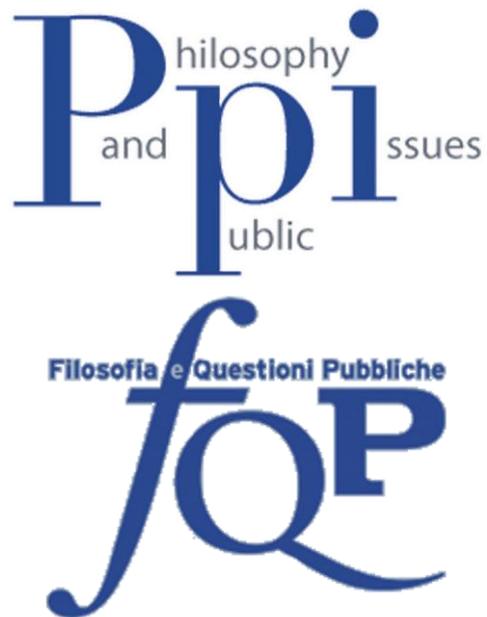


SYMPOSIUM
DEMOCRACY AND LAWMAKING



THE SPIRIT OF LEGISLATION

BY
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The Spirit of Legislation

Thomas Poole

The tendency to downplay the study of legislation I had thought an Anglo-American disease, the byproduct of our obsession with adjudication in general and the common law in particular. One of the few comforting things about Denis Baranger's elegant, erudite but consistently challenging new book is that it unsettles this assumption. It would appear that devaluing legislation as an object of scholarly enquiry is a more prevalent disease, one apparently immune to the long-established primacy of legislation within political life.

But it is not just the jurists who have a complicated relationship with legislation. The same is true, though for different reasons, of the citizenry at large. Legislation answers the particular needs of modernity for government and self-government. It facilitates the organisation of complex social interactions on the basis of a publicly accessible and presumptively coherent grand plan. In so doing, it can be said to produce order out of what might be chaos. As the primary expression of the body of citizens acting in the interests of the collective, it can also reinforce unity out of what might otherwise be a fragmented plurality. For all this, Baranger is surely right to detect that disenchantment with legislation has become a Europe-wide phenomenon (Baranger 2018, 10-1). We

recognise the need to enact laws, and in fact do so to an unprecedented degree. And yet it is hard to ignore the sense of diminishing returns from all this activity. We perceive this not just in practical terms, by means of a devaluation of the legislative technique, but more profoundly in cultural terms through a loss of our sense of - even a belief in - the legislative form.

This is no trivial matter. What we might call the spirit of legislation embodies a host of political goals, ideals and desires. “The exercise of legislative power, far from being anodyne, concentrates all our political aspirations.” To lose faith in legislation threatens the much broader political project of living in societies capable of governing themselves (*ibid.*, 12). *Penser la Loi* sets out to explain our current dissatisfaction with legislation by means of an intellectual history of the modern legislative form. Though it reaches back to the medieval period, the narrative centres on the eighteenth century, where the author is not alone in detecting a new philosophical project combining a grand political goal (collective autonomy) with the aspiration to reform society by means of the construction of a science of legislation (*ibid.*, 14-5). Among these philosophers of legislation Beccaria and especially Bentham get special billing. Their reform project was made possible by the ground-clearing endeavours of the state theorists of the previous century. Hobbes in particular – ‘great gravedigger’ of the medieval polity and ‘midwife’ of the new world order (*ibid.*, 59, 61) – inaugurated a modern worldview in which legislation became the closest thing possible to an act of sovereignty, and where the state itself could be conceived first and foremost as an entity which legislates (*ibid.*, 47).

