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CIVIL SCIENCE IN THE RENAISSANCE: JURISPRUDENCE ITALIAN STYLE

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In the history of Renaissance thought and learning jurisprudence seems to be a missing term. Not that the scholarship of civil, canon and customary law is itself lacking, or lagging, but it has not been sufficiently integrated with that of other fields, and even in the modern history of the Renaissance 'encyclopedia' it does not hold high priority. In some modern views of the *studium*, in fact, law seems to stand not only below the *trivium* and *quadrivium* but even, since it lacks utility as well as liberality, below the mechanical arts. Petrarch and other humanists would no doubt be pleased at this turnabout; and others may find justice (in a historian's if not a lawyer's sense) at the fall of the profession of law from academic grace. For present purposes, however, we must try to lay aside the prejudice which many of us may feel toward lawyers, modern counterparts of the pedants derided by Petrarch and the 'mean and mercenary' pettifoggers denounced by Cicero. It is not the purpose here to plead the cause of Renaissance jurists; but it may be possible, by attending to some of their less celebrated (or lamented) achievements, to do some justice to their place in the history of learning.

I

Much, perhaps too much, has been made of the sixteenth-century battle between the Italian and the French methods of law (*mores italicus* and *gallicus*), that is, between the scholastic jurisprudence associated with Bartolus and his professional colleagues and the new wave of humanist studies of the law.[1] The popular view of this controversy is illustrated by a little-known treatise *On the corrupted words of civil law* published by Claudio Tolomei in 1517. In this dialogue Giason del Maino appears as spokesman for the professional lawyers and Angelo Poliziano for the usurping 'grammarians'. Invoking the names of Pico, Ermolao Barbaro

[1] From different point of view there are discussions of 'legal humanism' (an unfortunate coinage since it suggests a counterpart 'illegal humanism') in D. Maffei, *Gli inizi dell'umanesimo giuridico* (Milan, 1956); D. R. Kelley, *Foundations of modern historical scholarship* (New York, 1970); and H. Troje, *Graeca leguntur* (Cologne, 1971).

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and other men of eloquence, Poliziano ridicules Giason for his ties with Bartolus, Baldus and such barbarians, whom he taxes with ignorance of history and bad taste in language (practically equivalent faults).[2] Giason's endorsement of such neologisms as *bastardum* and *guerra* (for *bellum*) could only corrupt the pure sources of law, as Lorenzo Valla had pointed out, and indeed Petrarch before him. Against such charges Giason seemed defenceless, and his weak responses typify the generally bad press enjoyed by Bartolists in the Renaissance, at least in texts likely to be read by historians.

Yet the notion that the conflict between humanist and scholastic jurisprudence was a gradual victory of the children of the light against the forces of medieval darkness is in no way historically tenable. To characterize the relationship in general one can hardly do better than to quote the conclusions of P. O. Kristeller about the analogous relationship between philosophy and humanism. 'The common notion that scholasticism as an old philosophy was superseded by the new philosophy of humanism is. . . disproved by plain facts,' writes Kristeller, 'for Italian scholasticism [here read: the *mos italicus*] originated toward the end of the thirteenth century, that is, about the same time as did Italian humanism, and both traditions developed side by side throughout the period of the Renaissance and even thereafter.'[3] Contacts there surely were, but no conquest of one by the other. So it was, too, with *l'umanesimo giuridico*, a movement that belongs rather to the history of literature, scholarship and education than to the law. The iconoclasm of Valla and the 'grammatical' method of Poliziano were certainly essential for the restoration and interpretation of legal texts, but they had no closer relation to jurisprudence than the higher criticism of the Bible has to theology – which is to say, not necessarily any at all. In order to understand the significance of Renaissance jurisprudence attention must shift from this noisy but peripheral logomachy – another of the interminable and inconclusive *dispute delle arti* – to the proper intellectual concerns of the jurists. So the focus here is not on the amateurs of the *mos gallicus*, who would subordinate law to the *studia humanitatis*, but rather on the 'pros', the advocates of the *mos italicus* – that is, so to say, on 'jurisprudence Italian style'.[4]

The starting point for the modern science of law is the authoritative corpus of Romano-Byzantine law assembled by the editors of the Emperor Justinian in the sixth century. These texts, together with the sources of older Greek and especially Aristotelian science, formed the

[2] Claudii Ptolemaei Senen., *De corruptis verbis iuris civilis dialogus* (Siena, 1517?), sig. Bi ff. Cf. P. Rossi in *Studi Senesi*, XXIX (1912), 358–72.

[3] *Studies in Renaissance thought and letters* (Rome, 1956), p. 576.

[4] G. Kisch, *Humanismus und Jurisprudenz, Der Kampf zwischen mos italicus und mos gallicus an der Universität Basel* (Basel, 1955), and G. Astuti, *Mos italicus e mos gallicus nei dialoghi 'de iuris interpretibus' di Alberico Gentili* (Bologna, 1937), are fundamental studies.

basis for the first great revival of ancient learning in the twelfth century.[5] One striking but not always noticed characteristic of this antique legacy is its conceptual duality, a duality which reflected and preserved the ancient polarity between *physis* and *nomos*, between nature and convention, or law. On the one hand there was the natural, and naturalistic, science of Aristotle and attendant works; on the other hand the systematic doctrine of social rules, customs, procedures and institutions which medieval jurists came to call *legitima, legalis* or *civilis scientia*; and the two have never been entirely at ease with one another. Jurists defiantly represented their self-sufficient and self-generating 'civil science' as 'true philosophy' and, even when resorting to Aristotelian devices, set it apart as a rival and even a superior system. In a way this opposition represents the original confrontation of the 'two cultures'.

