enlightenment* (*Transactions of the American Philosophical Society*. Held at Philadelphia for Promoting Useful Knowledge, 93; Philadelphia: American Philosophical Society, 2003), 1-11, at 6.

45 Robert Wokler, 'Isaiah Berlin's Enlightenment and Counter-Enlightenment', *Ibid.*, 13-31.

46 The Enlightenment can be understood as a "self-conscious 'project' conceived to transform human existence, *in* Lilla, 'What Is Counter-Enlightenment', at 4.

47 Daniel Brewer, 'The Enlightenment Today?', *The Cambridge Companion to the French Enlightenment* (Cambridge: Cambridge University Press, 2014), 1-13, at 1-2.

48 John Gray, *Black Mass. Apocalyptic Religion and the Death of Utopia* (London: Penguin Books, 2007) at 1-3.

49 Kennedy, 'A New Stream of International Law Scholarship', at 23.

50 George Crowder, 'Pluralism, Relativism, and Liberalism', *in* Joshua L. Cherniss and Steven B. Smith (eds.), *The Cambridge Companion to Isaiah Berlin* (Cambridge: Cambridge University Press, 2018), 229-249, at 233.

51 *Ibid.*

52 Gray, *Black Mass. Apocalyptic Religion and the Death of Utopia*, at 1-3.

53 Guglielmo Verdirame, 'International Law', *in* John Tasioulas (ed.), *The Cambridge Companion to the Philosophy of Law* (Cambridge, United Kingdom; New York: Cambridge University Press, 2020), 389-407, at 398.

reconfigured to philosophy, surviving as principles that guide international institutions.[54]

The religious Enlightenment with the ideal of progress can be discerned in two forms: the first, where the conditions to implement the projects are absent, in this category are projects that seek to establish a perfect harmony among the vast array of human values working without any trace of contradiction; examples are Marxism, anarchism, technocratic and liberal projects. The second type, where the achievements sought are impossible to obtain, such as the democratic project in Iraq after the removal of Saddam Hussein[55] and, most recently, the fight against terror and its whole project in Afghanistan. The faith in 'progress' to transform human existence to eliminate all evils and attain ultimate harmony is there. Even if it requires the use of violence as means to transform reality[56] at the expense of "breaking some eggs",[57] the religious belief in progress can have "recipes for graveyards".[58] As Kennedy asks himself,

> [C]an we read this [...] without thinking about communism, without prefiguring the post 1918 institutional structure of decolonization, self-determination and international administration? Without reaffirming international law as having done with all that, with empire, with universalism, with ideology, with war?[59]

The two swords of religion and law are a "collaborative project of division, exclusion and repression".[60] There is always a new apocalypse coming, a new secular, enlightened project, which seems to put more urgency. Climate change, what will be the consequences of a fight that we are doomed to fail? Moreover, how many lives will this fight take? What would happen if we do not fight? Even to put a name: 'the fight against climate change' replicates the idea of war, it is a fight, and in both, it predominates a monolithic vision. For example, a study led by Ayesha Tandon from Carbon Brief documents that out of the thousand authors from the 'The Reuters Hot List',[61] only five were African scientists and only 122 female authors. In general, South America entails just 2.8 per cent and Africa 0.7 per cent, meanwhile Europe 40.7 per cent and North America 33.2 per cent.[62] Who will lead

54 Kennedy, 'A New Stream of International Law Scholarship', at 19.

55 Gray, *Black Mass. Apocalyptic Religion and the Death of Utopia*, at 20-21.

56 *Ibid.*, at 21.

57 Aurelian Craiutu, 'Isaiah Berlin on Marx and Marxism', *in* Joshua L. Cherniss and Steven B. Smith (eds.), *The Cambridge Companion to Isaiah Berlin* (Cambridge: Cambridge University Press, 2018), 97-115, at 113.

58 Timothy Fuller, 'Michael Oakeshott: The Philosophical Skeptic in an Impatient Age', *in* Catherine H. Zuckert (ed.), *Political Philosophy in the Twentieth Century. Authors and Arguments* (Cambridge: Cambridge University Press, 2011), 142-153, at 147.