In case this spare summary gives too stilted an impression of the work as a whole, there are a number of elements and themes that cut across or complicate the analysis in intriguing ways. Baranger pays serious attention, for instance, to what for him are

false starts in the genesis of a science of legislation – Montesquieu and Rousseau. To be sure, this analysis serves a practical function in as much as many today, especially in France, tend to trace the origins of modern legislation to either or both these sources. It is possible to detect in these thinkers large-scale reflections on society and its political and moral resources. But an essential element of the modern account of legislation eludes them. For all their differences, Montesquieu and Rousseau shared a legal epistemology according to which the objective of the legislator was to ensure that the laws that were passed were such as were suited to the basic temper and moral character of a particular political community. They had as such little understanding of the transformative capacity of legislation: a technique for imposing new plans and new orders on society (*ibid.*, 151). To invoke Max Weber’s distinction, they both understood ‘positivity’ of law in its basic sense of the *source* of a law as an expression of the will of the legislator; but had no clear idea of positivity in a second sense, that is, relating to its *function* – “its capacity to place itself at the service of rational projects aimed at altering social reality” (*ibid.*, 92).

While the chapters on Montesquieu and Rousseau represent a detour of sorts, a more substantial theme relates to the interplay between will and reason. This first appears in a stylised jurisprudential rendering of the medieval polity. Here, Baranger juxtaposes voluntarists (or nominalists) like Ockham with rationalists like Aquinas. What initially separated the two schools was their understanding of natural law. The former stressed the centrality of divine will; the latter saw it more in terms of an intellectual act on God’s part through which we might comprehend what is right and wrong. These positions clearly have a legislative analogue, however, the former emphasising the essential structure of legislation as a command, the latter insisting that it is also and ultimately a work of reason (*ibid.*, 36-7). It is fascinating to watch Baranger trace the competition between these

two facets of legislation, will and reason, through the development of the modern idea of legislation and right up to the present-day tension between political and juristic conceptions of legislation (*la loi politique* and *la loi juridique*).

There is much to admire in this fine book. My comments relate to a number of its central theses. The work's centre of gravity lies squarely in the late eighteenth century, specifically the period from the 1760s to the 1800s – between the publication of Beccaria's *On Crimes and Punishments* (1764) and Bentham's *Fragment on Government* (1776) to the inauguration of the Civil Code under Napoleon in 1804. Indeed, the entire second half of the book (chapters 8-15) is devoted to that period, which is also where the story it tells effectively ends. My three main reflections target respectively that period's past, present, and future. First, I investigate Baranger's account of the move into modernity, focusing on his reading of Hobbes. My aim is to amplify that account. We can accept that the will (or command) element to law and legislation predominates in Hobbes's theory. But I say more about how reason is not displaced but relocated, assuming a vital structuring role within the interstices of the justice system imagined in *Leviathan*. Second, I argue that Baranger's interpretation of later Enlightenment thought misses a trick. Writers of the period, notably Hume and Smith, integrated the characteristically modern element of 'interest' into the study of politics, complicating in so doing the classic 'will versus reason' debate on law and morals. The implications of this omission are important, not least for understanding Bentham's project, which plays a starring role in the book. Third, I work beyond the book's compass, discussing the way that a Benthamite conception of legislation intersected with the growth of representative democracy, and the changes to the nature of legislation and our expectations of it that were entailed by the advent of the administrative state.

I

Reasoning through Hobbes

The antagonism between will and reason provides an anchor point in the narrative. The solution to that antagonism, in as much as there is one, was to bind the two together within the legislative capacity. In an important passage, Baranger writes that “contemporary legislation is in effect the result of a historical synthesis between a voluntarist recalibration of the idea of law [*loi*] and an internal, unceasing, working out of the rationalist preoccupation.” He continues: “Voluntarism and rationalism are no longer in opposition: the same government can be understood simultaneously as a sovereign legislator according to a voluntarist mode of thought and as the leader of a political and moral project of promoting rights and well-being.” (*ibid.*, 58)

