Norberto Bobbio: An Age of Rights without Foundations¹

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Abstract: The title of the following essay echoes one of Bobbio’s most famous books, and emphasizes one of its main issues: that of providing a “foundation” for the idea of rights. This essay summarizes what Bobbio means by “the age of rights” and presents his principal criticisms of any supposedly “absolute foundation” for rights. In exploring the notion of an age of rights without foundations Bobbio raised a number of crucial issues that effectively anticipated the contemporary debate around problems concerning the historical transformation of rights and the origin of these rights in specific social processes, the deontological status of rights and the connection between rights and duties, the contrast between universalism and relativism, the relationship between different “generations of rights” and social rights, and the international protection of rights in relation to the idea of “institutional pacifism.” To pursue further reflection and enquiry along these lines would be a way of remaining faithful to the spirit of Bobbio’s teaching. But in order to do so it would also be necessary to question some of the methodological assumptions of Bobbio’s work: normativism in the area of jurisprudence, neopositivism in the field of epistemology, and the analytical approach in the history of ideas.

1. A Copernican Revolution

1.1.

Norberto Bobbio was certainly no optimist. He even once described himself as “a chronic depressive, that is, someone who discharges his aggressiveness against himself.”² And in 1995 he pointed out that “even the great invention of our civilization” that is represented by “the new global ethos’ of human rights” must be considered “more of a proclamation than an actual

¹ Earlier versions of this paper have been presented at the conferences “Norberto Bobbio: democracia, direitos humanos e relações internacionais,” Universidade Federal da Paraíba, João Pessoa (Brasil), 9–12 November 2009, and “Diritti, democrazia, pace. L’eredità di Norberto Bobbio,” Università di Camerino, 2 January 2010.

achievement.” The rights that are typically proclaimed in international declarations are systematically violated in all countries in one way or another. The images of “heaps of abandoned corpses, of entire populations driven out of their own homes, hungry and in rags, of emaciated children with eyes bulging from faces that have never smiled, and never will before an early death snatches them away” serve to remind us that

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our moral sensibility advances, if it advances at all, far more slowly than our economic power, and than our political or technological power. All our declarations of rights belong to the world of the ideal, to the world of the ought, the world as it ought to be in reality.

Only five years earlier Bobbio had been rather less cautious than this, maintaining that human rights “are one of the principal indicators of progress.” This is one of the three theoretical theses on rights which Bobbio claims to have “highlighted” since 1951: the extension and intensification of the debate on human rights can be interpreted as “prophetic sign” (signum prognosticum) of the moral progress of humanity. For Bobbio “the progressive affirmation of human rights” is effectively marked by a series of particular steps: the constitutionalization of rights (their expression in positive legal form), the progressive extension of such rights, and the explicit universalization of these rights, as envisaged in the Universal Declaration of Human Rights in 1948. And finally the process of specifying rights defines them explicitly in relation to “specific demands for protection”: the rights of women, of children, of the elderly, of the sick, of the disabled, and of future generations. Bobbio has come to regard the politics of rights as a significant historical achievement and as a characteristic achievement of the European movements on the Left, over and beyond the “artificial denominations” and factional divisions which have weakened this tradition. He has thus effectively distanced himself from the label of “liberal socialism” that he formerly defended.

4 Bobbio, Ibid., p. 662.
6 Ibid., p. 49 [p. 35].
8 Ibid., p. 439.
9 In early 1992 Bobbio claimed that the expression “liberal socialism” and similar formulations enjoyed precious little theoretical coherence and represented a merely “abstract and artificial construction.” He argued that he was now adopting “the more concrete, and emotionally
But why should the “age of rights” be regarded as a “prognostic sign” in the sense suggested? And what specifically characterizes the age of rights? Bobbio’s response to this question is very clear. He claims that we have seen the eventual emergence, from earlier archaic and traditional normative codes and systems, of an expressly deontological conception of obligations, prohibitions, and laws. From the Ten Commandments to the Code of Hammurabi, to the Twelve Tables of the Law, we can identify moral and legal systems expressed in terms of binding norms, whether positive or negative, of commands and prohibitions.10

The proclamation and defense of human rights, in the natural law theories of the early modern age, and then in the specific declarations of rights that emerged at the end of the 18th century, represents a “Copernican Revolution”: in contrast to the long tradition of earlier political thought, we gradually came to regard the relationship between the rulers and the ruled no longer *ex parte principis*, but rather *ex parte populi*. The individual had long been considered as a mere object of power who has an obligation to observe the prevailing laws. But with the development of the Christian conception of human life, and then the modern natural law tradition, we have gradually witnessed the emergence of a more individualistic conception of society and the state which has finally supplanted the older organic conception of the social and political community.

This inversion of the former relationship between the individual and the state has also inverted the traditional relationship between the ideas of right and obligation. As far as individuals themselves are concerned, it is now the domain of rights that takes precedence over that of obligations; as far as the state is concerned, it is obligations that take precedence over rights.11

1.2.

But what is it that furnishes the theoretical legitimation for the age of rights? At least since 1964 Bobbio has explicitly acknowledged the impossibility of discov-

more engaging, approach of a politics of rights, understood no longer simply as the rights of abstract humanity, but as the rights of men and women, of children, of the old, of the sick, of the marginalized, in response to all those threats to freedom and the dignity of human beings that derive from the irresistible and irreversible advance of technology, an advance that brings benefits and difficulties in its wake [...] Was it not perhaps the demand for ever new rights that has characterized the course of history and the success of the European Left over the last two centuries?” (N. Bobbio, “Una nuova carta dei diritti,” in *La Stampa*, 2 January 1992, <http://www.erasmo.it/gobetti/copertine/9237.htm>).

