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The Idea of Civil Police

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Part 2 of 4

In order to get at the problems involved in formulating the idea of a civil police force and in establishing civil police as an operating institution, let us now look once again, and this time a little more closely, at the theory of *de jure*, constitutional, or what Rousseau calls "legitimate" government, government by right not just by might, government "deriving its just powers from the consent of the governed."

Anyone who is subject to government, whether *de facto* or *de jure*, surrenders his autonomy to a certain extent; for in those matters in which he submits to government, he does not obey himself alone. No government is ever or ever can be so pervasive that the individual subject to it retains no autonomy whatsoever: there are always matters to which government does not extend and in these respects, the individual remains autonomous—obeys himself alone. On the other hand, a society of completely autonomous in-

dividuals would be an anarchic society—a society without government.

The difference, then between a *de jure* and a *de facto* government lies in the manner in which individuals relinquish a portion of their autonomy to government—voluntarily and as act of reason, or involuntarily and as an act of fear. It is this difference which is embodied in the difficult notion of the consent of the governed, which is explicit and unanimous, as ideally it should be, only in the myth of the social contract. Yet that is a useful myth or, as Rousseau would call it, a contrafactual hypothesis.

It is useful because, first of all, it stresses the point that unanimity is required to institute the principle of majority rule; for dearly a majority cannot be appealed to as the source or basis for legitimatizing the authority of a majority.

It is useful, secondly because it enables us to pass from the social contract with its unanimous explicit consent to the implicit or tacit consent that is conferred upon a constitution or general framework or government by *all* who are *at the time* its constituents. This tacit consent is at later times given by *all* who in any way participate in the government by any due process that is set up by the constitution.

Finally, it enables us to see that when we happen to be in a minority that is adversely affected by a majority decision, that decision or act of government has our antecedent approval if it has been reached by due process, since it has been reached in a way to which we have already given our consent. Hence though we disapprove of the decision and wish to do everything that we legally can to express our dissent, that dissent is civil dissent, because it is by due process, and so it is within the boundaries of consent and reaffirms our consent. This, as we shall see, becomes a point of critical importance at a later stage of our analysis.

If this were not so, if the minority adversely affected by a majority decision wished to exercise a veto that would nullify the majority decision, then they would in effect be asking that all matters be decided unanimously instead of by a majority; and that in effect amounts to demanding complete autonomy for each of us and putting an end to government.

"Due process of law" means "in accordance with the constitution." When an act of government is unconstitutional, it lacks

authority, for it has exceeded or gone outside the limited and well-defined authority granted by the constitution.

Now let us ask about law itself—not the constitution, which in a certain sense is law, but the laws that are made by due process of law, the laws that are constitutionally enacted and enforced because they are made and enforced by agencies that the constitution sets up for this purpose and on which it confers authority to perform the legislative and executive function.

Since the legislative authority is set up to regulate by rules of law those matters which should be so regulated for the common good, the laws made by a duly constituted legislative authority are, in origin, rational devices—formulations achieved by thought addressed to the practical problems to be solved. They are products of the mind thinking about what is or is not for the common good. If the whole people does not engage in the task of thinking about the rules to be made for the common good, that task is then delegated to a public assembly, a group of officeholders having legislative authority under the constitution.

What has just been said is briefly summarized in Aquinas's definition of man-made law: "an ordinance of reason, for the common good, made by him who has the care of the community, and promulgated" (ST, I-II, 90,4). Reasonable men, thinking about what is for the common good, can reasonably disagree about whether this or that law should be formulated. If this were not the case, the formulation of laws would be like solving problems in mathematics—about which reasonable men cannot reasonably disagree. Since a decision must be reached, the matter must be put a vote; and when the vote of the majority prevails, an element of arbitrariness enters into law-making, for it is the will of the majority that makes the reason of the majority prevail over the reason of the minority.

The profound significance of this conception of law—the only conception of it that is appropriate to the lawmaking of a *de jur*e or constitutional government—is best seen by contrasting it with the exactly opposite conception of law, a conception appropriate to *de facto* or despotic government. That conception is expressed by the Roman jurist Ulpian: "That which pleases the prince has the force of law."

What is being said here has been said in other ways—before Ulpian, by Thrasymachus in the *Republic*, and after him by Hobbes and by Austin.

The essential points in this conception of law are: (i) since the law stems from the will of the prince (the person or government in power by might), and (ii) since it is made to please the prince, i.e., for his interest or advantage, not for the common good, it follows that (iii the law can be as arbitrary as the prince pleases, since whatever pleases him can be given the force of law by him. This is not to say that the prince cannot use his reason and think about what is expedient for his own interest; he may even think about what is for the good of his subjects, if he wishes to (if it pleases him to be benevolent). *But he need not*; and *when he does not*—when his rules of law are not well-devised, when they are not expedient for his own interest, or when they are not for the good of his subjects—they are laws nonetheless because (a) they proceed from his will and (b) because they have the coercive force he has the power to give them.

