

Mapping the Legal Writings of Norberto Bobbio

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Abstract

The present paper identifies and analyses seven main lines of research in Bobbio's legal philosophical work: 1) studies on analogy; 2) theoretical and metatheoretical studies on legal science; 3) studies on natural law and legal positivism; 4) the foundation of deontic logic in Italy; 5) the general (or "formal", in Bobbio's terminology) theory of law; 6) Kelsenian studies; 7) studies on the history of legal thought.

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The extensive work of Norberto Bobbio has been compared to a labyrinth¹. Indeed, in his long-life Bobbio wrote (at least) on positive law, general jurisprudence, legal philosophy, political philosophy, political science, philosophy of history, and history of philosophy.

In 1999 (if I remember correctly), some scholars were asked to draw a map of Bobbio's works to serve as a guide for readers². This little map of Bobbio's legal writings was my contribution³.

My task, if I have understood correctly, is to draw a map of Bobbio's legal writings. This is indeed a difficult task. It is well known that Bobbio's bibliography is very extensive and, as the title of this conference suggests, labyrinthine. In the modest little part of my library dedicated to him, which is also incomplete, I count no less than twenty volumes (some unfortunately only in photocopy) belonging to the class of "legal" writings: Monographs, notes for students, collections of essays,

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¹ V. Pazé, ed., *L'opera di Norberto Bobbio. Itinerari di lettura*, Milano, Franco Angeli, 2005.

² 1999 was Bobbio's ninetieth birthday.

³ The Italian version of the present paper was published in Pazé ed. 2005: 30-35.

and even an introduction to the Constitution (a manual on civic education), which he co-authored with Franco Pierandrei.

The map is made more difficult by the fact that Bobbio's "legal" writings include studies on the theory and philosophy of law as well as writings on the history of legal thought. In Bobbio's case, there is no clear distinction between these two areas (one need only think of his first major book on legal theory, that on analogy from 1938, and the course on legal positivism from 1961).

But even if one leaves aside the historical works and limits oneself to the studies on legal theory and philosophy (a precise distinction between the two is not possible), Patrizia Borsellino, an expert on Bobbio's thought, already listed 185 works in 1983. Since then, Bobbio's "legal" bibliography has been expanded by at least six important volumes (one of them in French). Ok, almost all of them are collections of essays that have already been published, but that does not simplify the map, on the contrary, it makes it even more complicated.

The truth is that, for those who have studied the legal writings of Bobbio, the only satisfactory map would be the one devised by Borges, which corresponds in a one-to-one relationship with the territory represented and therefore coincides perfectly with its subject. I will therefore refrain from drawing a map and limit myself to pointing out a few paths in this vast territory: those that seem most promising to me.

1. First path: studies on analogy. It is not a very rugged path, it unfolds in a few stages. It is, however, a thirty-year path: it begins in 1938 and ends (if I am not mistaken) in 1968. The first stage is the book *L' analogia nella logica del diritto* (Analogy in the Logic of Law), published in 1938⁴. In the same year, an essay on analogy and criminal law (*L' analogia e il diritto penale*) was published in the journal "Rivista penale". The following stages are the entry *Analogia* (Analogy) in the *Novissimo digesto italiano* (from 1957) and two commentaries on court decisions published in "Giurisprudenza italiana" in 1950 and 1968 respectively. The 1938 book is a paradigmatic example of Bobbio's ability to combine historical investigation and theoretical research, and is of truly special significance.

At this time, legal philosophy in Italy was dominated by idealist philosophy: pompous and largely devoid of content, with the notable exception of Guido Calogero's 1937 book *La logica del giudice e il suo controllo in cassazione* (The Logic of the Judge and its Control in Cassation). Not that there were no studies on legal theory: on the structure of the legal system, on interpretation, on legal gaps, etc. But they were studies carried out by "positive" jurists, as they say, within their respective academic disciplines: Donato Donati and Santi Romano (scholars of public law), Tomaso Perassi (scholar of international law), Giovanni Brunetti and Francesco Degni (scholars of private law). The "professional" legal philosophers devoted themselves to completely different topics.

⁴ New impression Giuffr , Milano 2006, ed. by Paolo Di Lucia.

Bobbio's book is rather a study of the "logical structure" of a certain type of argumentation characteristic of legal reasoning. It is a completely isolated example for its time. Today, there is an abundance of works in the legal philosophy literature on the argumentation techniques of lawyers. Bobbio's book paved the way.

As for the other stages of this first path (the studies on analogy), they contain – as far as I can remember – two commentaries on court decisions. I would just want to point out that legal philosophers are not in the habit of frequenting this literary genre (with the only exceptions, as far as I know, of my teacher, Giovanni Tarello, and myself)⁵. They do not write commentaries on judicial decisions for the simple reason, I fear, that they are legal philosophers but do not read judicial decisions (and it is legitimate to ask what else they read). Bobbio did read judicial decisions and occasionally commented on them. Bobbio's interest in court decisions is also documented by a short essay from 1971 (which was never published in Italy), which, under the bizarre title "Le bon législateur", contains an analysis of certain argumentation procedures of the Italian Court of Cassation⁶.