11 Bobbio, Ibid., p. 436.
ering some “absolute foundation” for human rights and basic rights generally. For Bobbio “human nature” remains an entirely vague idea which allows us to justify very different conceptions of rights, and the very definition of human rights is highly problematic. In the second place, human rights have evidently changed throughout the course of history: some rights that we regard as entirely fundamental today were never regarded in this way in earlier historical periods, and are still not regarded as such in other cultures, and the very content of rights – one only has to consider property rights – have been significant reinterpreted. All of this shows us that “rights are not fundamental by their nature.”

In the third place, the rights in question are frequently incompatible with one another: not only do the rights of certain individual subjects collide with those of other subjects, but in some cases we discover an antinomy, a “situation which involves a contradiction between the rights claimed by the same group of persons.” And “two fundamental but contradictory rights cannot have a single absolute principle which makes them both irrefutable and irresistible.”

Yet Bobbio also claims, on the other hand, that the problem of foundations has already found a “solution”: given that the great majority of governments have officially adopted it, the Universal Declaration of Human Rights [...] represents a unique demonstration that a value system can be considered to be founded on humanity and thus acknowledged by it: the proof is in the general consensus over its validity. Advocates of natural law would have spoken of consensus omnium gentium or consensus humani generis.

Bobbio has explicitly opposed all attempts to provide specifically philosophical arguments in favor of an “absolute foundation” here. Giuliano Pontara was already arguing in 1980, for example, that such a foundation could be found in the concept of “fundamental preferences” the satisfaction of which effectively constitutes the “necessary condition for pursuing the satisfaction of any other preference or the realization of any aspiration, purpose, and value that could possibly arise.” In this way, he claimed, we can ground rights to life, rights to health, and rights to authentic autonomy. Pontara regarded this as an “irresistible” argument based on three preferences that no rational person can possibly renounce for him or herself, or possibly deny to others.

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12 Bobbio, L’età dei diritti, p. 9 [p. 6].
13 Ibid., p. 13 [pp. 8-9].
14 Ibid., pp. 18-19 [p. 13].
16 “It is difficult to see how any rational person can fail to entertain these three preferences, and, in entertaining them, can deny that they are fundamental, and, in being rational, can wish to
In his response to this claim Bobbio argues that the preferences which Pontara identifies “are deduced from the supposed rational nature of the human being.” But “the rationality of human behavior is a pure rational hypothesis that fails to enjoy the support of any historical evidence.” And above all, “if we assume the hypothesis of the rational character of humanity, we presuppose what it is that we wanted to demonstrate, for if human beings are posited as rational then we can no longer entertain any doubt about the rationality of their choices.” Furthermore, Bobbio finds a logical fallacy in Pontara’s argument: even if there were certain universal preferences such as those suggested, “we cannot necessarily infer from the universality of a preference that we must recognize it as a fundamental right.” And finally, it is debatable whether the preferences which Pontara cites are indeed universal: the preference for autonomy itself may easily yield, in many contexts of moral experience, to a more general “fear of freedom” and the desire to avoid personal responsibility for choice.

In response to Pontara’s attempt to rebut his arguments Bobbio emphasizes the indeterminate character of the fundamental rights in question, taking the right to life as an example – a concept that hardly allows us to provide unambiguous answers to questions concerning the rightfulness of abortion, of euthanasia, of capital punishment. Likewise he emphasizes the historical character of these rights, something that is not invalidated by Pontara’s (problematic) idea that we can justifiably speak of the “discovery of new moral truths.” Then again, when Pontara addresses the problem regarding the incompatibility of fundamental rights he also refers to the notion of a certain hierarchy amongst the latter. But then, according to Bobbio, “at this point there are no longer a number of fundamental rights but only one, which comes to assume the foremost place in the hierarchy and as such furnishes the foundation for all the others.” If such a right, as Bobbio appears to believe,

is the right which permits the maximum realization of the other rights, we must conclude that indeterminacy is indeed one of the characteristics of fundamental rights. And the circle is closed.18

2. A Far-sighted Vision

In exploring this notion of an age of rights without foundations Bobbio raised a number of crucial issues that effectively anticipated the contemporary debate

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17 Ibid., p. 461.
18 Ibid., p. 463.
around problems concerning the historical transformation of rights and the origin of these rights in specific social processes, the deontological status of rights and the connection between rights and duties, the contrast between universalism and relativism, the relationship between different “generations of rights” and social rights, and the international protection of rights in relation to the idea of “institutional pacifism.”

2.1.

Bobbio does not simply emphasize the specifically modern origin of human rights, the historicity of these rights, and their historical variability; he also defends a further and extremely important thesis with regard to the genesis of such rights. Bobbio maintains that rights are a result of social conflict: they “are historical rights which emerge gradually from the battles human beings fight for their own emancipation and the transformation in living conditions which these struggles produce.”