A key moment concerns the move into the modern world - from the estates of princes to the sovereign state. Baranger is clear that Hobbes, though not the sole inventor of the modern idea of legislation, was transformative. It was he who cut the Gordian knot that tangled legislation up with other feudal techniques of rule (*ibid.*, 59). Hobbes unquestionably took a scythe to medieval forms, eradicating any site of political authority other than the state, whether seigneurial, religious or guild. The only thing left standing was law – or more precisely the artificial (legal) structure of rule, sovereign within its domain, and endowed with sufficient force to sustain it. As a formal entity, its primary mode of expression took the form of a formal, public instruction or command: in other words, a cleaned up and enhanced idea of legislation. And given the absence of much else that might induce subjects to obedience, such legislation naturally becomes the repository of the political ambitions of society and the receptacle of its moral judgements (*ibid.*, 58-9).

Baranger goes on to say that the Hobbesian model of legislation combines will and reason. But he doesn't explain clearly why this is so. The will element is more obvious in the theory. Law, after all, is defined as the *command* of the sovereign. As such, legal obligation is grounded in the will of the sovereign agent – *auctoritas non veritas facit legem*. But we need to be careful when reading Hobbes, who often says something apparently definitive only to claw back some of it later. Now, it is clear enough that Hobbes expects the sovereign to act rationally, most obviously in the exercise of its legislative capacity which, as Baranger notes, is its paradigmatic function. If not, then the theory accommodates the possibility of the arbitrary (unreasoning) exercise of power. And if that's right, we've escaped nothing by entering into the civil condition, but merely jumped out of the frying pan into the fire.

But how is that expectation of rationality reinforced? Hobbes doesn't offer a constitutionalist solution, even though such a response (even before Locke) was available.¹ Baranger identifies where Hobbes's solution is to be found – Chapter 26 of *Leviathan* – but not what it involves. That chapter provides an account of how the expectation that the sovereign acts rationally is reinforced by the judges. There are two noteworthy aspects to this solution, the first relating to *powers* and the second relating to *personnel*. (1) Hobbes is clear that the judges are the sovereign's judges – that is, part of the internal apparatus of the state. On the other hand, he also says that they are to interpret legislation – and he regards legislation as always in need of interpretation – not only with a view to the intention behind the legislation but also to ensure, so far as it is possible, that it is consistent with principles of equity. (Equity being the word he reserves for natural law when discussing its application in the civil condition. And natural law being a series of propositions or 'theorems' of right reason.) Hobbes envisages a

¹ See Loughlin 2007.

system of what we would call judicial review in which judges examine the lawfulness of legislation not just on formal grounds (e.g. publicity) but also on substantive grounds (e.g. equity). It is here where the reason of the law is to be argued over and ascertained.² (2) The judges are the sovereign's judges, we know. But that does not make them his minions. Hobbes envisages independent-minded judges. Not that he favoured a professional cadre of judges: he certainly did not want a bench stocked with common lawyers, whom he distrusted. What he envisaged were equity specialists – that is, specifically, those adept in moral reasoning.³ The rationale must be this: only judges with this profile can make sure that the key task of exposing law to reason is realised.

Now, there are various weaknesses with Hobbes's theory. We are still left with a series of credibility problems at both the macro level – why would the sovereign choose to go through law rather than power, other than it being in its long-term interest to do so? – and the micro – when wouldn't the sovereign just pack the court with those it knows will do its bidding? But that is not our present concern, which relates to the position of Hobbes within Baranger's narrative arc. If Hobbes is the leading architect of the modern conception of legislation and if, as the book also insists, that conception faces a long-term crisis of confidence, instead of extolling Hobbes's contribution perhaps we should be holding him to account. Far from offering a coherent template for the reconciliation of reason and will, perhaps *Leviathan* represents an

² For an elaboration of this analysis see Poole 2012.