The essential properties of law on this conception are arbitrariness (willfulness) and force. Whatever the prince wishes to enforce and has the power to enforce (the power, not the authority) can be made a law—a rule of conduct to be obeyed by his subjects.

The basic difference between the two conceptions of law—the one appropriate to *de jure* governments, the other appropriate to *de facto* governments—does not lie, as it is sometimes mistakenly thought, in the fact that despotic laws are categorical commands, whereas constitutional laws are either not commands or, if so, are hypothetical not categorical, offering those subject to law the option of obeying or taking the consequences.

Rules of law are always commands or prohibitions calling categorically for obedience, and also attaching a sanction for disobedience.

They are never mere recommendations or advice or directions, to be followed or not according to the choice of the individuals to whom the laws apply.

To say this does not mean that the laws are inviolable. On the contrary, being man-made rules calling for voluntary obedience, they are essentially violable, as the so-called "laws of nature" are not.

But their violability does not entail their being advice rather than commands, or hypothetical rather than categorical imperatives.

The basic difference between the two conceptions of law, which agree on the point that all laws are categorical commands that subjects, being voluntary agents, can either obey or disobey, lies in the way in which the law obtains obedience.

The arbitrary laws made by a *de facto* government and enforceable by it elicit obedience through the fear that such force, operative in punitive sanctions, inspires, and in no other way, since the laws are made without the consent of the governed and need not be and probably are not in the interest of the governed. In short, though they are called "laws" they are nothing but enforceable regulations, and it is nothing but their force that elicits obedience.

The reasonable laws made by a *de jure* government and also, as we shall see, enforceable by it solicit obedience, first, by the authority they have derived from the consent of the governed; and, second, by their reasonableness as regulations for the common good or the good or the ruled. Just as an autonomous individual, obeying himself alone, would obey a rule made by himself on the grounds that his reason told him it was a good rule for him to make for his own good, so consenting citizens of a republic, obeying its constitutionally made laws, made for their common good, are obeying regulations that they deem reasonable and reasonably well devised for that end. Hence in obeying they are responding to the authority of the law (made by a duly constituted authority and made in accordance with the constitution) and to the reason of the law (that it is calculated to serve the end it should serve—the common good). They would so respond, even if no coercive force were attached to the operation of the law—even if no punitive sanctions were applicable to the disobedient. In other words, on this conception of law, coercive force is *not an essential aspect of law*, as it is almost the *whole essence of law* on the other conception. That coercive force is a necessary adjunct of laws made by *de jure* governments arises from a crucial defect in the population being governed, not from a defect in the laws themselves.

Understanding this, we can also see that, as the nature of law differs in the two conceptions and in the two regimes, so does the nature of law enforcement. When that which pleases the prince has the force of law, and force is of the essence, the agents and agencies of law enforcement are minions of the prince, not public officials serving the common good and the interests of the people, as they are—or rather, *should be*—when coercive force is only a necessary adjunct of law and not of its essence, and when law is an ordinance of reason made for the common good and can obtain

obedience from those who acknowledge its authority and reasonableness without any threat or application of coercive force.

Before we examine more closely the need for and use of coercive force to supplement and support the operation of law under *de jure* government, let me spend a moment more on two points related to the distinction between the two conceptions of law.

Two quite opposite theories of justice are related to the two conceptions of law.

When the law is conceived as emanating from the will of a *de facto* sovereign having absolute power at his disposal, the law of the state is itself the standard of justice. As Thrasymachus said, and Hobbes and Austin later echoed, justice consists in doing what accords with the interest of the stronger. The stronger—the prince in power or a *de facto* government having superior force—expresses his interest in the laws he makes for his subjects to obey. To disobey them is unjust, i.e., criminal behavior. According to this theory, the laws themselves cannot be judged as either just or unjust, since they are the measure of justice.

On the other conception of law as an ordinance of reason made for the common good by the duly constituted authority of a *de jure* government, there are criteria of justice antecedent to law, and by these criteria man-made laws can be judged just or unjust: just if they are made by those with the authority to make laws and are made within the constitutional limits of that authority; just if they are made for the common good and not for some private interest; just if they conform to the dictates of reason not only with regard to what is for the common good, but also with regard to what is by nature right and wrong—what ought or ought not to be done.

The second point I wish to make is that the two conceptions of law are so disparate that the word "law" itself is being used with almost maximum equivocation when it is applied to the just laws made by a *de jure* government and the arbitrary laws made by a *de facto* government.

Aquinas's observation that "a tyrannical law is a law in name only" (a remark he also makes about an unjust law) amounts to saying that the two kinds of law have nothing. but the name in common, which is, of course, complete equivocation in the use of a name.

That is not quite true. As I have already pointed out, there is one element common to the two kinds of law: in both cases, a law is a categorical command or prohibition.

Nothing else is common to the two kinds of law: one is the measure of justice, the other can be measured by justice; one elicits obedience only through fear of punitive sanctions, the other solicits obedience by , virtue of its authority, its justice, and the end it serves; the coercive force that is the essence of the one is naked force, the coercive force that is an adjunct of the other is authorized force; and so on.