The story of this first legal renaissance is shrouded in legend; but the advancement of formal legal study from a rudimentary art (based on the literal and sometimes mistaken reading of the texts of the Digest, Institutes and Code) to a full-fledged science is well documented and well known, at least to legal historians. Ironically, this process began with a transgression of the law. Justinian, declaring that his collection would be unchanged 'for all time', officially prohibited any 'interpretation'; and it was in direct violation of this ban that civil science was established.[6] The first jurist to take this crucial step, according to Giason's colleague Andrea Alciato, was Azo; and the first stage of modern legal science, that of the 'glossators', was completed in the later thirteenth century with the assembling of the great Gloss of Accursius.

The second stage, and the one being considered here, is that of the Commentators; and it extends from that time not only through the Renaissance but well into the nineteenth century.[7] At the beginning of this tradition stand the philosophically inclined critics of the Gloss, including such French masters as Jacques de Révigny and Pierre de Belleperche, and at the other end such modern systematizers of civil law as Savigny and Rudolph von Ihering. However, the major phase, the great age of Italian legal science, extends from the time of Cino da Pistoia, contemporary and comrade of Dante, down to that of Alicato,

[5] See my 'Vera philosophia: the philosophical significance of Renaissance jurisprudence', *Journal of the History of Philosophy*, XIV (1976), 267–79; and for background E. Cortese, *La norma giuridica* (2 vols., Milan, 1962–4); F. Calasso, *Medio evo del diritto*, I (Milan, 1954); P. Koschaker, *Europa und das römische Recht* (Berlin, 1958); F. Wieacker, *Privatrechtsgeschichte der Neuzeit* (Göttingen, 1967); *La formazione storica del diritto moderno in Europa* (*Atti del terzo Congresso internaz, della società italiana di storia del diritto*) (3 vols., Florence, 1977); and for bibliography W. Ullmann, *Law and politics in the middle ages* (Ithaca, 1975).

[6] Justinian, constitution *Omnem*, and Alciato, *Parerga*, IX, 25, in *Lucubrationum in ius civile*, II (Basel, 1557), 86 ff. Cf. F. Pringelsheim, 'Justinian's prohibition of commentaries to the Digest', in his *Gesammelte Schriften*, II (Heidelberg, 1961), 438.

[7] Classic survey by W. Engelmann, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre* (Leipzig, 1938).

contemporary and comrade of Erasmus. The focus here is on this period, roughly from 1300, when Cino began to part company with his French masters, to 1550, when Alciato died and was already being superseded by his (also French) disciples. If this discussion does not always respect chronology, this is quite in keeping with the style of the jurists themselves, who collaborated and debated over many generations: indeed such transcendant 'cooperative scholarship' was essential to civil science.

Yet if lawyers continued to live in their own world, this does not mean that they did not keep up with the times. Recent attention has been given to 'the role of the lawyers in starting the Renaissance' (in the words of Roberto Weiss),[8] and much more remains to be said about their role in continuing it. Not only defectors like Petrarch and iconoclasts like Valla but also humdrum professionals like Bartolus and Giason contributed to the transmission and transformation of ancient learning. If the opposition between scholasticism and humanism has been overdrawn, so has that between the mindless 'apes of Cicero' and the barbaric worshippers of novelty, the first stage of the notorious quarrel between ancients and moderns. Cino da Pistoia, one of the founders of the *mos italicus* – *conditor iuris*, Bartolus calls him – is an excellent example of a Renaissance scholar whose method was based on a balance and synthesis of ancient and modern learning. On the one hand he was an accomplished classicist who cited in his commentaries not only jurists and orators but also poets (such as Juvenal and Ovid) and historians (such as Valerius Maximus and that *princeps historiographorum* Sallust). On the other hand he did not overlook what he called the 'novelties of modern scholars' (*novitates modernorum doctorum*), and in fact at the beginning of his famous lectures on the Code he took as his motto the principle that 'all novelty is pleasing' (*omnia nova placent*).[9] In this progressivist sense the Bartolist school belonged almost by definition to the party of the Moderns.

Cino's formula was hyperbole, of course. What he meant to express was not a celebration of all change but only the view that neither knowledge nor the process of thought was exhausted, or indeed exhaustible. Justinian's corpus was not the end of legal science, and neither was the Accursian Gloss. Some modern scholarship was nonsense, no doubt; and like his friend Dante, Cino rejected in particular the modernizing errors of the canonists (*decretistae*), whom he dismissed as politically corrupt as well as legally amateurish (*idiotae*); but ancient doctrine, he realized, could not be recovered or applied without modern analysis and adaptation. Politically, this procedure was illustrated by the

[8] *The dawn of humanism in Italy* (London, 1947), p. 5.

[9] *Lectura in Codicem, ad tit.* (Paris, 1528). In general, see G. Monti, *Cino da Pistoia giurista* (Città di Castello, 1924); G. Zaccagnini, *Cino da Pistoia* (Pistoia, 1918); and the collaborative volume, *Cino da Pistoia nei VI centenario della morte* (Pistoia, 1937).

attempt to justify the modern Ghibelline programme (which Cino shared with Dante) through the ancient imperial ideal.[10] In juridical and academic terms it meant moving from the specificity of ancient experience, that is, the letter of civil law, to a more general or equitable meaning which could serve and enhance modern society, in particular the Italian city states. Here we can see one of the perennial themes of civil science over many centuries: the pursuit of the 'reason' or 'spirit of the law' (*mens, ratio, intellectus, sententia* or *voluntas legis*).

Modernization through rationalization: this was the central aim of civil science as it was established by Cino and his successors. It is important to understand, however, that jurisprudence Italian style was by no means limited to the theory and practice of law narrowly, or pragmatically understood. Jurists had to evaluate questions both of fact and of law; they had in other words to be both experienced social critics and learned masters of a systematic science. What is more, the nature of their science and their method required them also to be in some ways historians and (in the old philosophical sense) anthropologists; and so at least inadvertently, and by the time of Alciato deliberately, they had begun to investigate aspects of the human condition that went far beyond legal pedagogy and normative practice. In at least one line of development the result was the transformation of legal science in one of its modes into what amounts to social science.