³ Hobbes 1994, chapter 26: "The things that make a good Judge, or good Interpreter of the Lawes, are, first, A right understanding of that principall Law of Nature called Equity; which depending not on the reading of other mens Writings, but on the goodnesse of a mans own naturall Reason, and Meditation, is presumed to be in those most, that have had most leisure, and had the most inclination to meditate thereon."

elaborate confidence trick or sleight of hand in which the medieval pack is reshuffled but in no way transcended. Maybe our fears about Hobbes, and by extension the sovereign state, are right, and that reason is too precarious, too ephemeral, in this picture and as such always on the verge of being sacrificed to will.

II

Legislating for Interest

A more neutral way of making the preceding point would be to say that the connection Baranger wants to make between Hobbes, so influential in laying the intellectual groundwork of the modern state, and our current dissatisfaction with legislation is unclear. I want to make a similar point now, but from a different perspective, the standpoint being that of the later 18th century, the period in which so much of Baranger's analysis is situated. But whereas the previous observation sought merely to clarify an exegetical point on Hobbes, my objective here is to detect a failure to notice the importance of the concept of 'interest'. That term, as the core concept within a new conception of politics, had its origins in 17th century discourse - where the word interest was taken up in earnest by English political writers at about the time Hobbes was writing *Leviathan*, having had an earlier career among French writers during the wars of religion.⁴ But to integrate interest within a developed political philosophy was the achievement of thinkers of the following century, notably Hume and Smith.⁵

⁴ See e.g. Gunn 2009.

⁵ Hume 1741, 42: "Political writers have established it as a maxim, that, in contriving any system of government, and fixing the several checks and controls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest."

Characteristic to this mode of thought are the propositions that authority is rooted in public opinion and that ‘*Self-Interest* is the original Motive to the *Establishment* of Justice’. God is absent from this worldview. So too is any semblance of grounding authority on hypothetical contracts.⁶ The trick is to identify how we might work out from a basis in self-interest to the world of public interest that justice inhabits - in other words, from rulership based on power to politics framed by law. The collective action problems are particularly substantial, since Hume and Smith take the reason element of the individual left to her own devices as too weak to subdue her self-interested passions. The notion of sympathy offers something of a solution⁷ – or rather, sympathy combined with the passage of time (regime stabilisation, the power of convention, inertia). As Hume writes in the same passage from which I just quoted: “This latter Principle of Sympathy is too weak to controul our Passions; but has sufficient Force to influence our Taste, and give us the Sentiments of Approbation or Blame.”⁸ So, once up and running, a system of justice can be stabilised and enhanced by the sympathy that we are likely to have for it as reflective of the public interest.

Alluding to the omission of interest in a study of late 18th century political thought is not intended as point-scoring. Nor is it simply an injunction to complete the conceptual puzzle. The introduction of interest into the analysis of politics marks a rupture in political thought. Specifically, and in Baranger’s terms, it disturbed the classic binary between will and reason by introducing a third component. Interest brings with it an element of active projection and calculation that neither reason nor will naturally possess. Thinking through the lens of interest thus maps directly

⁶ Both of these positions were taken in opposition to Locke: see Hume 1748.

⁷ The seminal treatment is Smith 1759.

⁸ Hume 1738, 3.2.2.24.

onto what Baranger takes to be the distinctive feature of modern legislation: that it provides the vehicle for realising the interest of the political community, projecting its goals, aims, and fears in the hope of mapping out its future.

