

Legal Thought in Early Modern England: The Theory of Thomas Hobbes

Raffaella Santi

University of Urbino Carlo Bo, Urbino, Italy

Thomas Hobbes of Malmesbury (1588-1679) is one of the most influential British philosophers of the seventeenth century. The paper reconstructs Hobbes's legal theory, focusing on his definition of law (*civil law*, as he calls it) found in *Leviathan*, XXVI, 3. The definition is only apparently simple, since it has been interpreted in different ways, especially with regard to the connections with natural law—and the Hobbesian assertion that civil law and natural law “contain each other”. Moreover, the definition of civil law changes in the corresponding paragraph of the Latin version of 1668. What is the meaning of this change? What about the divisions of the law/*divisio legis*, which—as Hobbes emphasizes—appears in different forms in different writers? Finally, if a good law is “that which is *needful*, for the *good of the people*”, what is it that dictates the paths to be followed by the sovereign representative, who is also the supreme legislator, when writing a new law? These are the main problems in Hobbes's legal thought that the paper will address.

Keywords: Hobbes, civil law, law of nature, *salus populi*, the artificial reason of the State

Introduction

The law of the Commonwealth (or State), i.e. what Thomas Hobbes (on Hobbes's life and philosophy see Lloyd, 2013 and Martinich & Hoekstra, 2016) calls the “civil law” (“*lex civilis*”, with reference to the Latin word for *Commonwealth* or State, namely *Civitas*) and he defines as “artificial reason” (“*artificialis ratio*”) becomes necessary because otherwise, without common rules, men would be in constant conflict with each other. In fact, although as a rule an argument can be correct, sometimes, however, it may prove wrong (or even absurd or senseless); human reason can be mistaken, partly because there is no right natural reason (“for want of a right reason constituted by nature”) and, given that men in themselves are equal and all endowed with reason, it happens that “no one man's reason, nor the reason of any one number of men, makes the certainty” (Hobbes, 2012, p. 68).

Now, what if any dispute should arise? What happens when you do not agree on something? Even if everyone would like to be right, or better still, precisely because everyone claims to be in the right, it is clear that none of the contenders can boast about holding the right reason (*recta ratio*). So what will then be the best and most rational solution to settle the dispute? If there is no right reason in itself, reason itself comes into action leading us to invent an artificial one: “the parties must by their own accord, set up for right reason, the

Raffaella Santi, Ph.D., lecturer in History of Philosophy, Department of Humanities, University of Urbino Carlo Bo, Urbino, Italy.

Correspondence concerning this article should be addressed to Raffaella Santi, Department of Humanities, University of Urbino Carlo Bo, via Bramante 17, Urbino (PU) 61029, Italy.

reason of some arbitrator, or judge, to whose sentence they will both stand” (Hobbes, 2012, p. 68).

Thus, for Hobbes, in the absence of a *naturalis recta ratio*, a situation of Protagorean chaos (*homo mensura*) comes into being as a result, which in turns generates conflict and destruction (a “bellum omnium contra omnes”, i.e. “a war of all against all”) and should therefore be overcome through the creation of an *artificialis recta ratio*, to be set up as a universal *métron*: “a common measure of all things” (Hobbes, 1969, p. 188).

Only those who hold sovereign power can therefore set their own reason up as (artificially) *right* and *universal* reason: “There is not amongst Men an Universal Reason agreed upon in any Nation, besides the Reason of him that hath the Sovereign Power” (Hobbes, 2005, p. 26).

Noteworthy, the expression “an Universal Reason agreed upon” is used here: the artificial reason of the State presents itself as “universal”, that is valid for all citizens, and as “shared” or—more literally—“which everyone has agreed upon” (implying: through the covenant that gave rise to the State) and upon whose guidelines and dictates, therefore, everyone cannot but agree.

Indeed, if the sovereign is still a particular reason, on the other hand, however, thanks to the authorisation process it spills over into a community level, succeeding in the difficult task of constantly maintaining harmony and social peace, adhering to the principles of equity and justice and, in general, to the laws of nature: “we must always understand that the legislator (that is, the person of the State) wants what is equitable”/“legislator (id est persona civitatis) semper intelligendum est velle id, quod aequum est” (Hobbes, 2012, p. 455).

To the civil law, issued by the sovereign, we owe an absolute obedience, postulated by the natural laws and required by the divine laws. Only in one case the citizens are allowed to disobey, namely when the sovereign is no longer able to protect them (as is the case, for instance, in the event of a conquest), or in the event that the king were to order something likely to endanger their safety. As a matter of fact, since the preservation of life is the primary principle from which, by deduction, the laws of nature are derived, it can never be subverted, either on a logical level, or at the level of praxis, as it would be contrary to the very reasons of the *lex naturalis*, that is against natural reason. It follows that “it is legitimate to preserve life in every way” —“vitam [...] conservare omni modo licitum est”—and therefore the obligation to the civil law ceases whenever, by obeying, it becomes impossible to stay alive: “for no one can be obliged to neglect the preservation of one’s own life”—“quia vitae suae conservationem negligere nemo obligatur” (Hobbes, 2012, p. 489).