II

These goals of rationalization and anthropological enquiry unavoidably required attention to philosophy; and here, since the Glossators had scant interest in the subject, the French connexion was of prime importance. This includes not only the Aristotelianism of the university of Paris but also the methods of the jurists at the university of Orleans, most notably Jacques de Révigny, whom Cino called *magister omnium philosophorum.* Among the results of this was the introduction of the Aristotelian system of four causes and an adaptation of the scholastic method developed within the arts faculty. This is the way Cino described his method of teaching: 'First I shall make divisions, second give an account of the case, third offer comparisons, fourth objections, and fifth pose questions.'[11] In this dialectical scheme authority seems conspicuously inferior to reason; and so, for example, Cino declared on one point of law that 'no matter how many doctors agree, even if there are a thousand, they are all wrong'. The criterion was reasonableness; and the bottom line, the ultimate expression of the *ratio legis,* was (in Cino's words) 'my interpretation' (*doctrina mea*).

In the fourteenth century the philosophical interpretation of law was

[10] Zaccagnini, *Cino da Pistoia,* p. 200; cf. C. Davis, *Dante and the Empire* (Oxford, 1957), p. 141.

[11] Calasso, *Medio evo del diritto,* I, 571.

carried on and much elaborated by Cino's followers, especially his disciple Bartolo de Sassoferrato and his grand-disciple Baldo degli Ubaldi, who in later generations became the eponymous heroes of the *mos italicus* and villains of the *mos gallicus*.[12] In the sixteenth century students with humanist inclinations were still complaining about the excessive professionalism of 'Bartolo-Baldizing' professors, while conservatives like Alberico Gentili were still singing (in their prosiac way) the praises of these authors.[13] In fact the ill repute of conventional jurisprudence derived less from the founders themselves than from their deferential disciples – the proliferating academic progeny who in the intervening generations canonized Bartolus and Baldus, transforming them literally into '-isms', as philosophers had done to Thomas, Scotus and many others. In most quarters Bartolus and Baldus themselves continued to be respected; and even for Alciato, reputed founder of the *mos gallicus* (during his tenure at the university of Bourges) they remained the most authoritiative of all jurists. Bartolus was pre-eminent, the only jurist whose words had statutory weight, but Baldus was perhaps the more philosophical minded (φιλοσοφότατος was one of his titles) and the most often cited on political questions.[14] He is also one of the major Renaissance scholars still lacking a modern critical study.

Philosophy is undoubtedly one of the cornerstones of 'jurisprudence Italian style', but at this point it is essential to avoid one common misunderstanding. Methodologically civil law was in no way, according to its own lights, subordinate to formal philosophy. In a general way Baldus might acknowledge that 'moral philosophy is the mother of laws', but this was no more than to say that law was the product of justice.[15] In other words the civil science of the Renaissance was created not simply by infusion of Aristotelian categories and 'scholastic' method. More fundamentally it was the product of philosophical ideas and constructs embedded in its own tradition. Aristotelianism supplied some of the style, but the substance and structure of civil science were largely inherent – or more precisely the result of a much earlier, pre-Christian invasion of Greek ideas.[16] The notion of the 'four causes' was a feature of Cino's and especially of Baldus' thought, for example, but these categories merely imposed a general teleology on the legal process and did not even require a naturalistic interpretation.[17] The efficient cause referred to the original law-giver, the emperor or magistrate, corresponding to God or

[12] *L'Opera di Baldo, per cura dell'Università di Perugia nel V centenario dela morte del grande giureconsulto* (Perugia, 1901). There is a comparable *Bartolo da Sassoferrato: Studie e documenti per VI centenario* (2 vols., Perugia, 1962–3).

[13] Th. Beza, *Correspondance*, ed. H. Aubert et al., I (Geneva, 1960), 35.

[14] Calasso, *Medio evo del diritto*, I, 571.

[15] *Commentariorum iuris utriusque interpretis doctissimi Baldi de Ubaldis Perissimi Prima pars in Digestum vetus* (s.l., 1535), fo. 5.

[16] F. Schulz, *A history of Roman legal science* (Oxford, 1953), pp. 62 ff.

[17] *Commentarii*, fo. 3 ff; cf. C. de Seyssel, *Speculum feudorum* (Basle, 1566), p. 14.

the first mover; the material cause to the facts (to particular case or, more generally, to history as a whole), according to the old rule that law emerges from fact (*lex ex facto oritur*); the formal cause to particular laws and statutes; and the final cause to the public good of a community. A 'scholastic' form of argument was employed, but in detail it proceded from cases and according to legal authorities and legal rules. Much the same can be said of the *quaestiones* and *divisiones juris*, which likewise depended on legal convention. In general, when Renaissance jurists called their discipline 'true philosophy' (*vera philosophia*), they meant that it was independent of other sciences, so of course of other academic faculties, and had its own traditions, methods and purposes. This was one of the first lessons taught by Bartolus and Baldus – and also, of course, one of the first targets of alien critics, whether philosophers, theologians, doctors of medicine or the lowly humanists.

The most philosophical of jurists, Baldus was also the most ingenious in developing the conceptual resources of civil law. One perennial problem was the contradictions or 'antinomies' which Justinian's editors were unable to purge from the millennium of accumulated legal experience and legislation on which the Digest was based. Like the Byzantine compilers, the Glossators had tended to deny the existence of such *antinomiae*, while most commentators tried to argue them away; but Baldus' reaction was quite different. He went so far as to welcome *contraria* on the grounds that they opened up new possibilities of interpretation and of resolving difficult cases.[18] Like Cino, whose 'golden work' he much admired, Baldus was attracted and influenced by 'novelty'. His views constitute a reminder that it was not only the humanists who looked forward to a new age, to new cultural achievements and so, in a sense, to the advancement of learning. This dimension of the legal tradition has been recognized by Ernst Kantorowicz and others, but the difficulty of accommodating it to the stereotype of the Renaissance has restricted its appreciation too narrowly to medievalists.