The essence of the historical project of the science of legislation lies precisely in this concept of interest. This is perhaps most apparent when we turn to Bentham, the central figure within Baranger's study. Though in many respects unique, Bentham can be read as extending the thinking of Hume and Smith, albeit in a certain direction. Though more focused on reforming existing social arrangements, his project was, like theirs, self-consciously modern. Much of his attack on common law jurist Blackstone concerned what he saw as the latter's perpetuation of musty and self-serving half-truths derived from a semi-idealised past. The modern world has no place for such cant: "the season of *Fiction* is now over." (Bentham 1988, 53). The modern Legislator, he tells us, has been steadily engaged with plucking "the mask of Mystery from the face of Jurisprudence." (*ibid.*, 21). In this brave new world, legislation becomes the governance mechanism *par excellence*, vastly to be preferred to the 'dog law' perpetuated by the lawyers. Whereas Hobbes wanted to preserve the play of equity within the interstices of law, Bentham wanted to eradicate it. A well-ordered legal system run on clear legislation has no need of equity (which Bentham understood as rampant judicial discretion). "*Equity*, that capricious and incomprehensible mistress of our fortunes, whose features neither our Author [Blackstone], nor perhaps any one is well able to delineate; – of *Equity*, who having in the beginning been a rib of Law, but since in some dark age plucked from her side, when sleeping, by the hands not so much of God as of enterprizing Judges, now lords it over her parent sister" (*ibid.*, 5-6)

But in a sense this is all for Bentham just superstructure: an assessment of the potential of various techniques of rule to

produce particular results. The whole political and legal edifice is to be put into the service of Utility, the maxim that the greatest happiness of the greatest number is the foundation of morals and legislation. “From *utility* then we may denominate a *principle*, that may serve to preside over and govern, as it were, such arrangement as shall be made of the several institutions or combinations of institutions that compose the matter of this science” (*ibid.*, 26). And what reasons do we adduce to work out what those institutions ought to do? Certainly not technical reasons of the type the lawyer trades in, which “is darkness,” but normal reasons to do with calculations of utility. In other words, in working out what we should do, we need do no more (and no less) than assess the mix of pleasure and pain that is expected to accrue from a new law or policy (*ibid.*, 27-8).

This is interest rationalised, turned into a overarching principle and matrix of calculation. Another way of expressing this point is to say that Bentham sought to align reason with utility. Reason is swallowed up by considerations of interest. The extent to which Bentham was prepared to go on this score can be gauged by his account of political authority. Hobbes had a story about that, and so did Hume. Bentham’s theory of the foundation of authority is all about utility, as one might expect. We have reason to obey, he argues, if it is in our interest: “taking the whole body together, it is their *duty* to obey, just so long as it is in their *interest*, and no longer.” (*ibid.*, 56)⁹ There are certain connections here with Hume, to be sure. But Bentham strips past practice out of the equation, at least directly, as he envisages calculations of utility to be future oriented, based on considerations of “future fact – the probability of certain future contingencies” (*ibid.*, 104).

⁹ Later in the same work, the story is complicated by the introduction of another definition of duty, this time one that correlates to a legal sanction (Bentham 1988, 109).

Bentham simply doesn't make sense if we come to him with only the classic dyad of reason and will. Interest is utterly pervasive. Interest strips reason out of the equation, or at least denudes it of utility-independent content. (I think the same may well be true of the will component of legislation.) But my point is not primarily an exegetical one. It is rather that to ignore interest in a theoretical inquiry into modern legislation is to miss what is perhaps most characteristically about the phenomenon. Moreover, if our objective is to understand why we may now be dissatisfied with the operation of the legislative capacity, interest simply can't be ignored. I suspect that much of that dissatisfaction, in as much as it exists and in so far as it relates to conceptual matters, is to do with our scepticism about securing the common interest through modern legislative practices – and indeed about the possibility of identifying the common interest in the first place. The danger of an interest-dominated conception of politics is that it produces an entirely functional account of legislation, one that may not allow for the play of other side-constraints – constitutional constraints, for instance, or other juridical concerns such as rights protection - in the elaboration of law and policy.

III

Legislation and Administration

It can be unfair to criticise a book for what it doesn't contain. But not, I think, in this case. *Penser la Loi* aims to explain our current dissatisfaction with legislation by means of a conceptual history of its subject. Given this aim, the problem with the coverage of the book is self-evident. Most of its pages are devoted to a study of Enlightenment thought. Substantive analysis stops with a consideration of Portalis and the Civil Code (chapter 14) - in other words, at the very dawn of the great era of legislation.

