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## WAR AND THE RULE OF LAW

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Part 1 of 2

The thesis of this lecture can be expressed in the simple proposition that peace on earth is impossible without the rule of law. An immediate corollary of this proposition is that war is inevitable so long as this one indispensable condition of peace is lacking. Since I believe that the rule of law, which has already established limited and partial peace on earth that is, peace among small groups of men can be extended to cover all men, my thinking leads me to the conclusion that war is a curable social disease; that law is its cure, the only effective remedy because the only one that goes to the roots of the pathology; and hence, finally, that it is possible to attain an unlimited peace unlimited in extent and in duration.

These truths have come to seem so obvious to me that I have had some difficulty in determining what more must be said or written to make them obvious to those who persist in thinking otherwise, that is to say, those who suppose that war is the inevitable and ineradicable lot of man; those who suppose that the root cause of war cannot be removed, so that peace among sovereign nations can be established without the abolition of their sovereignty; or those who suppose that the diplomatic guile and the gloved fist of power politics are the only available instruments in the sphere of world affairs all those who try in one way or another to avoid the conclusion that only by unity of government, only by a single rule of enforceable law governing all the peoples of the globe, can global peace be made and sustained.

On the other hand, we know, of course, that the whole of political theory and the whole philosophy of law are involved in the understanding of war and peace, the cause of peace and the prevention of war. When this is reflected upon, the problem is not how much more need be said but rather how far one must go in the exposition of basic principles in order to give one's conclusion the certitude of demonstrated truth, and in order to make its meaning so precise and so clear that there is some check against the inveterate human tendency to evade a conclusion as rigorous in its demands as it is rigorous in its foundation.

Confronted by these opposite difficulties, the effort will here be made to aim at the essential minimum that needs to be said. I have chosen what seem to me to be the five points that must be understood if the meaning and the truth of my thesis is to be seen. I shall try to provide only a rudimentary analytic elaboration of each of these five points. To do more than that would go beyond the scope of a single lecture. To do less would fail to present an unanswerable argument.

I shall proceed at once to the argument itself, the movement of which will be discernible in the order and connection of the five points which will be stated and briefly expounded. When that is done, I shall return to the thesis already presented and try to show how it necessarily follows as the unavoidable conclusion from these undeniable premises.

*The first point in the argument is that the institution of government is indispensable for the existence of any human community.*

By a community is meant a multitude of men living together in peace and order. A multitude of men taken without these further

qualifications is not a community. The root of the word “community” is unity, not any unity, but the unity of a multitude having something in common.

A community or a society’s nothing but the existence of a unity of public peace. The term “public peace” or “political peace” is used in order to prevent anyone from misunderstanding the kind of peace that is here referred to. In the history of European thought, and even today, the word “peace” is used with other connotations. We speak of “being at peace with one’s self.” The psychiatrist claims to help men find peace. That is not the kind of peace that concerns us here. The political peace or the public peace with which we are concerned occurs in the sphere of social action, whereas the inward peace of the soul, the contentment of the heart, lies in the conduct of the individual life. It belongs to the consideration of the moralist or the psychiatrist. It lies beyond the sphere of law and politics.

For a community to exist, for a multitude of men to live together in peace and order, each member of the community must consider the good of the community as well as his own good, and he must do so because his own personal good is inextricably bound up with the good of the community. If man were not by nature a social animal, this would not be true. If man were not by nature a social animal, he could live well in complete solitude. But since he is naturally social, which means that he needs the co-operation of his fellowmen in the pursuit of all the characteristically human goods, the well-being of the community in which he lives is itself a condition of his own personal welfare.

In the process of living together, men inevitably find themselves in disagreement about three things. This is not a reference to the speculative disagreements which occur in every culture disagreements in science or metaphysics, in religion or the theory of art. It is a reference to the practical disagreements which men inevitably face in the difficult process of living together, disagreements which arise from their efforts at co-operation and which occur in their transactions or dealings with one another.

There are three major areas of practical disagreement. These three types of disagreement are inescapable because they are incurable. They are due to the limited rationality of man.