Bobbio argues that

[…] human rights are rights and therefore arise from specific conditions characterized by the embattled defense of new freedoms against old powers. They are established gradually, not all at the same time, and not for ever […] Religious freedom resulted from the religious wars, civil liberties from the parliamentarian struggles against absolutism, and political and social freedoms from the birth, growth and experience of movements representing workers, landless peasants, and smallholders. The poor demand from the authorities not […] only recognition of personal freedom and negative freedoms, but also protection against unemployment, basic education to overcome illiteracy, and gradually further forms of welfare for sickness and old age.

As we have seen, the Copernican Revolution accomplished by the age of rights is directly bound up with the emergence of an individualistic conception of society. In the context of the age of rights Bobbio argues that the social sciences today are “dominated by a trend called ‘methodological individualism,’ according to which the study of society must commence from the study of the behavior of individuals.” And Bobbio also claims that “the perspective of the rights of man is unintelligible” without reference to

[…] the ontological individualism which works on the assumption […] of the autonomy of each individual in relation to all others and of the equal dignity of

19 Bobbio, L’età dei diritti, p. 26 [p. 18].
20 Ibid., pp. xiii-xiv [p. 11].
each individual, and the *ethical* individualism which regards every individual as a moral personality.\textsuperscript{21}

This thesis regarding “individualism” has been interpreted as the most authentic expression of Bobbio’s theory of rights, of his characteristic “neo-Enlightenment” perspective that would exclude the pernicious “ecumenical approaches” that are widely represented in the contemporary discussion, and would avert the “interpretative Babel” that results from such approaches.\textsuperscript{22} But the idea of an internal connection between individualism (in all its aspects) and the emergence of a theory of subjective rights is of course quite common. One only has to think of those historical accounts which link the emergence of an entirely subjectivist conception of *ius* to the individualist ontology and the voluntarist approach to ethics developed by Franciscan theologians, and by William of Ockham in particular, during the 14th century.\textsuperscript{23} But plausible arguments have also been raised against these claims: according to other commentators, certain jurists of the 12th and 13th century articulated some of the basic features of the modern doctrine of rights,\textsuperscript{24} and many who developed such a view on the philosophical and theological level did not accept ontological individualism and did not defend an atomistic conception of society. In short, we cannot construct a linear genealogy that would effectively identify the theory of subjective rights with individualism in general. Of course, many contributions to the theory of rights – and most especially that of Hobbes – have been based on an essentially individualistic philosophy. But the case of Hobbes himself is paradoxical: his theory represents the most radical version of the priority of individual subjective rights with respect to every norm and every obligation, and represents the most radical form of methodological, ontological, and ethical individualism. Yet the radical individualism of Hobbes was specifically designed to conceptualize the absolute character of sovereign power, the lack of any rights on the part of subjects in relation to that power, and the absolute illegitimacy of any action or contestation on their part with respect to the established political power.\textsuperscript{25}

\textsuperscript{21} Ibid., p. 60 [p. 42].
\textsuperscript{22} E. Vitale, “Ragione filosofica e diritti dell’uomo,” \textit{Iride}, 46 (2005), pp. 582 and 586.
\textsuperscript{23} See M. Villey, \textit{La formation de la pensée juridique moderne}, Paris: Montchretien, 1975, pp. 69-145, 240-272. Villey emphatically criticizes the idea that classical Roman law is acquainted with a subjectivistic conception of *ius*.
On the theoretical level as well one can certainly deny that the “Copernican Revolution” of the appeal to rights necessarily presupposes an individualistic vision of society. Bobbio himself appears to deny this when he points out that the origin of rights is connected with processes of contestation and social conflicts of one kind or another. For it is abundantly clear that the actors engaged in such processes are actually organized groups rather than single individuals. On the other hand, as we have seen, Bobbio does not simply point out the antinomies of human rights that certainly do not represent a “coherent theoretical nucleus”: if we seriously consider the complex of social, political, cultural processes that Bobbio describes in terms of “the age of rights,” then the notion of some grand and progressive assertion of individualism becomes increasingly difficult to sustain. The 1966 Convention on economic, political, and social rights already recognizes the collective right to self-determination on the part of peoples. Above all, if we consider the universalization of the language of rights, the extension of this language beyond its original point of origin, it is impossible to avoid acknowledging those cultural experiences to which individualism can only respond with considerable difficulty. And then we are forced to recognize the particular importance that must be ascribed in many contexts to social, economic and cultural rights, and to acknowledge that civil rights will also assume rather differentiated forms in the intercultural and multicultural context. One need only think of the forms of “land property” amongst the legal systems of indigenous peoples: the relation to land, here understood as an ancestral heritage, is seen as a matter of shared concern and administration where individual and collective rights are interdependent.26

But Bobbio’s idea that the age of rights places the individual in a primary position, if properly re-interpreted, could be endorsed and could furnish an appropriate point of reference for addressing the complex problem of the relationship between the growth of subjective rights and the defense of specific cultural contexts, between individual rights and collective rights. From the normative point of view, the thesis that the relevant point of reference is now provided by the weakest individuals, those who are most exposed to the effects of significant inequalities and disparities of income, to the various forms of subordination and domination, to violations of human dignity and identity, seems plausible and defensible. Individuals must now be considered in their singularity, as bearers of cultural and gender differences. Individuals are born and formed in a dialectical (often antagonistic) process within a particular cultural context, and they often appeal to this cultural context to

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protect them; but it is individuals that also constitute the point of reference for the evaluation of cultural differences. This implies in turn that neither the rigid universalism of the Western tradition nor the rigid vision of different cultures are sufficient to define the rights of individuals.27

2.2.