The Division of the Law

The civil law is more restrictive compared to the law of nature and the divine law, which only govern the general principles of the human conduct (the general precept of the *lex divina* can even be summarised in the concept of “caritas”/“charity”). Hobbes implements a tripartite *divisio legis*, based on the different nature of the legislators (“authors and lawmakers”): laws can either be divine, natural, or civil. The first two genres actually end up by coinciding, becoming “one and the same law”:

As for the first division of law into divine, natural, and civil, the first two branches are one and the same law. For the law of nature, which is also the moral law, is the law of the author of nature, God Almighty; and the law of God, taught by our Saviour Christ, is the moral law. For the sum of God’s law is: Thou shalt love God above all, and thy neighbor as thyself; and the same is the sum of the law of nature. (Hobbes, 1969, pp. 187-188)

Hobbes specifies that the Christian doctrine contains three parts, namely: the first is the “moral” one, involving laws of universal value; the second is the “theological” one, with indications (expressed in the form of advice, rather than laws) concerning what leads to salvation; finally, the last is the “ecclesiastical” one, which is part of the law of the State: “the latter part is a branch of the law civil”. (Hobbes, 1969, p. 187)

But what are they and why are civil laws necessary? They are the “measure”—in the sense of *métron*, as meant in the ancient world—of what must or must not be done and are necessary because of the disagreement existing amongst men in relation to the actions to be taken and to the meaning of words and concepts that we reason about in order to decide if and how to act:

[...] the civil laws are to all subjects the measures of their actions whereby to determine, whether they be right or wrong, profitable or unprofitable, virtuous or vicious; and by them the use and definition of all names not agreed upon, and tending to controversy, shall be established. (Hobbes, 1969, pp. 188-189).

Thus, the civil law becomes the evaluation yardstick, fixed and universal, that all citizens must abide to, as well as judges when issuing their sentences. The civil law (on which see Lemetti, 2012, pp. 181-184), which is always written, narrows the scope of individual liberties with respect to what is permitted by the law of nature, which only expresses general ethical principles, without ever regulating more specific cases. The civil law absorbs, at the level of principle, the law of nature, applying this instead to particular cases.

The Civil Law

To the civil law Hobbes dedicates Chapter XIV of *De Cive* and Chapter XVI of *Leviathan* (Dyzenhaus & Poole, 2012; May, 2013). The former is more synthetic, while the latter is more analytical and richer in information.

In *De Cive*, by his own admission, Hobbes focuses more on establishing the normative foundations of the positive law, that is, the law of nature—“haec est ea lex quam toto hoc libello explicare conatus sum” / “this is the law that I have tried to explain throughout the booklet” (Hobbes, 1983, p. 207)—rather than highlighting the characteristics of the civil laws.

The fact remains, however, that his voluntaristic orientation, although not as much argued here as in *Leviathan*, remains, here too, undisputed: “the law is, in fact, the order of the legislator and the order is a declaration of will” (Hobbes, 1983, p. 211), and “the civil law is a speech, defined by the will of the State, which commands the individual things that must be done” (Hobbes, 1983, p. 206).

We can easily deduce a clear attempt to derive the civil law from the natural and divine laws, and to show that, as regards the normative foundations (i.e. equity, justice, keeping covenants, treating your neighbour as yourself), they virtually coincide. The civil law is an emanation of the will of the sovereign (who legislates in his capacity as a *persona civilis*), but in actual fact the will of the latter is governed and steered by reason and therefore, ultimately, by the laws of nature; so much so that “it is impossible to order by civil law something contrary to the law of nature”. So, in conclusion, compared to civil laws, which require a “promulgation” (“promulgatio”) and express their provisions in words (subject to “interpretatio”), “the natural laws command the same things, but implicitly” (Hobbes, 1983, p. 211).

In *Leviathan*, Hobbes no longer characterises the civil law as an “order” (“mandatum”), but as a “command” (“imperatum”) and, getting ready to deal with it, specifies that he does not intend to dwell on the legislation of individual States and on national law; quite the opposite: “BY CIVIL LAWS, I understand the laws, that men are therefore bound to observe, because they are members, not of this, or that commonwealth in particular, but of a Commonwealth” (Hobbes, 2012, p. 428).

