Abstract: The author argues that the unity, coherence, and completeness of both the theory of law and the theory of politics and democracy throughout Bobbio's work was produced by the fruitful connection that he established between the approaches of several different disciplines. Bobbio was able to connect legal theory and political philosophy, and to entwine theory itself, whether legal or philosophical, with meta-theoretical and methodological reflection. In Bobbio's work even the theoretical-analytical approach was connected with an analytical history of ideas. Bobbio's capacity for synthesis and the systematic theoretical character of his investigations found specific expression, according to the author, in four fundamental connections: that between democracy and law; that between law and reason; that between reason and peace; and that between peace and human rights. This doctrinal framework, according to Ferrajoli, already suffices to establish Bobbio as a great teacher and thinker. Nonetheless, Ferrajoli also draws attention to certain aporias in Bobbio's thought. Thus the author argues that Bobbio fails to recognize the influence of strictly defined constitutions on the legal order and continues to defend a merely formal conception of the validity of legal norms and of democracy. Bobbio retains a non-evaluative conception of legal science without considering the internal criticisms regarding the lacunae and antinomies that constitutional norms forcibly reveal with respect to both legal science and the practice of jurisdiction.

1. Bobbio’s Style of Thinking

Norberto Bobbio has always been admired for his extraordinary ability to draw relevant distinctions: to analyze concepts, to clarify the different senses in which they are employed, to dismantle, to compare and contrast, and to reassemble the all too often misleading or ambiguous terms that belong to our theoretical-legal and philosophical-political discourse. But the aspect of Bobbio’s teaching that I wish to emphasize here is concerned not with these distinctions, but rather with the connections which he establishes between theoretical concepts, and also between the approaches of different disciplines. It is this extraordinary capacity for analysis and also synthesis, this attitude to the relevant distinctions, but also to the problem of organizing and relating them, that accounts for the considerable fascination that Bobbio’s thought has held for me ever since I was fortunate enough to become acquainted
with Bobbio and his work almost half a century ago. The substantial unity and systematic character of his work, for all the extraordinary variety of the issues and questions addressed, springs from a style of thinking that is informed by two kinds of convergence, one interdisciplinary in nature, the other thematic in nature.

The first convergence, which allows us to trace the unity, coherence, and completeness of both a theory of law and a theory of politics and democracy throughout the prodigious corpus of Bobbio’s work, is generated by the fertile connection he has established between several disciplinary approaches: between legal theory and political philosophy, between theory itself, whether legal or philosophical, and meta-theoretical and methodological reflection, and between the theoretical-analytical approach and the analytical history of ideas.

Bobbio always lamented the mutual ignorance, distrust, and lack of communication that generally characterize the relations between legal, historical, and philosophical-political approaches. One need only recall his words regarding

[…] the insidious imperialism of the division of labor that sets historians against philosophers, legal thinkers against political analysts, sociologists against historians, and so on in constant rivalry with one another. Yet in the vast, and ever vaster, universe of knowledge there is fortunately room for everyone.

And the true value of methodological reflection lies precisely in

[…] making us all more aware, each in our own field, of the limits of our own territory, and of the fact that other territories, whether near or remote, have a right to exist too.

Bobbio was thus not only fully aware of the variety of perspectives from which the field of law and political institutions can be considered – from the internal perspective of legal theory, from the external axiological perspective of political philosophy, from the empirical perspective of the sociology of law and of political science – but he also constantly fortified and enriched his theory of law with the resources of his philosophical-political learning and his political philosophy with the resources of his juridical learning. This is why he became the most significant Italian theorist of law and rights, and also indeed the most significant philosophical interpreter of politics in Italy: for while he took great care to distinguish between the approaches of different disciplines to the same object, and surely more so than almost any other academic figure in this field, he also knew how to draw upon his legal knowledge and expertise in his work as a philosopher, and upon his remarkably broad range of philosophical culture in his work as a legal theorist. From this
point of view, Bobbio certainly represented an exception within the entire field of academic legal thought and political thought, characterized as it was by the philosophical illiteracy of legal theorists, who usually only read books connected with law and are themselves read only by other legal theorists, and the even greater legal illiteracy of political philosophers, most of whom have never glanced at a civil or penal code, or opened a volume or private or public law, and have never even seen a law court or a prison.