2. Second path: theoretical and metatheoretical studies on legal science. It is a short and not very bumpy path. It begins with the essay *Scienza del diritto e analisi del linguaggio* (Science of law and analysis of language), published in 1950 in the journal "Rivista trimestrale di diritto e procedura civile", and with the course *Teoria della scienza giuridica* (Theory of Legal Science) from the same year. It continues with the 1954 essay *Il rigore nella scienza giuridica* (Rigour in Legal Science), and an essay from 1955 titled *Sul ragionamento dei giuristi* (On the Reasoning of Jurists).

One can stop, if only to save energy and devote it to other paths, at the 1967 essay *Essere e dover essere nella scienza giuridica* ("Sein" and "Sollen" in Legal Science), now in the volume *Studi per una teoria generale del diritto*, Studies for a general theory of law, published in 1970).

The first step on the journey is the essay "Science of law and analysis of language", which is of inestimable importance for the history of legal theory. It is in fact the founding act of analytical legal theory in Italy. "Analytical" in the sense of analysis of language. For the first time, Bobbio presents law as a language or, if you like, as a discourse: the prescriptive discourse of "the legislator". And consequently, he presents the study of law (be it a dogmatic or a general theoretical study) as a distinctly analytical-linguistic enterprise – a second order language bearing on the language of lawgivers.

⁵ Nowadays, this silly self-praise must be "updated", by mentioning several younger scholars who do study case-law jurisprudence. E.g., Damiano Canale, Giulio Itzcovich, Vito Velluzzi, Silvia Zorzetto, and, most of all, Pierluigi Chiassoni (see his book Chiassoni, *La giurisprudenza civile. Metodi d'interpretazione e tecniche argomentative*, Milano, Giuffrè, 1999).

⁶ In fact, the mentioned essay has been recently reprinted in *Lo Stato*, 11, 2018, 197-202, with a short presentation by R. Guastini.

This view is at the root of the entire Italian school of general legal theory: from Scarpelli to Tarello, from Gavazzi to Lazzaro, from Losano to Conte, from Pattaro to Guastini, not to mention the new generations.

3. Third path: studies on natural law and legal positivism. The fundamental stages are the 1961 course on legal positivism (*Il positivismo giuridico*, reprinted in 1979 and 1996) and the essays on natural law doctrine and legal positivism collected in the 1965 volume *Giusnaturalismo e positivismo giuridico*. These are highly innovative (and, incidentally, quite famous) studies from at least two points of view⁷.

The first is the thesis that, contrary to what is assumed, natural law is not a specific ethical-legal doctrine, but a “metaethics”, in a sense of this word: an empty (and also logically fallacious) way of justifying various and even competing normative ethics.

The second point is the anatomy of legal positivism. I speak of anatomy because, according to Bobbio’s analysis, legal positivism “comes out in pieces”. “Legal positivism” turns out to be the name not of one, but of three different and logically unrelated (albeit historically connected) doctrines: a doctrine of legal science (legal science as a value-neutral enterprise), a complex doctrine of law and legal interpretation (nineteenth century legal positivism, or legal positivism par excellence), and a moral doctrine about a obedience to the law (ethical legalism).

4. Fourth path: the foundation of deontic logic in Italy. It is a short path (too short and prematurely interrupted). In fact, it consists of only two stages: the 1954 essay *La logica giuridica di Eduardo García Máynez* (The Legal Logic of Eduardo García Máynez) and the essay *Diritto e logica* (Law and Logic) from 1962.

However, it is one of the most exciting paths in Bobbio’s work. It is no coincidence that I spoke of “foundation”. In Italy today, deontic logic is cultivated by important scholars and was born precisely with Bobbio’s 1954 essay. An essay in which Bobbio (anticipating Kelsen, Alchourrón, and von Wright) elaborates, among other things, the fundamental distinction between norms and propositions about norms and the consequent distinction between the logic “of law” and the logic of “legal science”.

5. Fifth path: the general (or “formal”, as Bobbio used to say) theory of law. Here we have a tortuous path. The beginning can be dated to 1942, with the small volume *La consuetudine come fatto normativo* (Custom as a Normative Fact)⁸. The path then unravels from the two courses *Teoria della norma giuridica* (Theory of the Legal Norm), published in 1958, and *Teoria dell’ordinamento giuridico* (Theory of

⁷ As to the natural law doctrine, some further studies by Bobbio were recently published with a preface by Tommaso Greco: see N. Bobbio, *Il giusnaturalismo moderno*, Torino, Giappichelli, 2009.