Fundamental to Baldus' conception of civil science was the attempt to bridge the gap between nature and will. The connecting link between these opposed forces was human – or what from the twelfth century has been called 'positive' – law. 'Nature is ruled by the heavens...,' wrote Baldus of the *jus naturale*; 'the will, however, is free, and the law renders the latter so that it is not reduced to the former, and so free will is limited for the sake of justice' (*ad bonum et aequum*).[19] Though excluded by natural philosophy, the factor of free will was central to jurisprudence. 'The science of law cannot exist without the acts of men,' said Baldus, and elsewhere, 'jurisprudence is the science of accidents'. Human will not only created the need for legal science but also established its tie with

[18] *Commentarii*, fo. 4.

[19] Ibid. fo. 6; see also Tarducci in *L'opera di Baldo*, pp. 415 ff., and E. Kantorowicz, *The king's two bodies* (Princeton, 1957), pp. 298 ff.

the *vita activa* and the demands of communal life. 'New cases require new remedies,' declared Baldus; 'so new material arises, and so it is necessary to have recourse to the legislator.' It is the jurist, we may infer, who first encounters, judges and reacts to social novelty, one of the most concrete and immediate forms of historical change. Such attitudes constituted not only a challenge but also a duty to contribute to a growing body of theoretical and practical judgments to be fitted into a consistent philosophic framework. Indeed it was this combination of *theoria* and *praxis* that established the claim of jurisprudence to be 'true philosophy'.

III

If civil science did not take humanism very seriously in a conceptual way, this is by no means to imply that it did not in its own way depend upon classical models and precedents. The difference is that the *mos italicus* was concerned to preserve the spirit of classical forms rather than the letter of classical texts. This is a vast but, surprisingly enough, largely neglected question, even among legal historians. The formal connexions between the legal science of antiquity and that of the Renaissance are a function of that scholarly syndrome which I have called 'Gaianism', after the second century (A.D.) jurist commonly referred to (by medieval and modern civilians as well as by Justinian) as *Gaius noster*, 'our Gaius'.[20] The argument addresses itself to four aspects of the great tradition of Roman, or Romanoid, jurisprudence: legal methodology and hermeneutics, the form of social thought, the search for an 'intelligible field of study' for mankind as a whole, and finally the values and goals of human society. These four themes, corresponding to central issues in jurisprudence 'Italian style', also form some of the major links between ancient learning and modern legal science.

The methods of civil science have been deeply indebted to Gaius, and Renaissance jurists in particular remained faithful to the twofold approach that he exemplified. On the one hand Gaius placed the most fundamental reliance on history – not only on the accumulated Roman experience on which his *Institutes* was based but also on the conviction that jurists were professionally obliged to inquire into origins and causes in matters great and small. 'The most important part of anything is the beginning,' Gaius declared (*rei potissima pars principium est*).[21] This axiom served as the justification for the famous title 'On the origin of law', which constituted the historical introduction to the Digest (and incidentally the

[20] Pursued further in my '*Gaius Noster:* substructures of Western social thought', *American Historical Review*, LXXXIV, (1979), 619–48.

[21] Cf. my '*De origine feudorum:* the beginnings of an historical problem', *Speculum*, XXXIX (1964), 27–68, and 'The rise of legal history in the Renaissance', *History and Theory*, IX (1970), 174–94.

classical model for one genre of legal history). It also defined the strategy for the examination of any particular *quaestio*. 'The jurisconsult...', according to Baldus, 'begins at the origin of law with the investigation of first principles' (*Jurisconsultus... incipit ab origine iuris ab investigatione principiorum*).[22] Joined to this concern for the *causa, fons et origo* was Gaius' equally characteristic dialectical method, derived from Greek philosophy and the basis for various essential distinctions, divisions and modes of explanation. In view of the persistence of these two defining features of Gaianism throughout the whole career of Roman legal science, it is not surprising that jurisprudence Italian style, possessing its own sources of rational and historical method, should be understood as independent both of scholasticism and Renaissance humanism.

IV

Within this general methodological strategy Renaissance jurists developed their own particular tactics, and in fact their conception of interpretation represents a significant (though again largely neglected) phase in the history of hermeneutics. Starting with the classic essay of Dilthey, 'Die Entstehung der Hermeneutik', this field has been understood mostly in terms of literary, biblical and philosophical criticism; but in some ways the juristic counterpart of these more recognizable traditions was developed in a more sophisticated and certainly more socially relevant fashion.[23] Despite Justinian's ban, the practice of *interpretatio* was unavoidable; and from the fourteenth century there arose a massive literature, indeed a new literary genre, devoted to the interpretation of law. The focus was on the very last title of the Digest, 'On the meaning of words' (*De verborum significatione* or *significationibus*), a topic which attracted a flood of commentary down to the classic, though in many ways derivative, treatise published by Alciato in 1522.[24]

In this connexion it is desirable to clear up a common misunderstanding about the alleged historical and philological incompetence of the Bartolists. In general, legal methods forbade alleging an error in the law on such grounds, but in all cases jurists were professionally bound to subordinate literary accuracy and even historical fact to legal principle. 'Grammarians will not fight with jurists if they understand them aright,' wrote the sixteenth-century legist Rebuffi, 'for justice must have priority.'[25] Baldus was well aware, for example, that deriving law from justice (*jus a justitia*) was grammatically and etymologically incorrect; and

[22] Cited by V. Piano Mortari, *Ricerche sulla teoria dell'interpretazione del diritto nel secolo XVI* (Milan, 1956), p. 27.

[23] 'Die Entstehung der Hermeneutik', *Gesammelte Schriften*, v (Munich, 1927), 334. A qualified exception to this is the work of Emilio Betti, who wrote on law as well as legal hermeneutics.

[24] 'De verborum significatione' (on Digest, 50), in *Opera omnia*, I (Frankfurt, 1617).