In the enormous body of Bobbio’s contributions to the general jurisprudence the question of subjective rights turns out to be rather marginal.28 But if we examine the matter more closely, we discover that there is a reason for what looks like a distinct lack of theoretical interest in this area. And that is Bobbio’s understandable adherence to a thesis which has found considerable support in the theoretical-juridical discussion on subjective rights: namely that concerning the correlative of rights and duties.

In his typological analysis of norms Bobbio explicitly addresses the question of “attributive and privative norms” and introduces an argument concerning the “bilateral” character of norms:

Generally speaking, when a legal norm generates a situation of obligation in one individual subject it simultaneously generates a situation of power in another, and vice versa. [...] “Obligation” and “power” are interrelated terms in the sense that neither can be defined independently of the other, and that each can be converted into the other; thus to say that “A has an obligation with regard to B” is equivalent to saying that “B has a certain power with regard to A.”29

It is not difficult to recognize in these remarks as an echo of a well-known essay of 1913 by the American jurist Wesley N. Hohfeld, to whom Bobbio explicitly refers.30 Hohfeld had complained about the “very broad and indiscriminate use of the term ‘right’” and demanded greater clarity in this regard. He thought this would be possible as long as we specify the different meanings of the word: right in the strictest sense as “claim,” and right in the further senses of “privilege,” “power,” and “immunity.” Hohfeld connects these four terms with their corresponding correlative terms: in the case of right as claim

28 There are no sections specifically dedicated to the idea of subjective rights either in Bobbio’s lectures on the Teoria generale del diritto (Turin: Giappichelli, 1993) or in his other important theoretical contributions to this field.
30 Ibid., p. 222, note 4.
the correlative term is “duty,” in the other three cases the correlative terms are “non-right,” “liability,” and “disability.” The starting point of the analysis is what Hohfeld regards as a general tendency to consider duty as the “invariable correlative” of right.\(^{31}\)

In his entry on “Norm” in the *Enciclopedia Einaudi* Bobbio suggests a typical example of an “attributive norm:” the right expressed in the signs we see posted on public seats and benches, such as: “reserved for the sick and disabled.” Bobbio argues that “the effect of such a norm is a situation that is called a “right,” and it is not any faculty whatever, but a protected faculty.”\(^{32}\) For Bobbio attributive norms can be found in every normative system. He provides some rather commonplace examples such as a player’s “right” to initiate a card game by drawing the highest card from the pack, or the “right” of a team that has just won the toss to kick off a football match. In fact the imperative norm directed to the passive subject and the correlative attributive norm directed to the active subject have the same significance, although this is expressed in two different propositions. And, in Bobbio’s view, analogous considerations also apply to norms that attribute powers, whether they are public or private in character.\(^{33}\)

Bobbio finds himself in excellent company here. We have already cited Hohfeld, but Hans Kelsen’s “pure theory of right” also claims that “the legal right is, in short, the law.”\(^{34}\) And Luigi Ferrajoli has also referred to the theses of Kelsen in his own *Principia iuris*.\(^{35}\) The typology presented by Hohfeld has been interpreted in a way that connects all of the terms with one another,\(^{36}\) reducing them to the three fundamental deontological modalities of “the obligatory,” “the forbidden,” and “the permitted,” all of which can be defined in terms of one another.\(^{37}\) This would imply, according to Bruno Celano, that rights “are merely an appearance, whose substance is produced by the imposition of duties (on others).”\(^{38}\) As we have seen, Bobbio endorses this

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33 See Ibid., pp. 199-201.
thesis,\textsuperscript{39} and indeed explicitly maintains that the \textit{primary} function of norms is a prescriptive one.\textsuperscript{40}

But this thesis regarding the correlativity of rights and duties has actually been subjected to significant criticisms. David Lyons\textsuperscript{41} has argued that it only properly holds for “passive” rights (typically the rights that emerge in situations analogous to those obtaining between debtors and creditors). “But some ‘active’ rights (rights to \textit{do} things) do not fit the pattern delineated”\textsuperscript{42} – such as freedom of speech, for example. And again, for Herbert Hart, the thesis of correlativity cannot account for the way in which civil law regards individuals\textsuperscript{43}:

[...] one individual being given by the law exclusive control, more or less extensive, over another person’s duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed.\textsuperscript{44}

The holder of the right can therefore exercise a form of control over the correlative duty, renouncing it or demanding it, waiving or extinguishing the duty or leaving it in existence; he can enforce the right or leave it “unenforced.”\textsuperscript{45}

For Neil MacCormick the possession of a specific right, conferred by the legal order, implies a vast gamut of “atomic” relations of the kind identified by Hohfeld. Such relations can be derived from the existence of right, but the existence of right cannot be derived from the totality of these relations: what we are dealing with here are complex “institutional” concepts.\textsuperscript{46}

One might argue therefore that Bobbio’s theory of rights is marked by certain ambivalence. On the one hand, he has emphasized the historical significance of the diffusion of the language of rights, even speaking of a “Copernican revolution” and a “radical inversion” of the political relationship between the state and the citizen, or the sovereign and the subject.\textsuperscript{47} On the other hand, he has also endorsed the thesis that rights can be reduced to