The convergence between the historical approach and the theoretical approach has proved no less fruitful in Bobbio’s work. The notion of a firm relationship connecting legal and political theory on the one side with the history of legal and political thought on the other not only informed all of Bobbio’s theoretical and philosophical work, but is also a distinctive feature of his meta-theory of law and of the political sphere. “Political theory without history is empty, history without theory is blind,” as Bobbio puts it. For the themes of the former are the “recurring themes” of the latter, and identifying these themes serves to specify the “major categories that allow us to capture the phenomena that enter into the political universe in general concepts” and to “establish the affinities and differences between the different political theories that have been defended in different periods.”

There is an original style of thought that underlies these convergences between different disciplines: an empirical-analytical method of conceptual distinctions, of linguistic analysis, of the redefinition of the principal categories, tested and explored first in the theory of law, then in the theory of politics, and then, once again, in what Bobbio himself has called “the ‘analytical’ history of political thought.” Bobbio makes use of the canonic texts (this is the “lesson of the classics” that he taught us to appreciate): he analyzes and employs the conceptual categories that have been historically produced and developed by these authors – those of freedom, equality, the person, power, democracy, law, rights – to construct the theory of law and the theory of politics in both of which these categories feature so prominently; and, conversely, he employs the theoretical categories in question to interpret the thought of the classic thinkers.

2. Four Teachings of Norberto Bobbio

But Bobbio’s capacity for synthesis and his systematic approach found their most productive expression in a number of thematic convergences. These convergences are expressed, it seems to me, in four internal connections that Bobbio establishes: namely that between democracy and law; that between law and reason; that between reason and peace; that between peace and human rights. It is with Bobbio’s claims regarding to these four internal connections
that I shall principally be concerned in what follows. These doctrines alone would suffice to establish Bobbio as a great teacher and thinker. And indeed they constitute, it seems to me, the principal “guiding thread” of his philosophical-legal and his philosophical-political thought.

2.1. Democracy and Law

First of all, then, I should like to discuss the rational connection, both theoretical and practical, that Bobbio establishes between democracy and law. Bobbio was an emphatic defender of legal positivism, and thus an emphatic defender of the separation of law and morality, and of law and justice. Positive law, as Bobbio has argued, does not necessarily imply justice, any more than it implies democracy, for it can, unfortunately, be completely unjust, illiberal, and anti-democratic. Yet the counter-implication does not hold, according to Bobbio. For justice, liberties, and certainly that system of values and principles that we call “democracy,” necessarily implies law. Obviously, there can be law without democracy, but there can be no democracy without law. For democracy involves a body of rules, the democratic “rules of the game,” as Bobbio has called them, and these rules are legal rules: not just any rules, but rules that secure the authority of the majority and at the same time secure the limits that are set to this authority in order to guarantee freedom, equality, and human rights. This is why Bobbio has always been hated by the Right – and especially by the contemporary Italian Right, that has turned the contempt for rules and the denial of limits to the political power of the majority into its own ideological banner.

I believe that this represents the most important single teaching of Norberto Bobbio. It was important in the past, when the delusion of a democracy or socialism without recognized rights was a significant reason for the failure of the “real socialism” that was a major aspiration of the last century. But it is no less important today, in Italy, where the impatience with rules and the rejection of controls and regulations have become the common denominator of contemporary libertarian ideologies that acknowledge no limits to private power and influence in the field of the market, and of current notions of democracy as the unlimited power of the majority and their populist and plebiscitary appeals.

2.2. Right and Reason

The second internal connection established by Bobbio is that between law and reason. If democracy is a legal construction, since law is the indispensable instrument for shaping and guaranteeing democratic institutions, it is also true
that law is a rational construction in the first place, according to Bobbio, since reason is the indispensable instrument for projecting and elaborating law.

This is the “enlightened” and “positive” legal dimension of the legal and political philosophy that Bobbio learnt from Thomas Hobbes. In the “Introduction” to his 1948 Italian edition of Hobbes’s *De Cive*, Bobbio writes that “civil philosophy, as geometry, directs our own minds to an object that we ourselves produce.” And

in what sense can one say that we produce the object of civil philosophy or, in the words of Hobbes himself, that we fashion the state? The state, so Hobbes replies, exists by convention rather than by nature. Precisely because it satisfies an elementary need of human beings it is human beings themselves who will it.

