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The Limits of the *Age of Rights*

I. Introduction

*The Age of Rights*¹ is the most important contribution of Bobbio to the issue of Human Rights. His wide knowledge allowed him to tackle the question from different viewpoints: legal philosophy, sociology, and history are the main methodological approaches.

His optimistic title, however, conceals a set of tensions. At the broader level, there is a tension between reality and ideal of rights. Moreover, there is a tension between Bobbio's conception of democracy and his ideas as to the expansion and enhancement of rights-protection. In a nutshell, democracy – understood as a way of solving social conflicts –² collide with rights adjudication – understood in the same way, that is to say as a method for the resolution of conflicts. Finally, and related to the last point, rights adjudication itself may point to a number of conflicts of norms supporting fundamental rights.³ For example, the right to free speech may conflict with the right to privacy. In this case, the tension is internal to the practice of rights.

Those tensions are worsened by an ambiguity in Bobbio's writings on rights: He leaves aside the search for an absolute foundation of rights in order to focus only on the question of protection.⁴ The plain assertion of the importance of protection of rights, however, is not satisfactorily justified. The problem is that the very same protection of rights needs to be steered in some direction. I do believe that the search for a non-absolute foundation of rights can provide guidance as to the direction in which protection has to be steered. Hence, the question of a foundation can be considered the head of the body, whereas the issue of protection can be considered the arms of the body. For example, if we favour a conse-

¹ Norberto Bobbio, *L'età dei diritti*, Torino: Einaudi, 1997 (Rev. ed., 1st ed. 1990). For the English edition (trans. A. Cameron), *The Age of Rights*, Cambridge: Polity, 1996. For a short guide to Bobbio's work, please see M. Bovero, "Norberto Bobbio (1909-2004). A Short Guide to a Great Work," *Ratio Juris*, Vol 18, No 2 June 2005, 271-84.

² Bobbio, *Il futuro della democrazia*, Torino: Einaudi, 1984, p. 170.

³ For Bobbio's understanding of the problem of conflict of norms, see Teresa Garcia-Berrio's paper in this journal.

⁴ N. Bobbio, *L'età dei diritti*, cit., *passim*.

quentialist foundation of rights, we will always be able to measure the stringency of rights in relation to the consequences that we expect to achieve. This is not the case if we have a strict deontological perspective. Human rights, within the latter understanding, are requirements that are incommensurable; that is, there is no common meter to establish the value of a right in relation to another right or a policy.

My point is that the question of the foundation should not be regarded as a mere *flatus voci*, a sort of abstract question with no practical significance whatsoever. I would like to stress here that the protection of rights vary accordingly to the way we conceptualize their foundation. In addition, I believe that protection for the sake of it does not lead very far. It is a pure illusion that we can both maximize the stringency of rights and expand its scope. And even if the scope was limited, conflicts between core rights could still be possible. Bobbio could have at least attempted to justify, rather than assume, that enhancing the protection of rights is a good *per se*.

In what follows, I will try to assess the value of Bobbio's position on rights from the point of view of theories of rights only. This is not an exegesis of his position trying to locate Bobbio's tack on rights within the wider framework of his political philosophy.⁵

My main aim is to say a little more on the tensions I have previously underlined. I do believe that Bobbio saw himself the gap between his ideal and reality as well as the gap between the widespread recognition of rights and their protection. To fill the gap, and dispel the ambiguity, I think that we need to have a firmer grasp of what foundation is about.

In order to do this I will enquire a little further on the idea of the Age of Rights and its implications as to the notion of rights and moral progress. In a second paragraph, which I call the Age of Terror, I will argue that protection of rights requires tragic choices, and that this is not necessarily consistent with maximization or expansion of rights. This will be illustrated also with a brief study of conflicts of fundamental rights as Bobbio sees them. Finally, we will try to understand Bobbio's favourite position as to the resolution of tensions between rights. This will hopefully help us in dispelling the initial tension that we spotted in Bobbio's contribution to rights literature.