\textsuperscript{39} See Bobbio, “Norma giuridica,” pp. 221-222.
\textsuperscript{40} See Bobbio, Ibid., p. 199.
\textsuperscript{42} Ibid., p. 47.
\textsuperscript{44} Ibid., p. 112.
\textsuperscript{45} Ibid., p. 116.
\textsuperscript{47} N. Bobbio, \textit{L’età dei diritti}, p. xi; see also pp. 54-57 and 112-114; Id., \textit{The Age of Rights}, pp. ix-x; p. 39; pp. 91-92.
duties, an approach which risks treating the language of rights as pointless and redundant, if not as a source of ambiguities. Is there a solution these difficulties? In addressing the question of the correlativity of rights and duties Joel Feinberg imagines “Nowheresville” as a world that has absolutely no conception of subjective right. What is lacking in Nowheresville in this case? Precisely “the activity of claiming.” For Feinberg the “characteristic use” of rights and “that for which they are distinctively well suited is to be claimed, demanded, affirmed, insisted upon.” As Feinberg further says:

Having rights, of course, makes claiming possible; but this is claiming that gives rights their special moral significance. This feature of rights is connected in a way with the customary rhetoric about what it is to be a human being. Having rights enables us to “stand up like men,” to look others in the eye, and to feel in some fundamental way the equal of anyone [...] and what is called “human dignity” may simply be the recognizable capacity to assert claims.48

I believe that the thesis of Feinberg, which captures the specificity of the language of rights in this notion of claiming, can readily be related to Bobbio’s thesis regarding the historical origin of rights in social conflicts and the processes of demanding such rights.49 Rights arise from below,50 and their typically deontological character expresses this development; and perhaps precisely this is the root of that basic Gestalt-switch to which Bobbio alludes, the fact that political phenomena are no longer regarded ex parte principis, but ex parte populi.

2.3.

In Bobbio’s thought the critique of foundations leads to relativism: no absolute foundation is possible once we acknowledge that rights are historically relative. By the term “relativism” in this connection Bobbio appears to refer to the plurality of different ethical visions, but the problem of cultural relativism has been explicitly raised ever since the Universal Declaration of Human Rights was framed: the question concerning the genuine universality of the Declaration, and the risk that it might simply end up expressing “the values prevalent in the countries of Western Europe and [North] America.”51 In spite

of the criticisms to which cultural relativism has been subjected, the basic reasons for skepticism regarding the supposed universalism of the Declaration have also been reformulated by the various currents of cultural anthropology.\footnote{See T. Pitch, \textit{I diritti fondamentali: differenze culturali, disuguaglianze sociali, differenza sessuale}, Turin: Giappichelli, 2004, pp. 49-59.} Clifford Geertz, in particular, has challenged the idea that there are certain characteristics of “Man” as such, that there are any “cultural universals” that effectively “underlie” the customs and practices that change and vary according to time and place. Or rather, he challenges the notion that such cultural universals can reveal anything other than empty and abstract categories.\footnote{See C. Geertz, \textit{The Interpretation of Cultures}, New York: Basic Books, 1973, p. 5, pp. 39-40. It should be noted that Geertz explicitly criticizes the criterion of the \textit{consensus gentium} as a method for investigating supposed cultural universals.} The relevant anthropological research in this field, like that of Marc Augé\footnote{See M. Augé, \textit{Le sens des autres. Actualité de l’anthropologie}, Paris: Fayard, 1994.} which places in question the universality of the very notion of the “individual” (the subject of rights), and the specific investigations of legal anthropology\footnote{See R. Rouland, \textit{Anthropologie juridique}, Paris: PUF, 1988; Id., “Les fondements anthropologiques des droits de l’Homme,” \textit{Revue générale de Droit}, 25 (1994).} have brought out the full complexity of these problems. What is more, the existence of highly divergent interpretations of human rights is something that has been widely recognized at least since the World Conference of the United Nations on the issue of human rights, held in Vienna in 1993, and can no longer be banished from the agenda of international politics.

In the context of this discussion we must ask whether the Declaration of 1948 does indeed represent a case of the \textit{consensus omnium gentium}. The argument in question could be rephrased in a modified form, by conceding that the language of human rights originated in the West, but also pointing out that it is now widely diffused in many different cultural contexts. In this sense, the charters and declarations of rights that relate to other geographical regions than those of Europe a North America are of particular interest and relevance. When we read such documents we have the impression that the object of consensus differs significantly from that characteristic of the liberal and Enlightenment tradition.\footnote{See, for example, the \textit{African Charter on Human and Peoples’ Rights}, adopted at Banjul in 1981 by the Organization of African Unity (<http://www.volint.it/scuolevis/dirittiumani/africanchart.htm>), the \textit{Cairo Declaration on Human Rights in Islam}, adopted by the Islamic Conference of Foreign Ministers (<http://en.wikisource.org/wiki/Cairo_Declaration_on_Human_Rights_in_Islam>), and the \textit{Universal Islamic Declaration of Human Rights} of 1981, drawn up by the Islamic Council of Europe under the aegis of UNESCO (<http://www.alhewar.com/ISLAMDECL.html>).} Furthermore, as Jean-François Lyotard has pointed out, the loss of authority on the part of the traditional “grand...
narratives” means that in a sense “consensus has now become an outmoded and suspect value,” and if there is to be any consensus, then “it must be local, in other words, agreed on by its present players and subject to eventual cancellation.” On the other hand, as Charles Taylor has argued, “something like” an overlapping consensus with regard to human rights demands not only that we recognize the Western cultural roots of the discourse of rights, but also that we focus our attention on the specificity of the notion of subjective right, on what distinguishes it from the mere attribution of freedom or immunity to particular individuals. When therefore we speak of an intercultural dialogue concerning the universality of human rights, we are effectively addressing two distinct questions: the universality of the normative content that is expressed in the language of subjective rights, and the universality of the form of subjective right, in short of the very language of rights. It is difficult to resolve the first question, as many have pointed out, simply by reducing the core principles to the minimum content on which we may hope to agree. For who is to decide what is to be excluded here? And why does the minimum catalogue of relevant rights always resemble the list of classic civil liberties that were conceptualized by the Western liberal tradition? It is necessary to take cultural differences really seriously, and to consider one’s own cultural tradition in the context of others, recognizing cultures as entities caught up in change, with open borders, with cultural traditions that are subject to a process of interpretation, deconstruction, and reconstruction. And we must do all this “in the full awareness that there will be black holes here, zones of irreducible reciprocal inscrutability.” On the other hand, the law offers specific resources for addressing these issues: for contrasts and differences that cannot be resolved within the Weberian perspective of a mortal struggle between absolute moral values may find solutions in a juridical con-