Individuals will not always agree about what measures should be adopted for the good of the community, what means should be chosen for the maintenance and promotion of the common good,

which is at once the good of each man as well as the good of the organized multitude that is the community. If this common good, if the good of the community, belonged to any one man and not to another, such disagreements might be avoidable, because then the common good would be the interest or province of one man and not of another. But since the common good or the good of the community is a good in which all members of the community have an equal interest, they are all equally privileged and obligated to consider what steps shall be taken for the common good. About such matters, reasonable differences of opinion are always possible.

Individuals will not always agree with one another about what is justly due to each of them in the sphere of those private transactions which constitute their dealings or intercourse with one another.

Individuals will not always agree with one another about what is due each of them in justice, either as a reward or as a punishment, from the community as a whole.

These are the three major areas in which men will always find themselves in disagreement when they try to live and work together, co-operating in the conduct of a community. Unless there is some way of settling such disputes, the community will not long endure.

Now there are only three ways in which every sort of dispute among men can be settled. Some disputes can be resolved by reason, demonstrating which of two contrary positions is true in the light of all the available evidence. This supposedly is the way mathematicians, philosophers, and scientists settle their disputes. Disputes can also be "settled" by the violent suppression of one of the parties by the other. This is the way in which brutes settle their disputes. A third way is by the adoption, on the part of all concerned, of some fixed principle of procedure in the arbitration of disputes.

Let us look at these three ways and see whether they are applicable, and how they are applicable, to the practical disputes which occur among men in the course of community life.

The practical problems of social life, in any of the three areas mentioned, cannot be solved by reason, as a mathematical or metaphysical problem can be. Political problems and all problems of justice involve contingent circumstances that make a scientific so-

lution of them utterly impossible. To problems of this sort, contrary solutions can usually be found and can usually be defended by reasonable men on both sides of the question. It follows, therefore, that the authority of reason alone is not sufficient to resolve the disagreements of men engaged in the difficult task of living together, aiming together at the common good of all and separately at the ultimate good of each.

Nor can these practical problems be solved by force alone without destroying the community itself, for the maintenance of which solutions are sought. This is not to say that these practical problems cannot be solved by force alone. If we are willing to play on the word "solved," we can say that force alone can solve them to the extent that one of the contenders, one of the disputants, is removed. But force, in removing the controversy, also destroys the community. A successful use of force by one of the parties will temporarily remove the other party as an effective contender, but it never really removes the issue itself and merely postpones the day when the loser will be able to exert force in the opposite direction. *The use of force, and force alone, in the settlement of disputes is nothing but war.* Where war is the only means for settling disputes, no community exists, for war and peace are incompatible, and some degree of peace is of the very essence of the community's existence.

Hence there is only one method of preserving the community from the disruptive consequences of inevitable disagreement among its members. That method combines reason and force. That method is the method of government and the rule of law.

Let me briefly explain the principle of government. To do this, we must take a nonexistent simple case. The term "nonexistent" is used because, so far as the writer knows, there is no clear exemplification of this simple case. Yet this simple case provides us with the principle in its most obvious form and so enables us to see the principle when it occurs in more complicated embodiments.

In its simplest form the principle of government consists in the convention of abiding by the decision of the majority. This convention itself establishes a procedure by which all disputes can be peacefully settled. On any given matter where there is a reasonable difference of opinion, the convention proclaims that the opinion of the majority shall prevail. This does not mean that the majority is always right in fact. It may be wrong in fact as often as it is right, though there is some reason to believe the opposite. The principle of majority rule is not justified as a way of reaching *the right deci-*

*sion in every case* but rather as a way of reaching *some decision peacefully*. Furthermore, reason can take part in this method of reaching a decision, in so far as the issue is debated prior to the vote. But what is most important of all is the fact that the majority decision, regardless of its content, is binding upon all, because the convention of abiding by such a decision has been freely chosen by all as a method of resolving disputes. Since the authority of this principle is the authority of the community itself, the force of the whole community can rightly be used against any dissidents who try to avoid the effect of a majority decision when they find it adverse to their private interests. Such use of force is not war, nor is it violence, for such force is used with the authority of the whole community.