Thus for Bobbio too, thanks to this lesson from Hobbes, the theory of law is a “theory of reason.” For Bobbio agrees with Hobbes that law is always something made rather than something natural: it is the fruit of politics and theory, and thus exists inasmuch as we interpret it and defend it, and what is more, inasmuch as we think it, project it, construct, and transform it.

2.3. Reason and Peace

Bobbio’s third teaching concerns the internal connection between reason and peace. As Bobbio points out, in the wake of the tragedy of the Second World War, peace too is something constructed, just as law is. As he writes in connection with Hobbes’s pessimism,

[...] while war is the product of a natural inclination, peace is a ‘rule of right reason,’ that is, of that faculty which allows human beings to extract certain consequences from certain premises, or arrive at principles on the basis of certain givens.

And the so-called “state of nature,” Bobbio adds, is by no means merely some imagined condition, a purely theoretical or philosophical hypothesis, but is the state of the contemporary world, of the law of the strongest, of a war that is endless because it knows no rules or principles – a state that can only be relinquished by recourse to law and reason. Hobbes, according to Bobbio “is not interested in knowing whether the human beings of primitive times were capable of following their reason to the point of agreeing upon the constitution of the State; the individuals to whom he speaks are his own contemporaries, or rather his fellow citizens, and the state of nature which they are called upon to abandon is the open religious and political conflict of his country which is stoking the dangers of civil war. It is to them that he tries to
explain that the State is the product of human beings themselves, and, more specifically, of the will of human beings as reasoning beings; or if one wishes to put it this way, is a product of the rational will of human beings.

These are the earliest pages which document Bobbio’s adoption of Hobbes as one of, perhaps even the most important of, his principal authors and points of reference. And three centuries later, in 1948, in the aftermath of the “Liberation,” in the wake of the bloodiest war in human history, it is clear that Bobbio too, with this interpretation of Hobbes, is speaking to his contemporaries and fellow citizens, is thinking specifically about the new Italian Republic, about the democracy that now has to be constructed, about the peace that now has to be protected and defended after the ravages of war and the horrors of Nazism and Fascism. And Bobbio too wants to show his contemporaries that law is a human construction, something for which we all bear responsibility: as philosophers, as legal theorists, and as citizens; and to show that peace and democracy, which are legal as well as social constructions, are constructed by human beings.

2.4. Peace and Human Rights

But how can peace be constructed and guaranteed? It is constructed, Bobbio writes, by realizing and establishing the fourth internal connection of which we spoke at the beginning, that is, by guaranteeing human rights: the right to life, the fundamental freedoms, the social rights that ensure survival and a decent life – all those rights the violation of which remains the principal cause of violence, war, and terrorism throughout the world. This is a warning that has absolutely nothing utopian about it, but is genuinely realistic and as topical as ever. Bobbio is simply reminding us of the words of the “Preamble” to the Universal Declaration of Human Rights that identify the protection of such rights as “the foundation of freedom, justice and peace in the world” and the only path we can take “if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.”

Of course, as Bobbio indicates, recalling another of his key authors, Emmanuel Kant, human progress in this direction “is not necessary” but “only possible.” But it also depends on our own faith in this “possibility” and our refusal to accept “the changeless inertia and monotonous repetitiveness of history.” As Bobbio points out:

With regard to the great human aspirations [which have been formulated in countless charters and declarations of human rights] we are still far behind. But let us not exacerbate this situation by our lack of faith, our indifference, our skepticism. There is no time to lose. History, as always, continues to reveal its ambiva-
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ence, proceeding in two contradictory directions: towards peace or towards war, towards freedom or towards oppression. The path of peace and freedom must certainly lead through the recognition and protection of human rights [...] I do not conceal the fact that this path is difficult. But there are no alternatives here.