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58 Ibid., p. 107.


60 Ibid., p. 136.


text in which, to adopt a Habermasian metaphor, the high tension of moral principles can at least be reduced.

The problem of universalizing the language of rights and the form of subjective right raises other questions, but it also permits us to adopt a different perspective. In fact, if we maintain that human rights, as rights, involve the activity of claiming, this itself seems to express an attitude that is typical of occidental modernity. Yet the ability to formulate claims that embody specific needs and interests, to express these claims in a form capable of producing relevant legal means of guaranteeing and protecting these needs and interests, this could be something that people suffering oppression and discrimination in very different cultural contexts can recognize as a fundamentally attractive feature of the occidental language of rights. It is in this context, I believe, that Bobbio’s analysis of the age of rights could be further developed: a language which is emancipatory in the literal sense of the word (ex-mancipum: the liberation from slavery) can prove attractive to anyone who is subordinated or subjugated, even if one has learned this language from one’s lords and masters, and even if those lords and masters have used it to subordinate or subjugate them in the past.

2.4.

In the context of his analysis of different “generations” of rights Bobbio has often focussed on the issue of social rights, while lamenting the fact that part of the political Left has followed the political Right in diminishing their significance. Bobbio underscores the importance of Article 22 of the Universal Declaration of Human Rights which acknowledges the principle: “Everyone, as a member of society, has the right to social security.” Bobbio here seems to resile from an individualistic conception of rights and uphold a vision of society as “a form of togetherness in which the various components are interdependent, as we also observe in an organism where a diseased part puts the whole entity in danger.”64 Bobbio analyzes the differences between social rights (“freedoms to something” which require the intervention of the state and are typically inspired by the principle of equality) and what he calls “freedoms from something.” But as an old kind of liberal-socialist he also displays a certain optimism with regard to the mutual compatibility of these kinds of freedom:

I maintain that the recognition of certain fundamental social rights is the presupposition or precondition for the effective exercise of rights to freedom. The

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64 N. Bobbio, “Sui diritti sociali” (1996); reprinted in: Id., Teoria generale, p. 460.
educated individual is freer than an uneducated one; an individual in employment is freer than one who is unemployed; an individual in good health is freer than one who is sick.  

Rights come into existence from the 

[…] increasing power of one man over another humanity, the inevitable consequence of technical progress which increases man’s ability to dominate nature and other men. This progress either creates new threats to individual freedom or allows new remedies for mass deprivation.

Bobbio had already referred to a “third” and a “fourth” generation of rights beyond that of civil and political rights and that of social rights: from ecological rights to the protection of rights regarding genetic identity. But we should probably try and correct the impression of linear progression that is easily suggested by the notion of successive generations of rights. In the light of the combined effects of globalization and cultural pluralism, some rights of the “first generation” must be redefined and/or protected in new forms (we may consider the demand to develop the free expression of thought in the direction of cognitive autonomy, or of the very right to life in the face of new wars). In addition, certain aspects of “traditional” cultural experience that have begun to press their claims and deploy the language of rights will require changes and modifications in already consolidated codes of rights.

It is necessary therefore to open ourselves up to the superimposition and interrelation of different codes, composed in different languages, and sometimes very difficult to translate into one another, and to recognize that such partial overlapping of discourses can probably never be reduced to complete convergence. And here we certainly find ourselves beyond the theoretical horizon of Bobbio’s thought. But these arguments in favor of social rights, of both collective and cultural rights, and in favor of the reinterpretation of rights of the “first generation,” also clearly connect up with some of Bobbio’s characteristic insights.

65 Ibid., p. 465.
66 Bobbio, L’età dei diritti, p. XV [p. XI].
67 See D. Zolo, “‘Habeas mentem.’ Oltre il privatismo e contro i vecchi padroni,” Rivista di filosofia, 1, 1997.
Bobbio tended to associate the issue of human rights with the issue of peace. Indeed he regarded these issues as “strictly connected with one another. The one cannot stand without the other.”69 In fact, Bobbio realized that war not only compromises the primary right to life,70 but also puts our rights to freedom itself in danger: in times of war even a non-autocratic form of government may be tempted to behave in an autocratic manner. In Bobbio’s view the unlimited sovereignty of states – the ultimate root of war – makes the international protection of human rights difficult or impossible (even though this protection is an effective condition of genuine rights: if individuals cannot appeal to a legitimate authority to uphold their rights even against the state to which they belong, then these rights are not guaranteed after all). And this also holds for social rights, or rather for the most fundamental of such rights:

[… at the present stage of human ethical consciousness we generally recognize that the individual is entitled not only to the right to live [...] but also to the right to possess the minimum that is indispensable in order to live.71

This right is compromised by the significant quantity of resources that are expended on armaments instead.