The investigation focuses, therefore, on the very essence of the civil law: what it is, how it is constituted, to whom it is addressed, in what ways it proves coercive, and how it should be interpreted. These characteristics do not vary from place to place, but have instead, as a rule, a universal value; it is as if Hobbes meant that, if there is a State, such is the law and it cannot be otherwise (which applies whatever the form of government in the State: monarchy, aristocracy, or democracy). The first step of the investigation consists in defining the civil law:

Which considered, I define civil law in this manner: CIVIL LAW, is to every subject, those rules, which the commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of, for the distinction of right, and wrong; that is to say, of that is contrary, and what is not contrary to the rule. (Hobbes, 2012, p. 430)

The definition appears to be simplified in the Latin version,

Legem igitur civilem sic definio: Lex civilis unicuique civi est regula qua, civitas verbo velscripto, vel alio quocunque voluntatis signo idoneo, ad distinctionem boni et mali, uti imperat. (Hobbes, 2012, p. 430)

In the Latin definition, “right and wrong” (meant as legal categories) are replaced by “good and evil” (meant as ethical categories). However, this change is not significant at a theoretical level: Hobbes just wishes to emphasize the fact that the civil laws give power to the moral laws, that is to say, to the laws of nature.

Once it has been established that the sovereign is the only legislator and, as such, he is not himself subjected to the law (which he can issue and abrogate, while the rules that have been imposed by customary law are to be deemed as laws only for the tacit approval of the sovereign, who could modify them at any time), Hobbes analyses the relationship between the law of nature and the civil law, stating that they “contain each other”—“se mutuo continent”—(Hobbes, 2012, p. 433) and, in the English version only, that they “are of equal extent” (Hobbes, 2012, p. 432).

According to Norberto Bobbio, this means that “the civil law is the one that makes the natural law binding; in other words, it is a positive law in the formal sense [...], but it is a natural law in the material sense, owing to the fact that it draws the matter of its own rules from the precepts of the natural law” (Bobbio, 1989, p. 126, my translation; on natural law, see Zagorin, 2009; see also Roux & Tricaud, 1992). The *civil law*, which limits and restrains (*restringo*) the right of nature and the individual freedom, introduces the coercive element, providing for punishments for the violators. Obedience to the civil law is imposed by the authority of the State and is at the same time required by the laws of nature. Actually, “obedience to the civil law is also part of the law of nature”; “consequently, infringing the civil law is tantamount to infringing the law of nature”—“per consequens legem civilem transgredi legis naturae transgressio est” (Hobbes, 2012, p. 434).

The Artificial Reason of the State

By participating in the *lex naturalis*, which is the result of reason, the *lex civilis* carries within it an element of rationality (which is added to the coercive one deriving from the authority of the sovereign), which ensures that the “law can never be against reason”—“legem contra rationem esse non posse” (Hobbes, 2012, pp. 436-437).

This is a fact that all jurists agree upon. The problem, however, is as follows: to establish “whose reason it is, that shall be received for law”. It can neither be the reason of private individuals, which is not free from passions, nor—as Hobbes emphasises—that of jurists, which can be led to err precisely due to the long study that underlies it and which, at times, can be misleading. All that remains is therefore the artificial reason of the sovereign:

[...] it is not that *juris prudentia*, or wisdom of subordinate judges; but the reason of this our artificial man the commonwealth, and his command, that maketh law: and the commonwealth being in their representative but one person, there cannot easily arise any contradiction in the laws; and when there doth, the same reason is able, by interpretation, or alteration, to take it away. In all courts of justice, the sovereign (which is the person of the commonwealth,) is he that judgeth: the subordinate judge, ought to have regard to the reason, which moved his sovereign to make such law, that his sentence may be according thereunto; which then is his sovereigns sentence; otherwise it is his own, and an unjust one. (Hobbes, 2012, p. 438)

Consistently with this assumption, Hobbes argues that the *interpreter* of the law must be either the sovereign or someone authorised by the latter, such as ordinary judges. Actually, both the written laws, i.e. the civil laws, and the unwritten ones, i.e. the natural laws, need to be interpreted. As for the latter, in particular, this is not because they are in themselves obscure, but because passions (being *perturbationes animi*—“perturbations of the mind”), by hindering reasoning, can make them such; as for the former, on the contrary, this is because the nature of the law does not consist in the literal meaning of the law itself, but in its “sense” (“sententia”), i.e. in the sense meant by the legislator, which must be correctly identified, otherwise the interpreter causes the law to say what *he* wants, so that the interpreter ends up by becoming himself the legislator (see Hobbes, 2012, p. 446).

In the identification of the authentic meaning of the law, the laws of nature, in particular equity and justice, play a key role because “the intention of the legislator is always supposed to be equity” (Hobbes, 2012, p. 454). If necessary, therefore, judges can resort to the laws of nature in order to “complement” (*supply with*) the literal meaning of the law.