Imagine a relatively small community in which the total population can be called into assembly on any question involving the interests of the whole community. Let the convention of majority rule provide the method for getting decisions. Since there is no way of *proving* in any case which is the right way to proceed, which is the right course of action since in any dispute about matters of public policy reasonable men and men of good will can take opposite sides this convention, which is the heart of the principle of government, is simply a way of finding a decision that will be obligatory upon all, because the convention underlying its attainment is set up by all. No one is injured, though some individuals in individual cases may suffer from the adverse effect of a decision. But the chances are the same for all in each case. This is the simplest example of the principle of government by which men are able peacefully to reach decisions about practical problems without resort to violence, though not without the use of force in the support of the decision when reached.

Now let us consider all the complicated cases. In all its representative forms, the principle of government remains essentially the same. Instead of the whole population deciding every issue by a majority vote, some part of the people, invested with the authority of government by the whole community, exercises that authority to decide public questions and uses the public force to make the public decisions binding upon those who refuse to recognize their authority. Thus we see that the principle of government is nothing but the establishment of a way of making the authority and force of the whole community supreme in matters that concern the public good. Since in practical matters decisions must be reached, and since in public matters a single decision must prevail, and must be binding on all the interested parties, among whom some disagreement is likely, the principle of government is needed to achieve

that unity of decision without which there cannot be peace and order no unity of men living together, no community.

The principle of government is the principle by which laws are made, the laws themselves determining what shall be done or shall not be done for the common good. The principle of government is also the principle underlying the administration of laws, and it is through the administration of laws that disputes between individuals about private matters can be arbitrated and resolved. In short, government is needed for the peaceful settlement of all disputes about matters affecting the common good, concerning which disagreements will always arise among men who are trying to live together.

*My second point, which qualifies my first substantially, is that the principle of constitutionality is indispensable to government by law.*

There are two ways in which government can be instituted. Government can be instituted by force and subjugation, some men imposing their arbitrary will upon others and making it binding upon them through actual or threatened violence. Government can also be instituted by the derivation of the authority and power of officials from the authority and force that are naturally vested in the community as a whole.

The community as a whole naturally has the authority to decide what is for the common good. No individual man has this authority naturally. His private authority does not go beyond deciding what is for his own good. But government, in every case in which it is not simply a majority decision by the whole population, must result from the decision made by some men for the common good of all. If all men are not at all times participating in the acts of government, the acts of government must be the acts of representative men, officials who in their public capacity are doing what they could not do rightly in their private capacity, for in their private capacity they have no authority to govern. It is only in their public personality, which is an adopted personality, that men have public authority. For the decisions of individual men to be authoritative in the community, the men making them must get their authority from its natural source, which is nothing but the community. The process by which the community's authority and power are conferred upon certain men, the men who occupy the offices of government, is the constitution of a government, whether that constitution be a customary device or a written document.

The basic opposition always referred to in the pages of political theory between government by men and government by laws properly understood only when it is conceived as an opposition between nonconstitutional government and constitutional government. It is sometimes wrongly supposed that the alternatives are constituted by government in which law alone rules and by government in which men rule without making laws. Both of these alternatives are obviously impossible. There is and can be no government by law alone, for men are always required to make and to administer laws. Nor, strictly speaking, is there ever government by men alone without there also being some semblance of lawmaking on their part. In the very act of governing, rules must be issued, promulgated, and enforced, even if they are only temporary edicts and decrees. Men and laws are always somehow implicated in the operations of government.

The real issue is seen only when the fundamental alternatives are expressed in the following manner. *Either* no man is above the law and no man can make or enforce a law except in a manner prescribed by law itself; *or* some men are above the law, and these men can make and enforce rules in any way they choose, without any norm of legality to check them and without any method except violent rebellion to nullify the rules they make.

In a nonconstitutional government, some men one or more, though usually only a few are above the coercive force of law. No sanctions are available to enforce the law against them. This holds for government by absolute monarchs, by dictators, by tyrants, by despots; and it holds whether or not the government is benevolent and just, as it may sometimes be in the case of despotism, or unjust as it always is in the case of tyranny. Absolute government exists whenever some men arrogate to themselves a status that does not rightfully belong to any man the status of sovereignty, which is nothing but the condition of being above the coercive force of law. Such men assume *a* kind of *personal* sovereignty which counteracts the sovereignty of the community itself. The sovereignty of the community is effectively paramount only when it reigns over every man in the community *without exception*, as is the case, for example, in the United States.

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