The idea of the age of rights therefore points us in the general direction of pacifism, a position that is not without its tensions and aporias if we bear in mind Bobbio’s own intellectual trajectory.72 If in the 1960s Bobbio had interpreted the doctrine of the just war as a reductio ad absurdum, and conceived of war as the antithesis of law, as legibus soluta: as bereft of laws or principles “an earthquake or a tempest,”73 in 1991 he described the first Gulf War as a “just war” insofar as it was “based on a fundamental principle of international law that justifies legitimate defense.” Along with a number of other European intellectuals, Bobbio had regarded the end of the Cold War as the historical moment that finally made the “institutional pacifism” prefigured in the proposals of Kant and Kelsen into a real possibility, and he hoped that the United Nations would actually assume the task of safeguarding peace and security that is envisaged in the Charter. In this sense the operation of “Desert Storm” was legitimate as the first, if indeed imperfect, example of an inter-

70 Ibid., p. 455.
71 Ibid., p. 457.
72 See D. Zolo, Luci e ombre del pacifismo giuridico di Bobbio.
73 N. Bobbio, Il problema della guerra e le vie della pace, Bologna: il Mulino, 1979, p. 60; see also Zolo, L’alito della libertà, pp. 85-98, 121-125.
vention on the part of the international community in order to safeguard the principles of international law. In spite of this justification, however, Bobbio did not oppose the Kosovo War of 1999 – which lacked any “authorization” in accordance with international law – and even went so far as to compare the role of the United States with the bearer of the “world spirit” in Hegel. Nonetheless, Bobbio was never remotely convinced of the utility of the notion of a “humanitarian war” – something which he claimed only reminded him of the crusades – and he explicitly criticized the now rather widespread idea that war was the only effective way for states to safeguard human rights. And in the end Bobbio conceded that

[...]

we are witnessing a war that finds its justification in the defense of human rights, but which defends them by systematically violating even the most elementary human rights of the country that it hopes to save.

This thesis concerning the self-contradictory character of a “war for rights” can be strengthened if we develop Bobbio’s arguments against the idea of absolute foundations. If we admit that rights cannot be attributed the status of a first absolute principle, of a superior authority that stands beyond discussion, we must also recognize that the process of universalizing human rights demands the patient, difficult, and responsible work of engagement and translation. It is not a matter of questioning the fundamental value of human rights, but rather of balancing them with other principles, starting with the problem of safeguarding peace, namely that without which human rights themselves are endangered.

3. Beyond the Analytical Approach

In the foregoing discussion I have attempted to show how Bobbio has the-matized a series of decisive problems and suggested a number of innovative approaches, proposals, and interpretations in response. I believe that to pursue reflection and enquiry further along these lines would be a way of remaining faithful to the spirit of Bobbio’s teaching. But in order to do so I feel it


would also be necessary to place some of the methodological assumptions of his work in question.

After an initial period of sympathy for a phenomenologically oriented legal philosophy Bobbio became one of those who were principally responsible for introducing an “analytical” approach to this field in Italy, and especially for promoting the reception of “normativism” in the version developed in Hans Kelsen’s “pure theory” of law.76 There is no doubt that, in terms of his general theory, Bobbio provided far more than a simple repetition of Kelsen, and that Bobbio’s own theory is not a “pure” theory of right since it refuses to isolate the phenomenon of law from other social and political phenomena.77 But when Bobbio analyzes legal concepts, discusses their validity, and attempts to define the relationship between norms and the legal system he makes use of Kelsen’s own conceptual approach to these matters. This seems particularly clear precisely in the case of Bobbio’s contributions to the theory of subjective rights, which he returns, not by chance, to the context of attributive norms, and elaborates in accordance with a typology of norms which clearly develops Kelsen’s approach. But if we wish to try and combine the theoretical-juridical analysis of subjective rights with reflection on the historical genesis of rights, the different “generations” of rights, and the ethical and political significance of the age of rights, then it is necessary to go beyond the Kelsenian perspective.

Legal theory, especially in the period of the post-war constitutional systems, of global and trans-national law, of the crisis of statute law and the widespread development of case law, cannot forego a critical analysis of the process of formation of law (political jurisgenesis), of the effective significance of the norms, interests, and values that find expression in claims of various kinds. It cannot simply confine itself to the horizon of national normative systems, but nor again can it take a purely monistic approach to the supra-national and trans-national dimension. And all this is particularly true for the theory of rights. In order to acknowledge the “Copernican revolution” of the age of rights and the genetic connection between social conflicts and human rights, to provide a perspicuous interpretation of the notion of subjective right, of its various uses and multiple meanings, of its specificity, we must renounce the search for absolute analytical rigour, for a formalized conceptual language, for the reduction of juridical concepts to elementary modalities, for ultimate methodological “purity.”