Taking Britain as a fairly standard case, the age of statutes is taken to have begun with a series of reforming (and Bentham-influenced) statutes, beginning with the Great Reform Act 1832, the Factory Act 1833 and the Poor Law Amendment Act 1834. Before that time, Acts of Parliament were characterised by their “extreme and verbose particularity” which, as legal historian Frederick Maitland remarked, rarely rose “to the dignity of a general proposition.”¹⁰ It is difficult in the extreme to see how we might solve the puzzle of contemporary legislation through a historical inquiry that stops before legislation in a recognisably contemporary form even begins.

If this criticism sounds harsh, it is not intended as such. Given how much I enjoyed the book, it is as much a back-handed compliment - even a plea for a second volume. Were its author’s ambition to turn in that direction, I would hope that attention would be given to certain fundamental changes in legislation’s subsequent career. Two such developments are especially germane. The first, concerning the post-Bentham success of the idea of interest as a leading conceptual marker for understanding the legislative function, picks up a theme discussed in the previous section. That story is bound up with the growth of representative democracy – another development that occurs after the period covered in the book. The more we think of legislation in terms of the public interest, the more we are likely to be concerned with the identity and incentives of the legislators whose job it is to determine it. And the more we couch the legislative project in transformative terms, as the key means of realising social goals, the more likely it is that there will be demands for more ‘voice’ in that process through which those goals are determined and given legal instantiation from those with little or none.

¹⁰ Maitland 1910, 605, quoted in Duxbury 2013, 155.

This first development – a widespread acceptance of legislation in its modern sense, grounded in the politics of interest, and the widening of the franchise – is the story of the nineteenth century. The second development, though it had its origins in that period, is more a twentieth century affair. We still tend to operate according to a model derived from the classic age of legislation, correspondingly roughly the period from 1830 to 1900, whereby legislation relating to a general matter of public interest, proposed by the executive but enacted after due deliberation by the legislature, settled the rights and duties of legal subjects, with no doubt some interpretative input from the courts. But in truth that model had by the early years of the twentieth century, and certainly after the end of the Great War, ceased to correspond to political reality. The density and complexity of the ‘administrative state’ that was the byproduct of the age of reform – as the state took upon itself more and more tasks and sought to implement them more and more effectively – led to a change in the nature of statutes. The practice was now to enact framework or ‘skeleton’ legislation. As one senior British lawyer observed at the start of the 1920s, a statute was now usually “a kind of preliminary announcement for legislation” indicating that Parliament “has had a legislative idea, has sketched an outline, has laid down a principle – and has left it at that,” relying on officials and technical staff to work it up into a functional legal framework.¹¹

The growth of the administrative state led to a rebalancing of power between the organs of state – towards the executive, and away from the legislature.¹² (It also led later to an augmented role for the courts. But that is a story for another time.) This rebalancing was reflected in the form that statutes took.¹³ The

¹¹ Carr 1921, 2 and 16.

¹² See e.g. Lindseth 2004, 1341.

¹³ See e.g. Rubin 1989, 369.

point is not a dry analytical one. This is a substantial change in the nature of our politics, with important implications not only for the nature of statutes, but also and more fundamentally for our ambitions for legislation. As such, it goes to the heart of Baranger's normative project, his concern to understand and ameliorate our conceptual disquiet about the legislative capacity. My suspicion is that we are caught in two paradoxes. The first relates to our sense of instrumental capacity – that is, our ability to get things done to our satisfaction – while the second implicates our sense of political capacity – that is, our ability to choose the things that get done in our name to our satisfaction. We demand that the state does an awful lot, possibly too much; but are unable to cope with the inevitable dissatisfaction with what we see as its continual underperformance. And the more it does in our name, the less it seems to be amenable to our determination. Legislation, still the best hope for realising our myriad political and social objectives, is caught in the middle of this. The danger is that it begins to feel a bit like a fraud - not just a screen for executive power, but disconnected from the people whose voice it is meant to project.

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