II. *The Age of Rights*

The Age of Rights holds two main theses. Firstly, Bobbio argues that the search for an absolute foundation of rights is a vain exercise. Rights, it is argued, do not provide with final, trumping, arguments on any issue. Secondly, the im-

⁵ For this exercise, please see Veronique Champeil-Desplats in this journal.

portance of human rights can be measured empirically by observing the widespread recognition of rights in bills of rights all over the world. Bobbio's conclusion is that we have to insist on the question of how to enhance protection of rights rather than on spurious theoretical questions such as those mentioned.

Some points are in order to complete the picture drawn by Bobbio. To start with, even if there is no absolute foundation of rights, still some rights have absolute value for Bobbio. This is the case of the right not to be tortured and the right not to be enslaved.⁶ The reason supporting the absolute character of, for example, the right not to be tortured is that the act of torturing is universally condemned. An evidence for this is meant to be the worldwide acceptance of international treaties against torture. This point is problematic because it suggests that it is possible to establish a ranking of rights based on their level of international recognition. It would seem, therefore, that the foundation of rights amounts to their recognition.⁷

A second point concerns the notion of importance of rights. The rights we are talking about are loosely called human rights. This term, however, is interchangeable with fundamental rights, and other less-frequent appellations.⁸ The notion of fundamental rights has *prima facie* a foundational turn. Rights are fundamental as opposed to ordinary rights. In other words, there are rights which are of a particular importance. The question is then what makes certain rights more important than others. Bobbio's reply is not satisfactory: the importance can be asserted in virtue of their diffusion.⁹ Since charters and declarations are so widespread nowadays, this amounts to a moral/political recognition of the idea of rights. This importance, however, is contingent. The list of fundamental rights is what it is because of historical reasons. As a result, Bobbio states, there is no absolute foundation.

⁶ *L'età dei diritti*, cit., 39.

⁷ Alan Dershowitz, in a recent book titled *Rights from Wrongs*, New York: Basic Books, 2004, has recently developed an argument along these lines. He argues that human rights are neither derived from nature, nor from positive law. The foundation is Nuture. The idea behind that is that humanity witnesses a number of wrongs in the course of its history. As a response to those wrongs, humanity developed rights. Paradoxically, therefore, the (relative) foundation of rights is the existence of wrongs themselves.

⁸ Bobbio uses the term fundamental rights in an article in response to Giuliano Pontara. Giuliano Pontara e Norberto Bobbio, "Vi sono diritti fondamentali?"

⁹ *Ibid.*, Bobbio says: "una prova sufficiente della loro importanza nella società di oggi riposa sul fatto che non più soltanto questo o quello stato, com'era accaduto nel passato, ma tutti gli stati esistenti abbiano dichiarato di comune accordo, a cominciare dalla dichiarazione universale dei diritti dell'uomo (1948) e via via in altre numerose dichiarazioni che si sono susseguite e continuano a susseguirsi, che vi sono diritti fondamentali, e ne abbiano proposto in lungo elenco."

Thirdly, Bobbio recognizes the existence of conflict of rights.¹⁰ That is, he thinks that rights are incompatible in certain circumstances. Bobbio uses this point as against the doctrine of absolute foundation of rights. He does not mention, however, that the existence of conflicts of rights implicates also the modulation/reduction of protection of rights in given instances. The problem, I think, lies in Bobbio's understanding of conflicts. He seems to believe that if there are conflicts, these are solvable.¹¹ Then, he goes on arguing that the question is difficult, and this supposedly supports his point.

Fourthly, Bobbio acknowledges the problem of heterogeneity of rights.¹² This point refers to a fragmentation of values underpinning human rights. Again, this argument is used against the idea of an absolute, monist, foundation of human rights. The same argument, however, can be used to argue that to concentrate on protection only, as Bobbio seems to suggest, is not sufficient as it is necessary to have guidance when protecting rights pulling in different directions. The argument from heterogeneity goes back to the typology of rights sketched before. There are different human rights of different scope and strength. This means that the system of human rights is not conceived in terms of perfect symmetry and equal weight of each human right. To the contrary, the weight varies and, therefore, also their importance. As a consequence, their collision ends up with the victory of one right over another, and there is not always room for conciliation, and harmony.