59 Kennedy, 'A New Stream of International Law Scholarship', at 20.

60 *Ibid.*, at 25.

61 Maurice Tamman, 'The Reuters Hot List' (last updated 20 April 2021), www.reuters.com/investigates/special-report/climate-change-scientists-list/ (last accessed 25 October 2021).

62 Ayesha Tandon, 'Analysis: The Lack of Diversity in Climate-Science Research', www.carbonbrief.org/analysis-the-lack-of-diversity-in-climate-science-research (last accessed 25 October 2021).

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the discourse on the 'fight against climate change'? Probably, the geographical zones with higher representation. In the name of science, there will be actions to counter the effects of climate change. In the name of science, there will be possibly grotesque outcomes, a 'race to the greenest' at the expense of 'breaking some eggs'. There is the risk of voices being shut. The "imposition of violence, intimidation, or propaganda the realization of only one form of civilization for itself the status of universality".[63] Vico – seen through the lenses of Isaiah Berlin – criticized this aim for the final solution. Which later transformed into the eighteenth-century rationalism, with Rosseau at the centre stage, the idea of one right way of human living that took the shape of totalitarian orders, that of communism and fascism.[64] Now, it seems that humanity runs the risk of a universal 'greener solution'.

Scepticism of future-based projects and utopian-religious sentiments is an anti-utopian stance or a term coined by Aileen Kelly as 'romantic irony' or to some degree with what Anne Orford refers to as the 'hermeneutic of suspicion' where lawyers, when interpreting, cannot escape their own historical context.[65] Such romantic irony challenges the metaphysical visions centred on a unitary reason, either call it Divine Providence or Universal Reason, all-in-all scepticism at projects that seek to explain the course of human history, leading to a state of harmony and happiness.[66] As said before, Vico criticized the 'conceit of philosophers', criticizing the fixed view of universal answers through space and time. Instead, answers could be obtained from historical reconstruction, most likely through *fantasia*. The implementation of imaginative reconstruction in the understanding of a society or an institution. Although there are some warnings of such imaginative reconstruction since it can take two different and irreconcilable paths, one that inspired Herder's work on pluralism and liberalism and another taken by Joseph de Maistre's work, leading to irrationalism and pessimism, even to the extreme to neglect science and empirical methods.[67] From a Vichian perspective, to exercise self-reflection, that is, to be anti-utopian, is to be critical, to see "perpetual motion, change and flow against any static and hence suffocating model".[68] Isaiah Berlin claims that Giambattista Vico's original notion of history helped see history as a human endeavour capable of human reconstruction, which served as a source of inspiration to further philosophers:

> Self-transformation of man and of human institutions in the course of man's struggle to overcome human and natural obstacles, which, because it is the

63 Steven B. Smith, 'Isaiah Berlin on the Enlightenment and Counter-Enlightenment', *in* Joshua L. Cherniss and Steven B. Smith (eds.), *Cambridge Companions to Philosophy* (Cambridge: Cambridge University Press, 2018), 132-148, at 142.

64 Ian Shapiro and Alicia Steinmetz, 'Negative Liberty and the Cold War', *ibid.*, 192-211, at 195.

65 Anne Orford, *International Law and the Politics of History* (Cambridge: Cambridge University Press, 2021) at 5-9.

66 Aileen Kelly, 'Irony and Utopia in Herzen and Dostoevsky: From the Other Shore and Diary of a Writer', *The Russian Review*, 50/4 (1991), 397-416, at 398.

67 Smith, 'Isaiah Berlin on the Enlightenment and Counter-Enlightenment', at 144.

68 Gina Gustavsson, 'Berlin's Romantics and Their Ambiguous Legacy', *in* Joshua L. Cherniss and Steven B. Smith (eds.), *Cambridge Companions to Philosophy* (Cambridge: Cambridge University Press, 2018), 149-166, at 157.

