

# Norberto Bobbio

## The Rule of Law and the Rule of Democracy

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*Abstract: One of the main themes of Bobbio's writings was the relationship between law and politics. Yet an ambiguity runs through his writings on this point. He saw politics and law as intimately related, with the one entailed by the other. Yet, the tautologous relationship he saw as existing between the two posed a potential problem – what could be called the Hobbes challenge. For if politics is impossible without law, yet all law flows from politics, then we seem faced with a dilemma of either a vicious circle or an infinite regress. Bobbio never really confronted this dilemma, although in a bid to escape the prospect of the Hobbesian lawless sovereign he gestured towards a natural law solution at odds with his legal positivism. Instead, this article suggests an alternative in precisely the non-sovereign account of politics Hobbes criticized, that of a republican democracy based on political equality rather than popular sovereignty. In this account, the rule of law can be reconciled with the rule of persons precisely because men must rule together as rulers and ruled in turn, rather than any one or group of them permanently ruling over the others. Law on this account results from a particular type of politics.*

A distinctive feature of Norberto Bobbio's work was the links he established between legal and political theory, particularly in his later writings. However, though he fully appreciated the interrelated character of law and politics, a tension between the two remains within his thinking and lies at the heart of his account of democracy as certain "rules of the game."<sup>1</sup> This tension arises out of what I shall call the Hobbes challenge and concerns the degree to which "law" can rule in and of itself. If the rule of law can only be sustained through the rule of persons, then defining and seeking to constrain democracy in terms of a certain set of rules poses a paradox – for who is to decide what those rules are? Citizens acting through established democratic procedures, the courts, some other body? Whatever body or figure is chosen,

<sup>1</sup> N. Bobbio, *Il futuro della democrazia*, Turin: Einaudi, 1984; [*The Future of Democracy: A Defence of the Rules of the Game*, trans. R. Griffen, ed. and introduction by Richard Bellamy, Cambridge: Polity Press, 1987].

the Rule of Law will have been displaced by the rule of the person or persons who deem what the rules or laws are.

Bobbio had a lifelong fascination with Hobbes,<sup>2</sup> and rather relished antinomies and paradoxes – most notably in his famous account of the “broken promises of democracy.”<sup>3</sup> Yet he never really grasped this particular nettle. However, it proves crucial for democrats that one does so. If a prime reason for adopting democracy is because Platonic theories of what Dahl calls Guardianship fail to convince,<sup>4</sup> then the rules of the democratic game must surely be themselves subject to democratic protection and scrutiny? It is not clear, though, that Bobbio accepted this conclusion. Bobbio rightly noted that democracy has never existed without the defense of those liberal rights that largely animate it. But that is not the same as saying that all liberal democracies must be constitutional democracies – indeed, many are not. Nevertheless, he seems to have assumed that they must be.

Bobbio’s basic mistake in this regard was to have seen democracy in Hobbesian terms as a (flawed) form of popular sovereignty. In truth, it is an anti-Hobbesian process that seeks to de-sovereignitize sovereignty through placing all citizens on a par with each other as equally authors of the law – albeit through their elected representatives – and equally subject to it. In other words, democracy is a form of the rule of persons that encapsulates the central notion of the Rule of Law as treating all as equals. To show why this is so, we need to outline the Hobbesian challenge and then explore how democracy provides the most adequate response.

### *1. The Hobbes Challenge to the Rule of Law*

If we were ruled by philosopher kings, who simply discovered the law through their devotion to truth and justice, and could be counted on to apply it with an angelic rectitude and a divine omniscience, then the Rule of Law would be unproblematic. The Law’s agents, whether we called them monarchs, legislators or judges, would be free from the uncertainties as well as the biases that animate politics. They would act as the mere mouthpieces of a superior wisdom, offering infallibly just solutions that harmonized the individual’s interest with that of the public. Clearly this is a fantasy, yet many versions of the Rule of Law have a tendency to embrace it. The danger lies with potentially bad political rulers. Enshrine good laws in the constitution and entrust

<sup>2</sup> See the essays collected in N. Bobbio, *Thomas Hobbes*, Turin: Einaudi, 1989.

<sup>3</sup> Bobbio, *The Future of Democracy*, pp. 26–41.

<sup>4</sup> R. A. Dahl, *Democracy and its Critics*, New Haven: Yale University Press, 1989, ch. 4.

a special caste of legal guardians to oversee them, and the rule of persons can be subordinated to the Rule of Law.

Unfortunately, this solution simply begs the very questions that lie at the heart of the problem. As Joseph Raz noted in a classic essay, some accounts of the Rule of Law use the term as a catch-all slogan for every desirable policy one might wish to see enacted. He cites as an instance of this approach the International Congress of Jurists' equation of the Rule of Law with the creation and maintenance of "the conditions which will uphold the dignity of man as an individual" – a requirement that includes "not only recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural traditions which are essential to the full development of his personality."<sup>5</sup> However, people reasonably disagree over the nature of the right and the good. Though most people will find the general aim of the ICJ's declaration unexceptionable, many will differ over what human dignity consists in and requires. Likewise, they will dispute the various ways such aims might be achieved by making all equal under the law – including what formal and substantive procedures and entitlements would need to be in place. Thus, if the Rule of Law depends on agreement on these contested issues, then it begs the question of who is to decide whose view is to prevail (or alternatively, of how agreement on them might be arrived at).