Few observations are in order at this level. Firstly, it is difficult to square the idea that there is no absolute foundation and, yet, that there are absolute rights, as Bobbio seems to suggest. For, what would give the absolute character to certain rights? Is it a general agreement that they should be absolute? But if this is the case, then I regard this as a foundationalist argument as any other. Secondly, Bobbio's hostility to the idea of absolute foundation does not tell us anything on the idea of non-absolute foundations. Why would it be impossible to conceive of a pluralist fragmentation of values? Bobbio's jump from his rejection of absolute foundations to the – almost exclusive – focus on problems of protection of human rights does not withstand criticism.

I would tend to agree with the idea of the lack of absolute foundation of rights. This, however, does not exclude the search for a non-absolute foundation of rights. There is a space between the abandonment of the search for absolute foundation and the insistence on the question of protection. Bobbio was silent on this issue, and I think that it would only be fruitful to explore it. I also have to add that I do not agree that widespread recognition is a sufficient ground for asserting the importance of rights. This is particularly not the case, when rights

¹⁰ *L'età dei diritti*, cit., 13.

¹¹ “Vi sono diritti fondamentali?”.

¹² *L'età dei diritti*, cit., 11.

collide with other rights or public interests, as it is the case when states tailor policies against terrorism.

III. *The Age of Terror*

The age of rights is threatened by the beginning of what is sometimes called ‘the age of terror’ in the aftermath of September 11.¹³ Worldwide legislations trying to cope with the issue of terrorism, struck a balance between security and freedom. Inevitably, security won the contest in a number of instances. As a result, the rights cloak was put 30 years backwards.

If Bobbio’s analysis of the importance of human rights was correct, then we should conclude that rights limitation and curtailment on the ground of widespread recognition of the importance of security is always acceptable. Thus, the idea of importance of rights as suggested by Bobbio works as a double-edged sword. On one hand, it helps to avoid the problem of absolute foundation; on the other, however, it opens the door to counterarguments in favour of the restriction of very basic rights. In this context, having a foundational argument about the importance of rights was of the utmost importance for the sake of tipping the balance in favour of liberty as opposed to security.

I am not claiming for an absolute foundation of rights. I think, as I said, that there is ample space for a non-absolutist foundation of rights. To have such arguments in favour of human rights would prevent representative institutions from reaching simplistic conclusions as to the protection of security over liberty. The patriot act, for example, treated security as an absolute trump over other interests.¹⁴ Moreover, it led to the suspension of constitutional guarantees in state of emergency. Finally, it created zones of no-rule of law, as in Guantanamo and Abu-Ghraib.

Now human rights are slowly kicking back;¹⁵ if we had, however, a firmer grasp of what the foundation of rights entails, certain violations of rights would not have been accepted to start with. In short, enhanced protection of rights claims for a strong non-absolutist foundation of human rights.

What justified policies such as those propounded in the Patriot act, is the idea that representative institutions are in the best position to strike a balance between competing values. Bobbio would find this question very problematic, as it involves a deep tension between democracy and rights. But again, if what deter-

¹³ Colin Warbrick, “The European Response to Terrorism in an Age of Human Rights,” *EJIL* (2004), Vol. 15, No. 5, 898-1018. Jonathan Raban, September 11: “The View from the West,” *New York Review of Books*, Vol. 52, Number 14, September 22, 2005.

¹⁴ Ronald Dworkin, “Terror and Attack on Civil Liberties,” *New York Review of Books*, Vol. 50, Number 17, November 6, 2003.

¹⁵ *Rasul et al. v. Bush*, 542 US (2004).

mines the importance of rights is itself dependent upon what is recognized as being important by democratic institutions, then the tension between democracy and human rights is resolved in favour of the former, and to the detriment of the latter.