> activity of men, and the consequence of human structures, can be understood by men, understood as nature cannot be. This is his own: it is this original doctrine that inspired Michelet and Croce and gained the admiration of both Marx and Dilthey.[69]

D History as Critical Theory

The fact remains that Vico could provide a possible alternative approach to Kant's ideal paradigm.[70] To do this is to take a step back to such ideal projects that seek human improvement in a linear progressive mode. However, there is a word of caution since Vico comes from the Italian tradition that engaged in talking directly to the 'fire'.[71] This tradition is shared with Gramsci, Croce and Machiavelli. Instead of the transformation of the world, the historical mode of knowledge as espoused by Vico follows perhaps a humbler aim, obtaining down-to-earth freedom through political order.[72] Accepting that different cultures are asking different questions seeking different and valid ends,[73] instead of central values, we can have "imaginative sympathy",[74] or "historical empathy", as expressed by Herder.[75] This turn to empathy relates to Devetak's proposition of "critical international theory in a historical mode",[76] a contextualist approach to critical international theory departing possibly from Vico's approach to history.[77] Ideas have a context. Past civilizations should not be judged in accordance to present advanced knowledge. Avoiding 'presentism',[78] judging distant times against current and dominant assumptions.

> [W]riting the history of the civil world required a method capable of understanding changing cultural, and political conditions, for these conditions form the contexts within which civil institutions such as nations or states rise and fall.[79]

Such contextual approach aims at a "more complete institutional welfare system at the international level".[80] Recognizing that the states are human institutions

69 Berlin and Hardy, *Three Critics of the Enlightenment: Vico, Hamann, Herder*, at 200.
70 Fred Rush, 'Conceptual Foundations of Early Critical Theory', *in* Fred Rush (ed.), *The Cambridge Companion to Critical Theory* (Cambridge Companions to Philosophy; Cambridge: Cambridge University Press, 2004), 6-39, at 10-11.
71 Stanley Hoffman, 'An American Social Science: International Relations', *Daedalus*, 106/3 (1977), 41-60, at 59.
72 Devetak, *Critical International Theory: An Intellectual History*, at 162.
73 Isaiah Berlin, 'The Lessons of History', *in* Joshua L. Cherniss and Steven B. Smith (eds.), *The Cambridge Companion to Isaiah Berlin* (Cambridge: Cambridge University Press, 2018), 265-276, at 276.
74 Smith, 'Isaiah Berlin on the Enlightenment and Counter-Enlightenment', at 140.
75 *Ibid.*, at 141.
76 Devetak, *Critical International Theory : An Intellectual History*, at 181-182.
77 Devetak, 'A Rival Enlightenment? Critical International Theory in Historical Mode', at 439.
78 Orford, *International Law and the Politics of History*, at 78.
79 Devetak, 'A Rival Enlightenment? Critical International Theory in Historical Mode', at 440.
80 Kennedy, 'A New Stream of International Law Scholarship', at 48.

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conveys the idea that "[i]nternational law is what international lawyers do and how they think",[81] to understand institutions in the argumentative context,[82] as they were understood in their own time,[83] that institutions come from the human effort of "describing, arguing and legitimating political interests and activities".[84]

Nevertheless, how can the contextualizing approach be understood as a critical theory in international law? Quentin Skinner answers that contextualizing gives a distance to the present, helps in reconsidering assumptions in a historical light and historicizes prevailing assumptions.[85] In line with a Vichian perspective, contextualization should avoid a historical reconstruction aiming at a linear progression. Contextualization should avoid imposing present dominant knowledge on past actions. The avoidance of 'presentism' and 'continuismo' when making history of international law.[86] What is more, coupled with the avoidance of 'presentism', there is the anti-utopian stance, which could lead to a level of liberal pragmatism; that "is willing to live with plurality rather than demand harmony".[87] In other words, to accept the splendour of diversity of the human experience, that the "crooked timber of humanity"[88] – imperfection is, in essence, a "characteristic of humanity [which] is, on the contrary, both our most tantalizing and awe-inspiring feature",[89] accordingly, to take a sincerely approach that the fundamental human goods in the 'human horizon' might be present or absent in a particular society.[90] Contextualizing is to ask questions that Koskenniemi asked to international law, "[W]ho have been the international lawyers? How have they been trained? What types of activity have they been engaged in? Have foreign offices followed their opinions?"[91] For instance, Ignacio de la Rasilla's *International Law and History* monograph serves as a roadmap for a type of contextualization in international law.[92] Accordingly, contextualization could be a route to avoid a nuclear view of international law, where one set of values excludes others,[93] in short, to avoid