3. The Aporias of Bobbio’s Formal Conception of Validity and Democracy, and the Notion of the Value-Free Character of Legal Science

The four basic connections we have just presented constitute, as I see it, the most important aspect of Bobbio’s thought. I should now like to submit the specific, and it seems to me rather partial, elaboration of the first of these four connections to further critical analysis. We are talking about the connection that Bobbio undertakes to establish between the conditions for the validity of legal norms and the conditions and rules of democracy.

Bobbio and Kelsen always maintained a purely formal conception of the validity of norms and a purely formal conception of democracy. These two conceptions—the legal theory of validity and the political theory of democracy, both based upon purely formal requirements— are evidently related. And they are related, in turn, to a rigorously value-free conception of legal science. For both Kelsen and Bobbio, in fact, the validity of a norm is equivalent to its actual existence, which depends solely on its enactment on the part of an authority entitled to enact it, in forms already defined by the norms that regulate the “who” and the “how” of its production. It is easy to see how such a formal theory of validity permits, for Bobbio and Kelsen alike, an analogous formal theory of democracy, one that is also anchored procedurally simply to the “rules of the game” that similarly regulate the “who” and the “how” of political decision-making, identifying the former with the representatives of the people and the latter with the principle of majority government. The isomorphic character of the two theories is manifest, in short, in the identification of democracy with the democratization of the forms—i.e. of the rules governing the “who” and the “how,” but not the content or the “what”—in which the production of norms and decision-making processes take place. Thus the existence and at the same time the validity of the decisions produced would depend solely on these forms. And this therefore implies the thesis of the value-free character of legal science: since the validity of the norms consists in their very existence, the acceptance of the norm, Bobbio writes, does not involve a value judgment, but only a “factual judgment” concerning the correspondence between the forms in which the norm has been produced and the forms already established by the norms governing that production.

It follows that the “legal theorist must essentially occupy himself” with “law as it is” rather than with “law as it ought to be,” with “real law” rather
than with “ideal law,” with “law as fact” rather than with “law as value.” And it is in this approach to law as fact that the properly “scientific” character of the legal theory consists, *i.e.* its specific

[... ] objectivity, understood precisely as an abstention from the adoption of any particular position in relation to the reality that is to be observed, or as an ethical neutrality, or, in Weber’s celebrated expression, as *Wertfreiheit*.

For Bobbio, the value-free character of legal science is, in short, a corollary of the notion of the validity of norms as existence or as fact, and it can therefore be taken as the “primary meaning of legal positivism.” In this primary meaning, so Bobbio writes, “a positivist is one who assumes a value-free, objective, or ethically neutral, attitude in relation to law.” Of course, for Bobbio, law can be criticized and evaluated. But this can only be done from an external point of view, from a specifically moral or political perspective. From the internal point of view, on the other hand, *i.e.* from the perspective of legal science, law can neither be evaluated or criticized, but merely described, albeit only with the inevitable margins of plausibility that are bound up with the vagueness and ambiguity of legal discourse.

Now all of this is beyond question, it seems to me, if we are speaking of the legislative state based on the rule of law, where the law is the supreme source of recognized order, where the will of the legislator is unlimited, where the validity of the laws depends solely on their form, *i.e.* on the “who” and the “how” of their production, where democracy is generated by the democratization of these forms through the rules of universal suffrage and the principle of majority government, where legal science merely describes norms that are valid and thus in fact exist simply because they have been produced in accordance with these forms. But these same theses – the theoretical-legal thesis of the purely formal character of the validity of norms, the theoretical-political thesis of the purely formal character of democracy, and the meta-theoretical thesis of the purely descriptive and value-free character of legal science – have become unsustainable as a result of the new paradigm of law that emerged in the aftermath of the Second World War, the paradigm of strict constitutionalism that neither Bobbio nor Kelsen before him, oddly enough, ever understood.