[25] P. Rebuffi, *Explicatio ad quatuor primos Pandectarum libros* (Lyon, 1589), p. 1.

he duly noted the *oppositio* according to which, and properly, '*jus* is included in the definition of *justitia*'.[26] But justice had to be prior to the law in two ways, he responded, first with regard to actions at law and second with regard to jurisdiction; and at this point he appealed to the authority of Aristotle as well as to reason, arguing that in causal terms law was the product of justice: *Jus causale finis est justitia; jus formale nascitur ex justitia.* This allegation, like many others in civil law, might not be acceptable in the rules of grammar, but it did serve the higher science of law, the 'art of the good and the just'.

As jurists might have to offend grammatical propriety, so they might also have to violate historical accuracy. A classic example was the problem of the donation of Constantine, a burning issue among jurists from Cino's time onwards. It so happened that Baldus was highly critical of this alienation of imperial authority, as indeed were Cino, Dante and most imperialists, in contrast with their canonist rivals. The authenticity of the document, however, or even the historicity of the act, was not at issue. Even if such a donation had not been made in the fourth century, the principle could be justified quite properly on grounds of prescription. In fact canonists did argue from this most useful civilian formula (the *praescriptio longae temporis*) and were still so arguing in the sixteenth century, long after the exposure of the donation as a forgery by Cusanus, Valla and others.[27] Similar reasoning underlay orthodox defences of the scriptural Vulgate.

Here we can see the major conceptual grounds for the conflict between humanism and Bartolism, a conflict which found classic expression in the invectives of Valla against Bartolus. Included in Valla's indictment were also Baldus, Accursius, Dinus and other barbarians (*idque genus hominum, qui non Romana lingua loquantur, sed barbara*).[28] In this polemic and in his criticisms of the Digest included in his best-selling *Elegancies of the Latin language* (even more than in his assault on the donation of Constantine) Valla fell afoul of the jurists because of his subversive appeal to the authority of grammar and rhetoric over that of law. The true issue, moreover, was not elegance but anachronism, that is, the appropriateness of antiquated language in the modern world. So the Bartolist Gentili, attacking the literary affectations of the humanists – 'Vallenses' – criticized the ancient jurist Tubero for his use of outmoded language instead of accommodating himself to his own time, 'as did Bartolus'.[29] On a less controversial level Valla also offended jurists by his grammatical criticisms of the Aristotelian *praedicamenta* (time, place,

[26] *Commentarii*, fo. 1.

[27] D. Maffei, *La Donazione di Costantino nei giuristi medievali* (Milan, 1964).

[28] Invective against Bartolus in Valla's letter to Pier Candido Decembrio in *Opera omnia* (Turin, 1962), 1, 633.

[29] *De iuris interpretibus dialogi sex* (London, 1582), p. 58. See the discussion of Valla's *Elegantiae* and *Dialecticae disputationes* in my *Foundations*, ch. 11.

quality and the like) on which Bartolists relied so heavily. Without such apparatus no interpretation except the most literal – and so in many cases the most irrational and unjust – would be possible.

It was on such professional grounds that even Alciato, otherwise so supportive of the *studia humanitatis* and the ancillary value of philology, launched his attack on the 'folly' (consciously using the Erasmian term *Moria*) of the 'contentious grammarians', and above all of their 'emperor' Lorenzo Valla.[30] Yet at the same time Alciato took a more complicated view of the task of preserving and restoring ancient jurisprudence. Alciato never denied the value of the commentators and in fact one remarked that 'Without Bartolus and other such interpreters we would have no science'; but he believed that such secondary wisdom could be presented in more economical and elegant form than the 'multiplicity of opinions' that dominated the margins of texts and intimidated students; and in fact he praised his teacher Giason del Maino for doing just that.[31] In turning to classical antiquity Alciato was furthering this hermeneutical goal by seeking out the primal meaning of civil law – by drinking from the fountain, as he put it, and not from the secondary streams (*a fonte ipso, non a rivulis*). The problem was still one of anachronism – to get behind modern usage (*novus sensus, novus intellectus*) and back to the words of classical authors like Ulpian (*Ulpiani immaculata verba*); and this in turn had to be accomplished not through the 'interpretation of Accursius' but only through 'erudition and the elegance of the Latin language'.[32] Yet it must be said about Alciato – as it cannot be said about Valla, Poliziane, Pietro Crinito or even Guillaume Budé – that his efforts were carried out within the guidelines of professional jurisprudence.

Despite the encroachments of liberal arts and philosophy, then, the hermeneutics of civil science had its own authorities, its own rationale and its own line of development. The basis principles of juridical interpretation were described by Alciato in his commentary 'On the meaning of words', but he was doing little more than giving more literary expression to the rules set down by Baldus a century and a half before. In the first place, according to the conventional formulation of Baldus, 'Interpretation should not be literal (*ad literam*) but meaningful (*ad sensum*), for the sense of words should prevail.'[33] In elaboration Baldus identified two modes of *interpretatio* besides the literal *expositio vocabuli*. One he referred to as 'the explanation of true meaning (*ad verum intellectum*), understood according to the reason rather than the shell and exterior of words...'. The basis for this sort of interpretation was that

[30] *Dispunctiones*, III, 1, in *Lucubrationes*, II, 78. Cf. Alexander ab Alexandro, *Genialium dierum libri sex* (Leiden, 1673), I, 19; II, 28; III, 19, etc.

[31] 'De verborum significatione', *Opera*, I, 461.

[32] *Dispunctiones*, I, and *Parerga*, I, 31, in *Lucubrationes*, II, 1, 199.

[33] Piano Mortari, *Ricerche*, p. 68.