81 Martti Koskenniemi, 'Between Commitment and Cynicism. Outline for a Theory of International Law as Practice', *in* Jean D'aspremont *et al.* (eds.), *International Law as a Profession* (Cambridge: Cambridge University Press, 2017), 38, 66, at 65.

82 Martti Koskenniemi, 'Why History of International Law Today?', *Rechtsgeschichte: Rg: Zeitschrift des Max-Planck-Instituts für Europäische Rechtsgeschichte*, 2004/4 (2004), 61-66, at 64.

83 Devetak, 'A Rival Enlightenment? Critical International Theory in Historical Mode', at 444-445.

84 *Ibid.*, at 445.

85 Quentin Skinner in: *ibid.*, at 446.

86 Koskenniemi, 'Why History of International Law Today?', at 63.

87 Kelly, 'Irony and Utopia in Herzen and Dostoevsky: From the Other Shore and Diary of a Writer', at 399.

88 Fania Oz-Salzberger, 'Isaiah Berlin on Nationalism, the Modern Jewish Condition, and Zionism', *in* Joshua L. Cherniss and Steven B. Smith (eds.), *Cambridge Companions to Philosophy* (Cambridge: Cambridge University Press, 2018), 169-191, at 180.

89 Gustavsson, 'Berlin's Romantics and Their Ambiguous Legacy', at 166.

90 Crowder, 'Pluralism, Relativism, and Liberalism', at 242.

91 Koskenniemi, 'Why History of International Law Today?', at 66.

92 *See* Chapter 2 in Ignacio De La Rasilla, *International Law and History. Modern Interfaces*, eds Larissa Van Den Herik and Jean D'aspremont (Cambridge Studies in International and Comparative Law; Cambridge: Cambridge University Press, 2021).

93 Verdirame, 'International Law', at 398.

becoming a prophet of the international law's faith.[94] To sum up, in the words of Isaiah Berlin on Vico and his view on history:

> Man's history for Vico is indeed a succession, but a succession of collective outlooks and conduct, of patterns of communal activity and response, which convey and embody images of the world and motives and goals – the story of the perpetual striving by men to maintain or transform relationships among themselves and with circumambient nature – and endless process enshrined in symbols – written and spoken, articulated in institutional life and every form of expressive behavior – which can be decoded by posterity [...] means of collective self-expression – ritual, art, language, gestures, myth, social custom, law, above all, the entire affective life of men.[95]

E Conclusion

Vico's work was ahead of his time. His writings on myths and symbolic structures had a formative element to the works of Hamann, Schelling, Nietzsche and Durkheim; even Isaiah Berlin claims that Vico was the true founder of the German historical school.[96] Also, he is considered by some the forerunner of the dialectical thinking of Marx.[97] Political philosophy and the history of political ideas were the subjects of profound study by Isaiah Berlin.[98] In addition, Robert Cox also claims to be heavily influenced by Vico in his work on critical theories in international relations.[99] Moreover, Donald Phillip Verene created the Institute for Vico Studies and its journal[100] sponsored by Emory University,[101] providing two sets of lists with a staggering amount of works relating to Vico, one from 1884 to 2009[102] and the other from 2009 to 2018.[103] Similarly, Vico has been a significant influence in literary works. Peone indicates that Vico was a source of inspiration to James Joyce in his novel *Finnegans Wake*, Carlos Fuentes' *Terra Nostra* and *Christopher Unborn*,

94 Koskenniemi, 'Between Commitment and Cynicism. Outline for a Theory of International Law as Practice', at 43.

95 Berlin, 'Corsi E Ricorsi', at 488.

96 Berlin and Hardy, *Three Critics of the Enlightenment: Vico, Hamann, Herder*, at 137.

97 Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory', at 132.