In fact, the constitutions that date from the second half of the last century – that of Italy, of Germany, later that of Spain and of Portugal, and finally those of certain Latin-American countries, and it is no accident that all of these constitutions were set up after the fall of Fascist or dictatorial regimes – have also changed through the strict constitutional controls and special procedures of review built into them, the conditions of the validity of laws, the nature of democracy, and the role of legal science. The validity of the laws, in the first
place, no longer depends solely on the form of the legislative process, but also on the substance of the laws produced; no longer on their simple conformity to normatively established procedures, but also on their coherence and compatibility with the constitutional norms to which they are subordinated; no longer, in short, on the “who” and the “how,” but also on the “what” of the decisions in question. This new isomorphism between the system of law and the political system has produced a substantive dimension with respect both to the idea of validity of law and that of democracy, for the fact that fundamental rights have been given specific constitutional form is tantamount to imposing substantive limits and controls on the decisions of any majority: limits generated by the rights to liberty that no majority is legitimately permitted to violate, controls generated by the social rights that any majority is expected to uphold and secure. And this likewise implies the impossibility of maintaining a purely value-free approach on the part of legal science. Since the constitutions in question have incorporated and given positive expression to the juridical “ought not to be” and the juridical “ought to be” of the content of the relevant laws, stipulating in the form of rights to liberty and social rights something that no majority can decide to ignore, and thus something that any majority is compelled to acknowledge, this has created a space for the notion of illegitimate law, an idea that was inconceivable in the older view of the legislative state based on the rule of law. For the task of juridical science is no longer simply that of describing, but also that of assessing the substantive invalidity of the nonetheless formally existing and prevailing norms, and of criticizing their constitutional illegitimacy and of moving to have them declared null and void by recourse to the constitutional courts.

4. The Sources of the Aporias in Bobbio’s Position

How can we explain the tenacity with which Bobbio, like Kelsen before him, always defended the three theses we have just discussed, all of them rooted in the old model of the law-governed legislative state, all of them inadequate to account for or to respond to the changes that have arisen with the more recent paradigm of states defined by legally binding constitutional systems? It can be explained, it appears to me, by the ambiguous twofold connection between the formal conception of the validity of norms (and thus in turn of democracy), that is based on the idea of identifying validity with existence, and the meta-theoretical conception of the value-free character of legal science. Both conceptions were equally assumed as axiomatic principles of legal positivism, even though they conflicted with the specific innovations introduced by the strict constitutionalism that emerged after the Second World War. Let us then resume the analysis of the three aforementioned theses.
4.1. The Formal Conception of Legal Validity

Let us begin with Kelsen’s, and then Bobbio’s, thesis of the equivalence of the validity and the existence of legal norms, which are identified by Bobbio with “law as it is” in contrast to the “law as it ought to be.” In this regard, Bobbio can rightly be seen as a follower of Kelsen, who always defended this equivalence as a sort of logical postulate and regarded the very idea of illegitimate law – something generated by substantively invalid laws that conflict with the content of the constitution – as an impossibility, as a “contradiction in terms” that would violate the “systematic unity” of legal norms.

Although Kelsen was the father of democratic constitutionalism, having theorized the hierarchical structure of the legal order and the centralization of the constitutional legitimacy of the laws, he was remarkably insistent and consistent in defending this aporia, appealing on each occasion to tortuous and incompatible arguments, sometimes maintaining that an unconstitutional law is still a valid law, and sometimes maintaining, even in the same work, that such a law cannot exist at all.

4.2. The Value-Free Conception of Legal Science

I have indicated in section 3 of our discussion how this theoretical thesis implies the meta-theoretical thesis of the value-free character of legal science, that Bobbio identifies with the very meaning of legal positivism in a methodological sense, i.e. with the idea that only “law as it is” rather than “law as it ought to be” is precisely “what the legal theorist should be concerned with.” But the inverse thesis holds too: the meta-theoretical thesis of the value-free character can only be maintained in turn when we conceive of law as fact and validity as synonymous with existence, something which permits us to exclude any critical or evaluative perspective on the part of the legal theorist. In short, the two theses serve in turn to legitimate one another. The thesis of the value-free character of legal science is defended by Bobbio as a deontological value and as a condition of scientific rigor just as firmly as Kelsen had defended the equivalence of validity and existence. In fact there are several epistemological traditions behind this thesis, and all of them played a part in Bobbio’s own intellectual background as well as in the prevailing legal culture of the time: Kelsen’s idea of the “purity” of legal theory, Weber’s notion of the value-free character of the social sciences, the technical-legal method and the technical-apolitical model of the role of the legal theorist that has come down to us from the German pandects, the endorsement, or at least the suggestive influence, of early logical positivism which had rejected all value judgments as devoid of any cognitive meaning.
Yet this thesis is even more indefensible than the thesis which it presupposes, namely that of the equivalence between validity and existence. And this for two sorts of reasons. In the first place, for epistemological reasons: both on account of the stipulative and conventional character of all the assumptions and definitions that are employed in legal theory, and on account of the discretionary choices that are inevitably imposed on the positive legal disciplines by the often vague, imprecise, and sometimes evaluative character of the legal language that is the object of legal analysis and interpretation. In the second place, the thesis is indefensible because of the very structure of the legal order established by strict constitutional systems, where the logical principles regarding the coherence and completeness of ordinary legislation in relation to constitutional principles that consist in fundamental rights (*iuris et in iure*) are theoretical principles (*iuris tantum*); they are not descriptive but normative principles which designate the “juridical ought” of legislation, namely that which is not always realized but is sometimes violated by legislation. Thus positive legal science in turn assumes a role that is not purely descriptive but explicitly critical in relation to persisting antinomies and reconstructive in relation to the persisting lacunae of current legislation, that is, in relation either to violations of the rights to liberty or to the absence of constitutionally established social rights.