'natural reason' which Gaius himself had proclaimed to be the major source of human law next to custom, and which in turn was derived from natural law. For Baldus, of course, there was an additional implication that Christian faith would lead beyond the deadening letter to the life-giving spirit of the law, and he expressly warned against interpreting the law 'Jewishly' (*judaice* or *more Judaeorum*), implying a literalism untouched by grace or reason.[34]

Essential as it was to determine the spirit of the law, it was not always sufficient. Following the lead of Cino, Bartolus and Alberico de Rosate, Baldus also conceded to the jurist discretion in applying interpreted law to particular cases. Here arose, according to Baldus, the problem of 'discussing the subtleties created by the authority of experts. . .' and more particularly the endlessly debated question of strict as against liberal interpretation (*restrictiva* and *extensiva interpretatio*).[35] The distinction between a 'rigorous' and a 'more benign' judgment constitutes a central theme not only of the *mos italicus* but of European jurisprudence as a whole. The consensus (the *communis opinio*) seemed to be on the side of liberal interpretation, which is to say judicial discretion; but the limits and guidelines of this professional principle became almost unmanageably complicated in the crush of monographs devoted to legal *interpretatio* and *extensiones*. What extended juridical liberalism still further was the ever present assumption that judgments had to be in accord with 'equity'. According to a much repeated formula, *aequitas* or *epieikeia* was the basis of interpreting laws and treaties (*fundamentum interpretandi leges et pacta*); and the final goal, the *jus aequissimum*, was natural law, which in its primary form was usually identified with divine law.[36] This premise, too, takes us back to Gaius.

V

Though less conspicuous, there is an aspect of civil law even more basic than inherent methodology and the expanding theory of interpretation, and this is its structure. Here again the influence of Gaius is obvious, pervasive and virtually unquestioned before the sixteenth century. The full text of Gaius' *Institutes* was not known until the nineteenth-century discovery by Niebuhr, but many fragments had been preserved in the Digest, and perhaps more important the form of his system was carried over intact into the *Institutes* of Justinian. This work remained the standard textbook of civil law for many centuries and indeed continues to be the model in Italy, Germany and France. The heart of the Gaian

[34] See Engelmann, *Die Wiedergeburt*, pp. 152 ff.

[35] See especially Piano Mortari, 'Il problema dell'interpretatio iuris nei commentatori', *Annali di storia del diritto*, II (1958), 29–109, and Cortese, *La norma giuridica*, I, chs. VI–VII.

[36] N. Horn, *Aequitas in den Lehre des Baldus* (Cologne, 1968), and G. Kisch, *Erasmus und die Jurisprudenz seiner Zeit* (Basel, 1960).

system – or as medieval jurists would prefer to say, its soul – lay in the celebrated tripartite classification of law. 'All our law', Gaius declared, 'pertains either to persons or to things or to actions'; and this secular trinity represents in effect the metaphysical foundations of legal science, and to some extent of social thought, down to the nineteenth century.[37] Renaissance jurists never tired of discussing this arrangement and of explaining how broad and adaptable the categories were. Persons could be collective as well as individual, for example, and it was commonplace that the notion of 'thing' had to be understood in an abstract as well as a concrete sense (*res incorporeales* as well as *corporales*). But none of Gaius' successors were tempted to suggest any alternative.

What is important to notice in this context is that the Gaian triad had philosophical, and especially epistemological, as well as legal implications. The essential point – the *sine quo non* – is that 'personality' was situated at the very centre of civil science; for as Justinian wrote in justification of the Gaian arrangement, 'It is of little purpose to know the law if we do not know the persons for whom the law was made.' Only after determining the status of persons, that is, the degree of liberty, kinship and other social attributes, could attention be turned to the world of reality (*res*), that is, to material objects and how to acquire, retain, retrieve, exchange and pass on the same, and finally to the relationship between subjects and objects, that is, to 'actions' in a general sense.[38] First subject and then object was the proper sequence: first humanity and then its worldly concerns, which was above all to say property.

In keeping with this anthropocentric orientation, with this premise of legal 'subjectivity', as lawyers called it, one of the prime rubrics of Roman jurisprudence (Digest 1, 5, 3, and Institutes 1, 8) dealt with the quality of the 'human condition'. In legal terms the Ciceronian notion of *conditio humana* corresponded to Gaius' *condicio hominum* and to Justinian's *status hominum*. This rubric not only formed a locus for the discussion of human liberty and servitude in political terms but also, for more philosophical jurists, an occasion to digress and offer obiter dicta on that famous humanist topic, 'the dignity of man', sometimes in the style of and with reference to the famous oration by Pico.[39] Indirectly at least, this title represents a link between an old humanist topos and modern formulations of 'the rights of man', most notably in the Napoleonic Code, whose form was also Gaian and whose interpretation has in many ways followed the pattern of the *mos italicus*.[40] The Roman

[37] Gaius, *Institutes*, 1, 8, and Justinian, *Institutes*, 1, 2, 12. See G. Pugliese, '"Res corporeales", "res incorporeales" e il problema del diritto soggetivo', *Studi in onore de Vicenzo Arangio-Ruiz*, III (Naples, 1953), 223–60.

[38] Relevant discussions include P. Zatti, *Persona giuridica e soggetività* (Padua, 1975), and C. Maiorca, *La cosa in senso giuridico* (Turin, 1937).

[39] B. Chasseneux, *Catalogue gloriae mundi* (Paris, 1529), x, 18 ff.

[40] See the classic survey of F. Geny, *Méthode d'interprétation et sources en droit privé positif* (Paris, 1899).

Empire has been lost, as Lorenzo Valla lamented; and so, as a living force, has the Roman tongue, despite the efforts of Valla and other Renaissance humanists. Still remaining, however, is the spirit of Roman law: *mens legum non moritur.*

VI

In its broadest and most philosophical sense civil science may indeed be understood as a systematic attempt to comprehend and to order the human condition; but of course even Italian jurists did not expect to pursue this in exclusively Roman terms, even in the symmetrical terms of the Gaian system. Nevertheless, it was in civil law that the enterprise of empirical and transcultural investigation found what Toynbee called an 'intelligible field of historical study'. This oecumenical Roman construct was the *jus gentium*, that 'law of nations' which, according to the definition of Gaius, included the customs and institutions of non-Roman peoples who had been drawn into Roman jurisdiction. The line between the *jus gentium* and the *jus naturale* was often hard to draw, but it was generally agreed that such conventional institutions as war, slavery and property belonged to the law of nations. In this widest field of human law (*jus communissimum*, as Baldus called it)[41] the continuing search for equity and 'extensive interpretation' was carried on; and so, more significantly, was the cultivation of comparative legal and institutional studies. One special task was the adaptation of civil law to municipal statutes, and according to Walter Ullmann, Cino's efforts in this task entitle him to be listed among the founders of comparative law.[42] This modern projection of the *jus gentium* was carried on by Bartolus and Baldus, who extended it into the still newer field of international law, another area where the spirit of Roman law has been preserved.