⁸ New impression Giappichelli, Torino, 2010, with a preface by Paolo Grossi.

the Legal Order), in 1960 (in 1993, both were collected in a volume entitled *Teoria generale del diritto*, General Theory of Law) to a countless series of essays and encyclopedia entries.

Almost all of these scattered works are now collected in one volume, or rather in several volumes: *Studi sulla teoria generale del diritto* (Studies on the General Theory of Law, 1955), *Studi per una Teoria generale del diritto* (Studies for a General Theory, 1970)⁹, the “new studies” collected in 1977 under the title *Dalla struttura alla funzione* (From Structure to Function), up to the most recent *Contributi ad un dizionario giuridico* (Contributions to a Legal Dictionary, 1994), which I proudly edited myself, overcoming Bobbio’s resistance with difficulty.

Bobbio’s contributions, although he never wanted to give them a systematic form, touch on all the problems of contemporary legal theory: the concept of law, of course, the concept of norm, the typology of norms, norms on legal production, sanctions, general principles, the notion of order, the notion of validity, gaps, antinomies, and so on. In his latest works, a completely new approach and a new topic for legal theory even emerges: the functional approach and the question of the functions of law.

The only thing that is almost completely left out of Bobbio’s theory of law is interpretation: Bobbio devoted historical works to it, but hardly any theoretical elaborations. It is a commonplace that Bobbio’s theory of law is largely tributary to that of Kelsen. But this commonplace is largely false.

6. Here I should give, for the connection, a sixth path: Kelsenian studies. Bobbio has dedicated no less than ten essays to Kelsen (so many are collected in the volume *Diritto e potere*, Law and Power, 1992¹⁰): the first dates from 1954, the last from 1986. But the dialogue with Kelsen runs like a red thread through his theoretical-legal work. But, as I said, it is wrong to say that Bobbio’s legal theory pays tribute to Kelsen’s theory. Anyone who thinks so has only looked at Bobbio’s works superficially.

Indeed, Bobbio’s approach, which is empiricist and analytical-linguistic, is very far removed from that of Kelsen. Two examples.

The theory of the norm. Where Kelsen feels the need to duplicate the world and distinguish between facts and norms (the realm of *Sein* and the realm of *Sollen*¹¹), Bobbio sees only one – semantic, not ontological – problem. For him, norms are nothing more than prescriptive sentences. And his problem is to establish the distinction between prescriptive discourse and cognitive discourse.

The question of gaps and antinomies. According to Kelsen, every legal order is necessarily complete (without gaps) and consistent (without antinomies): neces-

⁹ New impression Giappichelli, Torino, 2012, with a preface by R. Guastini.

¹⁰ New impression Giappichelli, Torino, 2014, with a preface by Agostino Carrino.

¹¹ The English version of this essay was published in *Archiv für Rechts- und Sozialphilosophie*, v. 56, n. 6 (1970), 7-29.

sarily, i.e. for logical reasons, so that the question can be resolved a priori without distinguishing between one legal order and another and, of course, without even knowing the normative content of the various legal orders. For Bobbio, on the contrary, there are complete and incomplete legal systems, consistent and inconsistent legal systems: it is not a question of logic, but of positive law. A legal system can only be judged as complete or incomplete, consistent or inconsistent in retrospect on the basis of its normative content.

7. Seventh path: Studies on the history of legal thought. I emphasize legal thought, and not (or not only) political thought. I like to remember: the 1957 course *Diritto e Stato nel pensiero di Emanuele Kant* (Law and the state in the thought of Immanuel Kant, there is a second edition from 1969); the 1963 course *Locke e il diritto naturale* (Locke and Natural Law¹²); the 1965 collection of essays *Da Hobbes a Marx* (From Hobbes to Marx); the 1973 course by Bobbio and Bovero, *Società e Stato da Hobbes a Marx* (Society and State from Hobbes to Marx); the book, also by Bobbio and Bovero, *Società e Stato nella filosofia politica moderna* (Society and State in Modern Political Philosophy, 1979); the course *La teoria delle forme di governo* (The Theory of Forms of Government, 1976); the seven Hegelian Studies (*Studi hegeliani*), collected in one volume in 1981; and finally the Hobbesian studies, collected in 1989 under the title *Thomas Hobbes*.

But here, too, it is a tortuous path: There are pages on the history of legal thought in all of Bobbio's books: in the book on analogy (the entire first part is of a historical nature), in the course on legal positivism (here too, the theoretical part is preceded by a historical section), in the very well-known volume *L'età dei diritti* (The Age of Rights¹³), the first edition of which was published in 1990, and so on. In these works, a distinctive feature of his academic style is evident: the ability to happily combine the history of thought and the analysis of concepts or, if you like, to give theoretical analysis, as it were, "historical depth". For me, affected as I am by serious "logicism" and lacking in historiographical sensibility, this is a great cause for envy.

¹² New impression Giappichelli, Torino, 2017, with a preface by Gaetano Pecora.

¹³ The English e-book version was published by Polity Press, 1996.