There is a certain ambiguity in this matter that it is advisable to clear up here. The theory of law is indeed, as Bobbio maintains, a *pure* and *formal* theory in Kelsen’s terms: in the sense that it elaborates valid concepts and assertions for any legal order whatsoever, without saying anything about what establishes the right of a given order, nor about what would justly establish this order, nor about the extent to which, or precisely how, this order functions in a concrete sense. But “formal” is by no means equivalent to “descriptive” or “value-free,” as Bobbio claims that it is. On the contrary, the theory can be neither descriptive nor value-free precisely because it is formal, and thus formalizable—precisely because it is elaborated in an artificial language that is stipulatively constructed by the theorist himself, and because the logic necessarily forms part of the theory, whereas it is not part of the law, even if it ought to be.

### 4.3. The Formal Conception of Democracy

Finally I come to the third thesis which is defended both by Bobbio and Kelsen, and is correlative with the purely formal conception of legal validity: that which expresses the minimal definition of democracy as a political system based solely on formal rules that concern the “who” and the “how” but not the “what” of legislative decisions. It is no longer possible to defend this thesis either since it is incompatible with contemporary constitutional democracies where strictly
defined constitutions involve not only formal rules regulating the representative system of majority government responsible for these decisions, but also certain substantial rules, like those specifying fundamental rights, that establish the “what,” the content, which no majority is permitted to decide upon one way or the other, i.e. that prevent the suppression or limitation of rights to freedom, or civil liberties, and enjoin the satisfaction of social rights.

But it is also true that amongst the conditions and constitutive rules of the minimal idea of democracy Bobbio always included at least some rules and conditions that refer not to the “who” and the “how,” to the pure form, but to the “what,” to the substance of the decisions in question. In *The Future of Democracy*, for example, Bobbio added a “third condition” to the two conditions regarding the “form” of legislative decisions (the “who” and the “how”) that are expressed by universal suffrage and the principle of majority rule: “those who are required to decide, or to elect those who will decide, must be provided with real alternatives and placed in a condition to choose between these alternatives. If this condition is to be realized, those required to decide must be guaranteed what are described as rights to freedom – the rights to form and to express their own opinions, the rights to free assembly and to free association, etc.” And no majority is therefore permitted to deprive them of these rights. It is clear that this third condition is a substantive one with regard to the limits imposed on the “what,” i.e on the possible content of legislative decisions. So much so, in fact, that Danilo Zolo has recently challenged the claim that Bobbio’s theory and his minimal definition of democracy are in fact purely formal and procedural. Yet Bobbio expressly contradicted this interpretation and emphatically reaffirmed, in a letter published by Zolo himself, the essentially formal character of his minimal definition of democracy. After denying that this definition involves “a reference to any minimal content,” Bobbio asserts that

> [...], civil rights are not the content but the conditions of the democratic state. The content depends on the collective decisions that at one time or another are actually taken by means of these rules.

Now it is clear, as Bobbio himself has always said, that the suppression of civil rights and rights to freedom cannot be part of this “content of collective decisions;” this is itself a *substantive* condition of democracy. But this means that the thesis of the purely formal character of Bobbio’s notion of democracy, however firmly it was defended by Bobbio, is contradicted by the condition in question.