In the context of Bobbio’s intellectual development his increasing closeness to Kelsen parallels his sympathy for the analytic philosophy that was inspired by logical empiricism. In his work on Scienza giuridica e analisi del

76 On the significance of Bobbio’s study of Hobbes as a means of facilitating his approach to Kelsen, see P. P. Portinaro, Introduzione a Bobbio, Rome-Bari: Laterza, 2008, p. 64 ff.
77 Ibid, p. 81.
**Jurisprudence and the Analysis of Language** – generally acknowledged as a pioneering study with respect to analytical philosophy of law in Italy, and not only in Italy – Bobbio expressly adopts “the new conception of science developed by more recent methodological approaches that derive from ‘logical positivism’.” This conception assumes a particular rigorous language – along with propositions that are “perfectly communicable in inter-subjective terms” – as a criterion for the genuinely scientific character of a given discipline, and identifies science with “a closed and coherent system of definite propositions.” On the basis of these methodological criteria, legal theory, understood as an analysis of legal language designed to “transform legislative discourse into a rigorous discourse,” can properly be regarded as a science, one “that is the equal of every other empirical or formal science.”

This neo-positivist choice of approach revealed itself anew, with particular clarity, in Bobbio’s contribution to the discussion regarding the status of political science and political philosophy and the relation between them. Bobbio characterized the former in terms of its fundamentally empirical, descriptive, and value-free character. Political science, for Bobbio, must therefore adopt the method of the “hard” empirical sciences, that is, sciences defined by the “verifiability” of the propositions they contain. What is more, political science must propose theories that are capable of explaining and predicting phenomena in its relevant field. And finally, it must be *Wertfrei*, avoiding all judgments of value in its pursuit of objectivity. As Danilo Zolo has pointed out, if these claims are taken strictly, we would apparently have to place Bobbio firmly “within the context of the ‘standard view’ of the empiricist approach, and perhaps even of its most rigid formulations.” But, in reality

there is a considerable tension in Bobbio’s writings between the prevailing epistemological framework – which is undoubtedly neo-positivist in character – and his perception of the insurmountable difficulties to which the neo-positivist program is inevitably exposed, in view of the fact that man is a fundamentally symbolical, teleological, and ideological animal. I believe that we could make analogous points in relation to

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79 Ibid., p. 351.

80 Ibid., p. 355.


the way in which Bobbio theorizes the “age of rights” and in particular to his critique of the notion of absolute foundations: these reflections also transcend the strict framework of neo-positivism. But then on this terrain we cannot avoid engaging with post-empiricist epistemology and, more generally, with the philosophical discourse of late modernity which, strongly influenced by the work of the “masters of suspicion”83 and the “linguistic turn,” has raised basic questions that have dispelled all thought of trying to furnish some ultimate ground or foundation for human rights. And it seems to me that the various contemporary attempts to re-interpret this approach in proceduralist terms, by trying to identify relevant transcendental or quasi-transcendental structures,84 do not really succeed in getting beyond the “bedrock” at which we arrive when all our justifications have been exhausted.85

Finally, Bobbio recognizes the importance of the history of legal and political thought, of the “lesson of the classics,” for the development of legal and political theory, something which sets him rather apart from much analytical philosophy. Yet with regard to the history of ideas, the general approach which Bobbio endorses is again an analytic one that undertakes

[...] to examine the classic texts in themselves, in terms of their conceptual articulation and internal coherence, independently of any specific historical reference.86

But if the genealogy of the notion of subjective right, of natural rights, and then human rights, is relevant to the domain of theory – a thesis which I believe Bobbio would have shared – then we would have to go beyond the purely analytical approach in the historiographical regard as well. When we consider the problematization of the meaning of *ius* in classical Roman law, the question of the very existence of a notion of subjective right in that context (and in other examples of historical experience), the reconstruction of the emergence of a specific language of rights and of a theory of natural rights in the work of medieval jurists, political thinkers and theologians, the further development and elaboration of these theories in early modernity, then, in all


86 N. Bobbio, “Ragioni della filosofia politica” (1990), reprinted in Id., *Teoria generale*, p. 35.
these cases, it is evident that we are dealing with issues that require a historiographical approach that is sensitive to linguistic context (to the underlying “forms of life” involved), to the often almost imperceptible shifts of meaning, and to the subsequent theoretical re-interpretations of earlier positions. And it is also necessary in this connection to examine writers who are not generally included in the canon of classic authors and even, as Brian Tierney puts it, to consult the “obscure glosses of the medieval jurists.”

In my attempt to indicate something of the theoretical importance of Bobbio’s reflections on the issue of rights I have also sought to point out certain shifts and changes in the positions he has defended, certain reformulations and re-conceptualizations of the issues under consideration, in short, certain internal tensions that the very clarity of his argumentation and the purity of his exposition sometimes render rather less than explicit. And I believe, in fact, that it would hardly be the best way of assessing his legacy if we were simply to furnish some hagiographical and “normalized” account of Bobbio’s thought. It is a question, rather, of acknowledging his significance as a great master of the 20th century, one who still shared some of the theoretical paradigms that characterized the tradition of “strong thought.” From this point of view – at least with regard to cultural and intellectual life in Italy – we could describe Bobbio as the “last of the moderns.” And we must certainly recognize that some of the issues and questions of which we are now aware would be far less clear to us without Bobbio’s work and teaching, and above all that some of the problems that we now address would otherwise be addressed in a much more confused and unsatisfactory manner. And this is true, in particular, of his investigations regarding “the age of rights.”

(Translated from Italian by Nicholas Walker)

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