98 Isaiah Berlin, 'Giambattista Vico and Cultural History', *in* Henry Hardy (ed.), *The Crooked Timber of Humanity: Chapters in the History of Ideas* (2nd edn.; Princeton and Oxford: Princeton University Press, 2013d), 51-72, Berlin and Hardy, *Three Critics of the Enlightenment: Vico, Hamann, Herder*, Berlin, 'Vico and the Ideal of the Enlightenment', Isaiah Berlin, 'Vico's Concept of Knowledge', *in* Henry Hardy (ed.), *Against the Current: Essays in the History of Ideas* (2nd edn.; Princeton: Princeton University Press, 2013b), 140-150.

99 Devetak, *Critical International Theory: An Intellectual History*, at 109.

100 Philosophy Documentation Center, 'New Vico Studies', *The Journal of the Institute for Vico Studies, 1983-2009*, www.pdcnet.org/newvico/New-Vico-Studies

101 Emory University, 'Institute for Vico Studies', http://ivs.emory.edu/home/index.html (last accessed 8 November 2021).

102 Molly Black Verene, 'Works on Giambattista Vico in English from 1884 through 2009', *New Vico Studies*, 1/27 (2009), 83-304.

103 Dustin Peone, 'Works on Giambattista Vico in English from 2009 to 2018', *ibid.* (2018).

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Byatt's *Possession*, Borges, *The Immortal* and Balzac's *The Illustrious Gaudissart*. Also, Vico is mentioned in Milan Kundera's *Immortality* and was even read by Dostoevsky.[104]

The originality of Vico and his influence cannot be denied. His approximation of the philosophy of history from philology and philosophy is a step towards critical studies. In a more nuanced way, Vico shares common traits with David Kennedy, Marti Koskenniemi and Anne Orford, just to name a few. On one side, Kennedy and Vico shared the conviction that legal education needs reassessment.[105] They share the value of historical investigation and seem to delve deep into history, maybe even through '*fantasia*' when reconstructing history to go even "to the uttermost parts of the Earth".[106] The element of history opens the spectrum of the evolution of international law as a human endeavour. Admittedly, Vico's thought on the law of nations is a task to be achieved in further works. Hopefully, as Verene states, "[W]hat Grotius had begun for our comprehension of law and the life of nations, Vico would correct, transform, and complete".[107] All in all, the movement in orbit rather than a straight line to progress opens the discussion of plurality and how values may clash one with the other. To select the value of security over democracy, how the fight against COVID-19 (coronavirus disease 2019) brought values in a direct clash and the value of health and human life in direct contradiction to that of freedom of movement. Hence, depending on the situation, some values have pre-eminence and sometimes get into conflict with each other. To sum up, taking a step back as an international legal scholar helps understand that the project for a 'better future' can take the form of a 'faith'-based project, with negative results. Situating ourselves at a safe distance will help us reflect on what the international legal scholars are doing in this 'mad world'.[108]

104 *Ibid.*, at 4-7, Giuseppe claims that Vico was as well read and posed a great deal of enigmatic enchantment to Hamann, Herder, Goethe, Michelet, and Carpentier in: Giuseppe Mazzotta, *The New Map of the World: The Poetic Philosophy of Giambattista Vico* (Princeton: Princeton University Press, 1999) at x.

105 Giuseppe Mazzota claims this criticism of the legal education in Vico's works, *in* Vico, 'Introduction', at xix, Kennedy focusing more on the international legal scholarship, *in* Kennedy, 'A New Stream of International Law Scholarship'.

106 Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870* (Cambridge: Cambridge University Press, 2021).

107 Verene, *Vico's New Science. A Philosophical Commentary*, at 6.

108 Michael Andrews, 'Mad World (Feat. Gary Jules)', *Donnie Darko (Original Motion Picture Soundtrack)* (2001).