Or perhaps this is not a genuine contradiction after all. Perhaps the contradiction is merely apparent, and can be avoided if we consider two aspects, not in themselves procedural, of the limit and condition that are required by Bobbio’s minimal definition of democracy. The first aspect concerns the
nature of this limit, which consists, it is true, in the guarantee of certain freedoms, but only those which are necessary to ensure the effective and deliberate exercise of political rights, and thus the formal dimension of democracy. In other words, Bobbio’s rules do not include, as limits or necessary conditions, any guarantees of the other fundamental freedoms, such as the right to personal integrity, or immunity from torture, the freedom of residence and communication, personal freedom, guarantees concerning due process in penal matters, or the right to health, all of which obviously have nothing to do with the “who” and the “how,” with the form of legislative decisions. The formal notion of democracy is not therefore contradicted when the elementary conditions ensuring the effective functioning of democracy are imposed by the rules regarding the “who” and the “how.”

The second aspect that allows to deny the apparent contradiction is the fact that Bobbio, along with the entire classical liberal tradition, speaks of such limits on the level of a political philosophy of the state based on the rule of law, not on the level of a legal theory of democracy – in other words, of political limits rather than of legal constitutional limits. In fact, he does not associate these limits with the strictly circumscribed constitutions of today, to which he alludes merely incidentally and only in passing. He does not formulate a theory of constitutional democracy at all, but only a political theory regarding the limits of the power of the state. In short, neither Bobbio’s theory of law nor his theory of democracy leaves any adequate room for the issue of the constitution.

5. Three Further Teachings of Norberto Bobbio

The cost of these three theses of Bobbio – the formal conception of validity, the supposedly value-free character of legal science, and the formal conception of democracy – can thus be measured by their inability to account for the substantial and substantive features of contemporary constitutional democracies, and for the critical and reconstructive role that these features imply both for legal science and the theory of democracy. Yet although these three theses are unsustainable, they are dictated by a series of otherwise plausible reasons that are worth rendering explicit because they too correspond to certain other teachings of Bobbio.

5.1. The Separation of Law and Morality

Bobbio’s first thesis, that regarding the essentially formal character of validity is a corollary of the great cultural achievement that was represented by
the liberal-secular separation of law and morality. From this point of view, the defense of this separation has always been one aspect, perhaps even the principal aspect, of Bobbio’s polemic, like that of Kelsen before him, against both the natural law tradition, which in all its versions blurs or conflates law with issues of morality and justice, and the ethical legalism that, even more problematically, conflates justice and morality with positive law.

We are talking here of an utterly fundamental principle of modernity which establishes the secular and liberal character of law and other institutions generally. Yet this principle is now more relevant than ever, given both the frequent attacks on the secular world and its institutions that are mounted by religious groups and representatives, and the revival of the natural law perspective regarding the alleged connection between law and morality that has been mounted by many defenders of contemporary neo-constitutionalism.

I have frequently attempted to distinguish two senses with regard to the principle of the separation of law and morality, senses which correspond to two principles, both of them essential, that are required to guarantee the rule of law, equality before the law, freedom against arbitrary moral or ideological compulsion, due subordination to the law of public authorities. The first assertive or theoretical sense involved here is a corollary of legal positivism, i.e. of the principle of legality as the norm for recognizing existing law. It thus expresses two reciprocal forms of autonomy: that of law with respect to morality and that of morality with respect to law, as separate and distinct spheres, the one public, and the other private. The second prescriptive or axiological sense involved here is a corollary of political liberalism. It expresses the claim, expressed in the principle of harm, that the task of law and the state is not to promote, support, or reinforce the existing (or any specific) morality or culture or religion or ideology, but simply to prevent, ne cives ad arma veniant, any conduct that harms a third party, and more generally to protect persons by guaranteeing them life, dignity, liberty, equality, and peaceful co-existence.

5.2. External Value-Neutrality

The second thesis, that regarding the value-free character of legal science, is itself a normative thesis that, with the specific clarifications and qualifications already indicated, imposes a deontological commitment to neutrality and objectivity in any area of scholarly or scientific investigation.