As I pointed out at the beginning, and wish to repeat because it is so important to this discussion, the equivocation on the word “law” that we have just observed occurs similarly in the case of the word “state” or the phrase “political community” or “civil society.” Locke’s remark that “absolute monarchy is indeed inconsistent with civil society, and so can be no form of civil government at all”‘ or Rousseau’s identification of a state having a legitimate or *de jure* government with a republic; or Aristotle’s view of the state as coming into existence with the invention of constitutional government—these are all ways of saying that the word “state” or “political society” or “civil society” is equivocal when applied to a community under *de facto* government and to a community under *de jure* government.

I have insisted that the laws made by a *de jure* government require obedience, adding that they solicit it in a way that the laws of a *de facto* government do not. But it must now be said that the laws of a *de jure* government also elicit obedience in the same way that the laws of a de *facto* government do. The difference is that, in the latter case, coercive force compels obedience from *all* who are subject to law; whereas in the former case, it does so only from some, not all—and always a minority of the population. Let me explain this point, for it is of critical relevance to the conception of civil police.

A private person can make rules for others to follow but such rules or recommendations are nothing but advice. Private advice has authority only to the extent that it is the voice of reason; but such advice, even when it has authority, is not accompanied by coercive force.

In contrast, the rules of law made by a public personage (i.e., a government), duly constituted, not only have authority, but are accompanied by the use of coercive force to compel obedience

on the part of those who do not obey the law because of its authority and its justice.

Aquinas writes: "A private person can only advise and if his advice be not taken, it has no coercive force, such as law should have to be efficacious...Coercive force is vested in the people as a whole or in some public personage who is their vicegerent or representative, to whom it properly belongs to inflict penalties" (S.T., I-II, 90,3 ad 2). Cf. *ibid*., 96, 5.

To which must be added Locke's statement that "where the laws cannot be executed, it is all one as if there were no laws; and a government without laws is a mystery in politics."

To understand the necessity of coercive force as an adjunct or property of the laws made by a *de jure* government, we must observe the fact that obedience to law takes two forms.

On the one hand, we have the good or virtuous man who is bound in conscience to obey laws the authority and justice of which his own reason acknowledges. The good or virtuous man would obey the law *even if it had no coercive sanction for its enforcement*.

On the other hand, in every population there are always bad men who obey the law *only* through fear of punishment—the threat of coercive force applied to law-breakers.

Aristotle had said that good men do from virtue what bad men do only from fear of the law; Aquinas adds that, when we consider men as subject to law as the coerced are subject to the coercer, "the virtuous or just are not subject to law, but only the wicked or unjust" (S.T., I-II, 977, 5).

If all men were angels or perfectly virtuous, they would be bound *by* conscience alone to obey just laws justly made for the common good; for their virtue alone would impel them to act for the common good, and to refrain from injuring others. If it be asked why, then, do they need laws at all, the answer is that on many matters (which are in themselves morally indifferent), it is necessary to determine what is for the common good and such determinations are set forth in rules of positive law. Precisely, because it adds such determinations, and also because it can apply coercive force, the positive law is needed to supplement the natural moral law.

The coercive force of positive law operates only against had men—men who are disposed to act unjustly, to injure others or to act for their private interests against the public welfare.

Legal coercion, i.e., the use of authorized force to apply the sanctions of law, may appear to deprive men of freedom, for those who are coerced or act under duress from fear of coercion do not act freely. However, *that is not the case*; first, because good or virtuous men are not subject to law as the coerced is to the coercer, since they are bound in conscience to obey the law and would do so even if the law had no coercive force; and, second, because if doing as one pleases when what one wishes to do is unjust is not true liberty hut license, then, those who are restrained from license either by the coercive force of law or by fear of it are in no way deprived of liberty.

Finally, let us consider the role of coercive force in de jure or constitutional government.

Adopting the traditional threefold differentiation of the branches or departments of government—legislative, judicial, and executive—it should be clear at once that the enforcement of law is primarily, if not exclusively, an executive function. The employment of coercive force has sometimes been and may be needed to implement the decisions of courts: their decisions in'particular cases must be enforced, as well as the laws that they apply to particular cases.

In a *de jure* or constitutional government, each branch of government and its component offices are granted a limited and well-defined authority to perform the functions assigned to that branch. Hence the force put into the hands of the executive, and perhaps the judicial, branch must itself be authorized, defined and limited.

Such authorized force is *legal* or *de jure* force.

All other force used by anyone—by citizens or officeholders, including police officers—is violence. And wherever violence is resorted to by anyone, war, which is nothing but naked force, creeps into society to breach the peace.

A well-constituted government must have and exercise a monopoly of authorized force. All other force, being violence, must be kept to a minimum; or in other words, civil peace is maintained only to the extent that all disputes are settled by law and by

authorized force. To whatever extent men resort to violence to gain their ends, war breaches that peace.

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