Finally, I would like to stress that the restrictions on human rights following the terrorist attacks, and the enactment of anti-terrorist legislation, were justified on the grounds of arguments which were made possible by the very existence, and inability to respond, to the basic tensions that are present, for example, in Bobbio's writings. To repeat, those are the tensions between reality v. ideal, democracy v. rights protection, and the existence of conflicts between various constitutional values.

Henry Steiner, a prominent Human Rights professor at Harvard, puts his fingers on the most important problem concealed by the tension between reality and ideal of rights: "It is instructive to set beside the age of rights a 1984 report by Amnesty International that contains accounts from ninety-eight countries of one of the ugliest of human rights violations. The report points out that no state legalizes torture, that indeed governments 'universally and collectively' condemn it. Nonetheless, 'more than a third of the world's governments have used or tolerated torture or ill-treatment of prisoners in the 1980s.' Each of these books of radically different intentions tells an important part of the human rights story. Those parts complement each other by speaking to the ideal and the real, to norms and power, to law and politics. Neither by itself permits an evaluation of the human rights movement as a whole. Together they expose the problematic character of that movement. Do they in combination suggest that human rights is the idea of our time, the essential idea?"¹⁶

IV. Conclusion

Michelangelo Bovero noted in a recent article: "Without peace, in conditions of actual or potential war, fundamental rights may be suspended, abolished, or easily violated, and democracy stiffened or falsified by demagogical thrust."¹⁷

The problem is that, when governments have the monopoly of the definition of war, they end up controlling also the boundaries of rights. This is the case when politicians waive the spectre of the war on terror.

In these cases, we should be able to look at rights as 'an essential response to terrorism, even a war against terrorism, which is waged to protect the rule of law.'¹⁸ In other words, even when a democratic elected government, or a supra-

¹⁶ Henry J. Steiner, "The Youth of Rights," 104 *Harvard Law Review* 917.

¹⁷ Michelangelo Bovero, "Norberto Bobbio (1909-2004). A Short Guide to a Great Work," *Ratio Juris*, Vol. 18, No. 2 June 2005, 281.

¹⁸ Colin Warbrick, cf. *supra*, 989.

national institution for what it matters, decide to take steps and wage a war, this is not sufficient to put rights in a standby mood, as Bobbio may let us believe.¹⁹ Thus, human rights, democracy, and peace are not – as Bobbio suggested – three essential (and equal) components of the same historic movement. At times, concerns for rights must be able to resist any easy call for fighting a (just or unjust) war. From that viewpoint, human rights have an Archimedean foundation, which needs not being absolute.

Neither utilitarian nor deontological approaches to rights need not be equated to absolutist approaches. This is easy to understand in the case of utilitarianism, an outcome based moral theory. What counts is the maximization of a certain principle. The absolute primacy of that principle, however, is not part of the standard utilitarian viewpoint. In utilitarian terms, it is clear that no right has an absolute priority. Not even the right not to be tortured. It is easy to imagine a case in which it would be morally acceptable from the utilitarian standpoint to torture someone in order to, say, save the lives of two or more people.

Conversely, a deontological approach of rights, which seems to be closer to Bobbio's perspective, must set certain threshold of inviolability the infringement of which cannot be justified on moral grounds. Here, it is very important to stress that those thresholds of inviolability need not be absolute prohibitions. By definition, thresholds only permit/prohibit acts to a certain degree. Of course, the degree of compliance which is required by human rights is very high, and rightly so. As Bobbio has shown, human rights have no absolute foundation. Yet, they have a strong non-absolutist one.

¹⁹ Bobbio, *Una Guerra giusta? Sul conflitto del golfo*, Venice: Marsilio, 1991. For a criticism, Danilo Zolo, "From Hiroshima to Bagdad –The Legacy of Norberto Bobbio: Assessments and Recollections", *Critical Review of International Social and Political Philosophy*, Vol. 7, No. 3, Autumn 2004, 79-83.