From this point of view, I think it is useful to distinguish between what we could call internal value-neutrality and external value-neutrality. The notion of internal value-neutrality is actually unrealizable here, for the epistemic and legal reasons discussed above. The epistemic reasons derive from
the value-judgments that inevitably arise in the doctrinal interpretation of laws on account of their semantic indeterminacy, in the construction of the theory on account of the choices demanded by the stipulative character of the relevant definitions and other theoretical assumptions. The legal reasons derive from that normative disparity between the constitution and ordinary law which demands the exercise of critical judgment and a due response to problems or infringements on either side, whether they consist in antinomies or lacunae in the system. The notion of external value-neutrality, on the other hand, is quite different, for while it is unrelated to the nature or structure of law, it is a constitutive value for all research and all scientific discourse. It is this second type of value-neutrality that Bobbio propounded for us: the impartiality of judgment, the absence of ideological prejudices and political prepossessions, the distaste for pointless rhetorical declarations of values.

5.3. The Rejection of Ideological Mystifications

Finally, we come to the thesis regarding the purely formal character of democracy, and the refusal to recognize a more substantial conception of democracy. This thesis is undoubtedly motivated not only by Bobbio’s polemic against the natural law tradition, but also by the way in which the expression “substantial democracy” was abused by the apologists of the “people’s democracies” once proclaimed by the states of “real existing socialism,” and by Bobbio’s rejection of the idea, enthusiastically propagated by these apologists, of a supposed democracy “for the people” beyond, or worse, instead of, a “democracy of the people.” It is obvious that the critique of these disastrous historical experiences and the explicit repudiation of such mystifications have proved to be a most invaluable and salutary teaching for all of us throughout the years of ideological struggles and confusions. But the very arbitrariness with which expressions as “substantial democracy” or “democracy for the people” have been used and depleted has actually encouraged me, rather provocatively, to rehabilitate them precisely in order to describe a political system that is the exact opposite of the form of government defended by the apologists who appealed to these expressions: to describe, by contrast, the double subordination of the forms of political power not only to formal rules regarding the “who” and the “how,” but also to substantive rules regarding the “what” of collective decision-making – a content that is defined and determined by the paradigm of democratic constitutionalism.

Given this double subordination, it is by no means true that a democracy “at once formal and substantial” would amount, as Bobbio claims, to “a perfect democracy that has never been realized anywhere” and that must
be consigned “to the category of utopian notions.” Nor is it true that these two formal and the substantial dimensions are mutually incompatible. The characteristic feature and the significantly novel character introduced by strict constitutionalism consist precisely in having rendered these two things compatible by normatively projecting a **substantial** as well as a **formal** dimension, one that is for the people as well as of the people. The constitutionalization of fundamental rights has limited and bound the sphere of what may be legislated upon, which is entrusted to the rules of formal democracy or democracy of the people, by specifying a sphere of what may not be legislated upon — determined positively by the limits imposed to guarantee rights to liberty and defined negatively by the bounds imposed to guarantee social rights — through rules of a democracy that can well be described as substantial, or as a democracy for the people, since these rules concern what may not be legislated upon one way or another in order to guarantee the rights of each and everyone. And the conjunction of these two dimensions — the formal and substantial dimension, that of the people and that for the people in the aforementioned sense — is neither impossible nor utopian in character. This gives rise, when the substantial norms are themselves violated, to illegitimate law — an entirely inconceivable expression, as we have seen, in the legislative state where, in the absence of any superordinate substantial norms, all formally existing norms are valid. But this merely indicates, in an apparent paradox, the major defect but also the major advantage of those constitutional democracies where the power of the legislator is subjected to limits and bounds with regard to content as well as form since both may sometimes be violated.

The constitutional paradigm, in short, always involves a certain tension in relation to existing positive law: a tension that can be reduced but never entirely eliminated. Apart from implying a normative, critical, and reconstructive role for legal science, this tension also allows us to speak not indeed of a “perfect democracy” (since democracy is always imperfect), but of a degree of democracy (and of legitimation) that is higher or lower with respect to the normative guarantees that have been introduced, and above all with respect to the effectiveness of such guarantees.

(Translated from Italian by Nicholas Walker)

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