Thus, it is precisely in the judicial sphere, that is, in the discussion of the prerogatives and duties of judges when it comes to interpreting the law in view of passing a judgment, that rationalism and voluntarism merge together into the Hobbesian reflection. In actual fact, it cannot be denied that the natural laws do enjoy a pre-eminence at the logical-normative level: “Leges civiles, et civilia omnia transeunt et mutantur; sed leges naturales, cum sint divinae transire aut mutari non possunt” (Hobbes, 2012, p. 451).

However, on the other hand, it is also true that only if they are included and incorporated into the civil laws, which make them binding *in foro externo* thanks to sovereign authority, the natural laws can become *laws* in the proper sense; and their interpretation belongs to the sovereign: “In civitate constituta, legum naturae interpretatio non a doctoribus et scriptoribus moralis philosophiae dependet, sed ab auctoritate civitatis. Doctrinae quidem verae esse possunt; sed auctoritas non veritas facit legem” (Hobbes, 2012, p. 448).

Conclusion

In all his political works, Hobbes claims that the sovereign (whether the king or the assembly) stands above the civil law, of which he constitutes the source (partly because, as legislator, if he wants he can amend it), but is obliged—for the sake of conscience and before God—to follow the law of nature.

If the law of nature for individuals is summarised in the imperative *Quod tibi fieri non vis, alii ne feceris*, for the sovereign, who governs on the community, in a sense it is transformed into *Salus populi suprema lex*, i.e. into the obligation or moral duty (“officium”/“duty”) to follow, as a general principle, the “safety of the people”, placing it at the centre every time he legislates or makes political decisions.

The maxim is taken from *De Legibus* by Cicero, an author disliked by Hobbes on account of his political theories, but who, however, exerted a certain influence on him on a conceptual level. In the *Elements of Law* there is only a brief—yet well defined—reference to Cicero’s maxim:

1. the law over them that have sovereign power; 2. their duty; 3. their profit: are one and the same thing contained in this sentence, *Salus populi suprema lex*; by which must be understood, not the mere preservation of their lives, but generally their benefit and good. So that this is the general law for sovereigns: that they procure, to the uttermost of their endeavour, the good of the people. (Hobbes, 1969, p. 179)

It is the duty of the sovereign to ensure that the people not only live, but live well. The aim of politics is therefore constituted by collective security and well-being. The same idea is resumed and further developed in his subsequent works. In Chapter XXX of *Leviathan*, Hobbes provides a definition of people's safety (Curran, 2007):

The office of the sovereign, (be it a monarch or an assembly,) consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of *the safety of the people*; to which he is obliged by the law of nature, and to render an account thereof to God, the author of that law, and to none but him. But by safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself. (Hobbes, 2012, p. 542)

In the light of these last words, Hobbes's philosophy can be read as an attempt to scientifically determine the conditions for peace, harmony and (as far as possible) happiness of human beings: "*reason is the pace*; increase of *science*, the way; and the benefit of mankind, the *end*" (Hobbes, 2012, p. 78).

References

- Bobbio, N. (1989). *Thomas Hobbes*. Turin: Einaudi.
- Curran, E. (2007). *Reclaiming the rights of the Hobbesian subject*. Basingstoke, New York: Palgrave Macmillan.
- Dyzenhaus, D., & Poole, Th. (Eds.). (2012). *Hobbes and the law*. Cambridge, New York: Cambridge University Press.
- Hobbes, T. (1969). *The Elements of law, natural and politic* (F. Tönnies Ed., with an introduction by M. M. Goldsmith). London: Franck Cass & Co.
- Hobbes, T. (1983). *De Cive. The Latin version* (H. Warrender Ed.). Oxford: Clarendon Press.
- Hobbes, T. (2005). A dialogue between a philosopher and a student, of the common laws of England. In A. Cromartie and Q. Skinner (Eds.), *Writings on Common Law and Hereditary Right*. Oxford: Clarendon Press.
- Hobbes, T. (2012). *Leviatano [Leviathan]* (with English and Latin texts, 3rd ed.). R. Santi, (Ed.). Milan: Bompiani.
- Lemetti, J. (2012). *Historical dictionary of Hobbes's philosophy*. Lanham, Toronto, Plymouth, UK: The Scarecrow Press, Inc.
- Lloyd, S. A. (Ed.). (2013). *The Bloomsbury companion to Hobbes*. London, New Delhi, New York, Sidney: Bloomsbury.
- Martinich, A. P., & Hoekstra, K. (2016). *The Oxford handbook of Hobbes*. Oxford, New York: Oxford University Press.
- May, L. (2013). *Limiting Leviathan. Hobbes on law and international affairs*. Oxford, New York: Oxford University Press.
- Roux, L., & Tricaud, F. (Eds.). (1992). *Le Pouvoir et le Droit. Hobbes et le fondements de la Loi*. Saint-Etienne: Publications de l'Université de Saint-Etienne.
- Zagorin, P. (2009). *Hobbes and the law of nature*. Princeton, Oxford: Princeton University Press.