The civil science of the Renaissance, expanding within the framework of the *jus gentium*, or *jus naturale gentium* as it was later called, had to be elaborated and adapted in later times along lines unforeseen even to Bartolus and Baldus. Demanding to be accommodated to modern legal and social thought were not only the feudal monarchies that denied any affiliation with the old Roman *imperium* and the Italian city states that were struggling to act independently of it, but also, with the widening horizons and great discoveries of the later middle ages, the strange peoples who had never heard of it. Investigations in both space and time made the human condition appear 'curioser and curioser', and classical assumptions and norms were stretched badly out of shape. Yet conceptually all had to be related to the 'law of nations', since according to highest authority (that of Justinian and Gaius) it applied to 'all peoples' (*omnes gentes*). This modernized form of an ancient category Baldus designated the 'newest law of nations' (*novissimum jus gentium, quo omnes*

[41] E. Besta, *Introduzione al diritto commune* (Milan, 1938), p. 43.

[42] *The medieval idea of law as represented by Lucas de Penna* (London, 1946), p. 107.

gentes utuntur),[43] and its content was drastically changed in the century and a half between his time and that of Alciato. Of course it was changed still more in the two centuries between Alciato's time and that of Giambattista Vico, whose *scienza nuova* was explicitly defined as a modern version of the *jus naturale gentium* and may be regarded as one of the last and certainly most famous transmutations of Italian 'civil science'.[44]

This expansion of legal horizons was reflected not only in the discovery of the variety but also in the appreciation of the mutability of the human condition. The notion that Bartolism was lacking a sense of history is merely a more recent (but no more tenable) version of the self-congratulatory humanist hyperbole that claimed a monopoly over classical learning. In fact these professional jurists understood very well the character and irreversibility of historical change (more realistically, perhaps, than many of their humanist critics), but they were little interested in its emotional or antiquarian implications.[45] Though devoted to the ideal, they had to understand the real, or more precisely the interplay between the two; and this preoccupation led to an extensive and historically fruitful discussion of human customs in both a positive and a negative sense (both *consuetudo* and *disuetudo*). Formerly the custom or law was so, went the formula, but today (*hodie*) something quite different. Even the allegedly immortal corporations (*universitates*) sometimes perished. According to Baldus, for example, the Roman senate could not be restored by the meeting of a couple of senators 'because there is no hope of the formal revival (*reintegratio*) of the number and order of senators'. It was on the basis not only of humanist scholarship but also of such professional considerations that Roman history, especially legal, institutional and social history, was reconstructed. This was the background of Alciato's work on the *Form of the Roman Empire* and other more technical contributions to Roman history.[46] No doubt it would be too paradoxical to press further the claims of scholastic jurisprudence to be a major factor in the reconstruction of western history – and yet paradox has always troubled logicians more than humanists and historians.

VII

Perhaps the most familiar question about civil science is its ideological significance, and here again interpretations have tended to be distorted or partial at best. Politically the main party line within academic

[43] Horn, *Aequitas*, p. 74. Cf. J. A. Wahl, 'Baldus de Ubaldis and the foundations of the nation state', *Manuscripta*, XXI (1977), 80–96.

[44] See my 'Vico's road', in *Giambattista Vico's Science of Humanity*, ed. G. Tagliacozzo and D. Verene (Baltimore, 1976), pp. 15–29.

[45] Further discussion in my 'Clio and the lawyers: forms of historical consciousness in medieval jurisprudence', *Medievalia et Humanistica*, n.s., V (1974), 25–49.

[46] *De formula Romani imperii libellus* (Basel, 1559), and see note 21.

jurisprudence (aside from the differences between canonists and civilians) was that marking off the 'ultramontanes' from the 'citramontanes'. The latter, Italian for the most part, looked more respectfully on Romanist tradition; and Cino in particular complained about the irreverent *ultramontani* who were continually carping at the Accursian Gloss.[47] More subversively, this group were not inclined to accept the 'Emperor's law' on grounds of authority but only of reason. While Bartolus argued that Italian cities were *de facto* independent of the Empire, the Ultramontanes denied a *de jure* relationship – or indeed that the northern European nations had even historically been subject to Roman rule. In general, the Citramontane position was universalist. Whether their sympathies were imperial or republican, lay or ecclesiastical, their motto was summed up in the civilian formula which declared Rome to be the 'common fatherland' of nations: *Roma communis patria.*[48]

Once again this Romanist orientation suggests a congruence between civil law and Renaissance humanism, but once again the relationship is neither causal nor even sequential. Mutually reinforcing is perhaps a better way of expressing it, despite conspicuous methodological and linguistic divergences. Roman law, as Walter Ullmann has written, 'was perhaps the strongest bond holding together the ancient, medieval and modern worlds'.[49] It was also a vehicle of certain humane values conceptually associated with the humanist movement – and with the easy classicist assumption that *Romanitas* was the moral equivalent of *humanitas.* Conversely, of course, there was the mutual scorn of 'barbarism'. In more historical terms the symbiotic relationship between civil law and humanism was preserved through a mutual dependence on that key member of the *studia humanitatis,* the art of rhetoric.[50] This dependence is apparent not only in the medieval *ars dictaminis,* which involved both a rudimentary legal expertise and public speaking, but also in the teaching of law, pleading and the law of evidence. The continuing connexion is apparent in the importance that legal training and scholarship had for many leading humanists. Classical jurisprudence, if not the academic variety, was prized by Petrarch, Salutati, Bruni and Valla, among others on political as well as literary grounds.