A more formal approach, that tempted Bobbio in his early writings on law,<sup>6</sup> attempts to overcome these difficulties.<sup>7</sup> This strategy focuses on the benefits, values and constraints inherent in the very existence of legal forms and procedures. After all, people often obey laws with which they disagree simply out of respect for the advantages of living in a law-governed environment. Law facilitates social interaction and helps curb the abuse of power. It can even provide regular procedures for contesting and changing laws and decisions that they dislike. None of these considerations need involve substantive agreement with the goodness of the law. Yet, legality *per se* can only play a limited role in protecting against oppression and domination – even dictatorships, to the extent they are regimes, are to some degree legal regimes. To avoid oppressive and dominating laws, we need not just laws but good laws. However, even good laws cannot rule in and of themselves – they need to be enacted and cannot be expected to cover all possible eventualities and infallibly guide those entrusted to uphold them towards the right answer.

<sup>5</sup> J. Raz, *The Authority of Law*, Oxford: Clarendon Press, 1979, pp. 210–11.

<sup>6</sup> N. Bobbio, *Teoria della norma giuridica*, Turin: Giappichelli, 1958.

<sup>7</sup> For the contrast between "formal" and "substantive" approaches, see P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Public Law* (1997), pp. 467–87.

Does this return us to the original dilemma of relying on good persons to give us good laws? This question brings us to the Hobbes challenge. Stated crudely, Hobbes argued that in circumstances of conflicting interests and deep disagreements about values and judgments, laws would only be equitably and coherently drafted and applied by all individuals being equally in awe of a sovereign who was outside the law and whose power was indivisible. For a start, the meaning of laws is rarely clear, so that “all Laws, written and unwritten, have need of Interpretation” and these interpretations are usually controversial. Even when the meaning of laws is clear, their bearing on particular situations often is not – producing another source of controversy. Indeed, even if laws could be defined in an absolutely clear manner as to both their meaning and application, self-love, partiality and passion can lead people to employ them in self-serving ways and hence into conflict with each other. Hobbes believed these difficulties arise as much with the hypothetical imperatives of the Law of Nature as human laws. Therefore, laws or rules do not themselves provide the basis for social co-operation. Rather, a peaceful society results from having a political authority vested with the power to formulate, interpret and apply the laws and, crucially, to overrule rival views of their bearing in any given case. The claim that laws could be set above those sovereign person or persons empowered to enact and implement them was incoherent for Hobbes. It could only mean to set up another power able to judge and enforce these laws “which is to make a new Sovereign” leading to an infinite regress with the need “for the same reason a third, to punish the second; and so continually without end, to the Confusion, and Dissolution of the Common-wealth.”<sup>8</sup> On this view, law is not only subject to political contestation but intrinsically political by virtue of being the creation of political authority.

Of course, as H. L. A. Hart observed, the sovereign’s rule is recognized in part because it has legal foundations. In his terminology, we need “secondary” rules of recognition to identify what counts as law as well as the “primary” rules or laws that are created within a recognized legal system.<sup>9</sup> Among these secondary rules are those identifying the sovereign as authorized to decide what the law is. Such rules do place a legal constraint on personal rule, but not necessarily a very strong one. It is not just that tyrants have a habit of securing legal legitimacy for their rule after, rather than before, seizing power. Political rulers of all stripes habitually claim that the Rule of Law simply requires obedience to their commands as the legally recognized authorities. Yet if government is by definition the agency authorized by law

<sup>8</sup> Th. Hobbes, *Leviathan*, ed. Richard Tuck, Cambridge: Cambridge University Press, 1991, p. 169.

<sup>9</sup> H. L. A. Hart, *The Concept of Law* [1961], Oxford: Clarendon Press, 1984<sup>2</sup>, pp. 94-5.

to issue laws, then on this interpretation the Rule of Law barely constrains the rule of persons. To say all acts of government must have a foundation in law becomes almost a tautology. If law is merely (and only) what the lawful government decrees, then anything the lawful government decrees is authorized by law and what is not authorized or so decreed is illegal and so cannot be an action of the government.<sup>10</sup>

True, it would be wrong to dismiss this view completely. After all, British courts have frequently done a valuable job in restraining Ministers and officials from acting beyond their remit. A government (or other body) that has to act within and according to its legally defined powers can be held to account in ways bodies or people that are not so constrained cannot. The rule of the socially influential and wealthy, of the mafia or of the mob reveal in their different ways the disadvantages of lawless compared to lawful government. However, the Hobbes challenge emerges again since some body of people, be they judges or other politicians, have to decide if the government has breached the rules. And although they too will be legally constituted, at some point some person or persons possesses the competence to decide questions regarding its own competence.<sup>11</sup> Meanwhile, an underlying set of problems remain: namely, why should the powerful have accepted to be rule-bound in the first place, unless it had somehow become in their interest to do so, and how can the legal forms of legislation and judging ensure that the law prevails rather than the will of those authorized to make decisions?