On these same political grounds the public image of civil law has often

[47] *L'opera di Baldo,* p. 78.

[48] Alciato, *Dispunctiones,* II, 21, in *Lucubrationes,* II, 30; cf. Digest, L, 1, 33; XLVIII, 22, 7, 15; I, 12, 1, 13.

[49] *Medieval foundations of Renaissance humanism* (London, 1977), pp. 156–7.

[50] Good discussion in Q. Skinner, *The foundations of modern political thought* (2 vols., Cambridge, 1978), I, 28 ff. Cf. P. Stein, 'The relations between grammar and law in the early Principate: the beginning of analogy', *La critica del testo,* II (Florence, 1971), 757–69; F. Lanfranchi, *Il diritto nei retori romani* (Milan, 1938); A. Giuliani, 'The influence of rhetoric on the law of evidence and pleading', *The Juridical Review* (1962), pp. 216–51; and C. Vasoli, 'La dialettica umanistica e la metodologia giuridica nel secolo XVI', *La formazione storica del diritto moderno in Europa,* I, 237–79.

been something of a caricature, portraying a monolithic doctrine of authoritarianism and absolutism. The inadequacy of this view has become increasingly apparent with recent investigations into the contributions of civil law to conceptions of representation, popular government, individual rights and even political resistance.[51] What adds further weight to this line of interpretation is the not always appreciated fact that civil law was technically restricted to the domestic, moral or private sphere: that the *jus privatum* was carefully marked off from the *jus publicum*, in other words, implied that individual relations were generally immune, theoretically at least, from political interference. In a sense, then, civil science represented an asylum for a variety of rights, especially those of life, liberty and property.

Recent enthusiasm for the Renaissance epiphenomenon known as 'civic humanism' has been restricted all too narrowly to the more popular Florentine ideologues associated with Machiavelli and what a recent historian has identified as the 'Machiavellian moment'.[52] Unfortunately excluded from this perspective is recognition of the fact that civil law was also a major repository – it is hardly too much to say a locus classicus – of a kind of political, social and historical consciousness that self consciously appealed to a distinction between antiquity and modernity. This cast of mind, or scholarly syndrome, which for convenience might be called 'civil humanism', involved commitments to 'liberty', civic spirit, republicanism and a critical view of Italian history; and while it may not be located so precisely in time or tied to social context, it surely has a more coherent and continuous professional basis; and in doctrinal terms it may be identified more easily and traced more directly than the 'civic humanism' which has been stretched over three centuries and more. The juridical *civilità* of Cino and his successors comes much closer than the *vivere civile* of Bruni and his successors to representing a political 'paradigm' in Thomas Kuhn's much used and abused sense of this term.

Beyond the legal profession the social and institutional base of civil humanism was provided by the Italian city state. Conceptions of citizenship and the rights thereof and active political life in general gave new life to Roman jurisprudence. So Bartolus, one of the pioneers in adapting ancient patterns to modern civic life, not only gave legitimacy to the Italian *civitas* by identifying it with the Roman *princeps* but also, from his knowledge of ancient law and philosophy, drew up a classic indictment of political tyranny.[53] Baldus followed suit by posing funda-

[51] Beginning with the fundamental work of G. Post, *Studies in medieval legal and political thought* (Princeton, 1962); and see J. Kirshner, 'Civitas sibi facit civem: Bartolus de Sassoferrato's doctrine on the making of a citizen', *Speculum*, XLVIII (1973), 694, and '*Ars imitatur naturam: a consilium* of Baldus on Naturalization in Florence', *Viator*, V (1974), 289.

[52] J. Pocock, *The Machiavellian moment* (Princeton, 1975), building, as so many others, on the work of Hans Baron and Eugenio Garin.

[53] See F. Ercole, *Da Bartolo all'Althusio* (Florence, 1932) and the classic work of C. Woolf, *Bartolus of Sassoferrato* (Cambridge, 1913).

mental questions about political authority and legitimacy, such as 'whether tyrants are recognized by the *jus gentium*', 'whether a ruler may be expelled by reason of tyrannicide', and 'whether governments are continued by election or succession'.[54] With customary professional 'duplicity', jurists could argue these and other questions in the most rational and radical terms; and both the style of argument and particular formulations can be traced over several centuries and through several social contexts. More generally, civil science was associated by its practitioners with the highest moral and political qualities of free men. What Valla claimed for rhetoric and Poliziano for grammar, Renaissance jurists claimed for their discipline: it represented the highest product and agency of the civilizing process.

These are only a few of the more prominent features of civil science that establish ties between ancient and modern learning and that, despite an almost institutionalized neglect, deserve recognition as a vital part of Renaissance thought. We can no longer conceive of jurisprudence as 'true philosophy', perhaps, or even as a plausible model of social science, but with a little imaginative effort we may be able to appreciate some of its cultural significance in a pre-scientific and pre-technological age. Jurisprudence Italian style offered a sophisticated hermeneutical theory applicable to various levels of social and textual criticism; it suggested a conceptual system to rival Aristotle's and a way for social thought to maintain its independence from natural philosophy; it provided a vehicle for historical, social and anthropological investigation beyond its original normative function; and through the millennium, or rather two millennia, of thought and experience reflected in its sources, it offered insights into the human condition and a range of cultural ideals which, on a higher level, might extend that normative function. In a long perspective what Ernst Curtius remarked about Latin literature might apply also to civil science: it constitutes a 'crumbling road from the antique to the modern world'.[55] And of this *via* both *antiqua* and *moderna* 'jurisprudence Italian style' constitutes one of the most direct and best constructed, if not most scenic, stretches. It should be travelled more often.

[54] *Commentarii*, fo. 1.

[55] *European literature and the Latin middle Ages*, trans. W. Trask (New York, 1953), p. 19.