Therefore, the central dilemma posed by the Rule of Law is how to enjoy the benefits of legality while overcoming the Hobbes challenge. The law cannot rule without legislators and the judiciary. Can the rule of persons be modified by the Rule of Law if they are necessarily the instruments through which it governs? It is sometimes claimed that by ruling through law, those who make and enforce it are somehow led to be ruled by it in their turn. Fidelity to law is an intrinsic aspect of a coherent legal system, and for that to obtain the laws and judging must possess certain desirable qualities.<sup>12</sup> Yet that

<sup>10</sup> Raz, *The Authority of Law*, pp. 212-13.

<sup>11</sup> It is sometimes argued that a democratic account of the Rule of Law requires a constitutional or other courts to uphold the rights and procedures intrinsic to democracy (e.g. by J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge, MA: Harvard University Press, 1980 and, in more qualified terms, by R. Dworkin, "Political Judges and the Rule of Law," in Id., *A Matter of Principle*, Oxford: Clarendon Press: 1986, ch. 1). However, at least one reason why this proposal proves unsatisfactory is that these criteria are as disputable as any other law or right, so that placing their protection in the hands of a court suffers from parallel difficulties to them and is itself subject to the Hobbes challenge. I provide a detailed critique of this thesis in R. Bellamy, *Political Constitutionalism*, Cambridge: Cambridge University Press, 2007, ch. 3.

<sup>12</sup> Lon L. Fuller, *The Morality of Law*, New Haven: Yale University Press, 1964, ch. 2.

view ends up perilously close to the fantasy of a system of good laws under the jurisdiction of beneficent philosophical kings.

Somehow the Hobbes challenge has to be tackled at its heart – the problem of the sovereign ruler. As I'll attempt briefly to show, this is precisely what democracy attempts to do. However, Bobbio's characterization of democracy in legalistic terms as "the rules of the game" simply reintroduces the Hobbes challenge rather than dissolving it – for who decides what those rules are? Defining democracy in terms of the "rules of the game" is at best tautologous, since any practice involves rules, at worst to mistake its sources and purpose.

## 2. *Democracy and the Rule of Law*

Somewhat misleadingly, democracy is sometimes identified with popular sovereignty, suggesting rule by the will of a homogeneous people. It was this view above all that Bobbio was keen to criticize as impractical and incoherent. But, as modern analysts have shown,<sup>13</sup> democracy is better understood as a mechanism whereby the various peoples found in any community settle their disagreements and provisionally agree on a common definition of the rules. Without a degree of social pluralism, no democracy exists – for it is this social circumstance that obliges people to agree to be rulers and ruled in turn, sharing power with others on an equitable basis. They can only rule by cooperating with others, constructing a majority through diverse coalitions between different minorities. Without disagreement, though, democracy has no point – for its role is to offer a fair procedure for resolving our differences where a common rule is necessary. In this scenario, it is the democratic process, not the people *per se*, that is authoritative. Sovereignty exists not in the demos but in the procedures for voting.

Within this set up, the Rule of Law simply is the democratic organization of rule-making. For it is the obligation to vote on an equal basis to others, to accept the decision even if you voted the other way – notions that are at the heart of democracy, that encapsulates the core meaning of the Rule of Law, that laws should be equitable and apply equally to all. As Hobbes's great critic, the English republican James Harrington, observed, it is only when all are equal in the making of the laws that they will be "framed by every private man unto no other end (or they may thank themselves) than to protect the liberty of every man."<sup>14</sup> And that "or they may thank themselves" indicates

<sup>13</sup> E.g. Dahl, *Democracy and its Critics*, ch. 16.

<sup>14</sup> J. Harrington, *The Commonwealth of Oceana*, ed. J. G. A. Pocock, Cambridge: CUP, 1992, p. 20 and see Skinner, *Liberty*, pp. 74–77.

that what ensures democracy performs this function are not its rules – since they too need to be subject to democratic vigilance and revision – but the political involvement of citizens themselves.

### *3. Conclusion*

To conclude: a central theme of Bobbio's thinking was the inter-connection between law and politics. He regarded law as a human, institutional artifact. I think his acknowledgement of the constructed character of law largely explains his lifelong fascination with Hobbes. However, he never faced up to the full consequences of the Hobbesian challenge. He always gave way to the temptations of a naturalist or Kantian tendency to prioritize an already existing law over politics. But if the Hobbes challenge is sound that cannot be the case. That challenge can only be met by seeing law as the outcome of a certain sort of democratic politics. In which case, the rules of the democratic game have to be seen as intrinsic to a democratic society and practices rather than as pre-existing legal or constitutional norms.

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