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On Lawful Governments

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What is the meaning of sentences of the form 'X is the lawful government of the country Y,' and what kinds of statements are normally made by using them? Most answers to these questions can be classified as legalistic, moralistic, or compromise solutions. The gist of the legalistic approach is that the lawful government is that authorized by the positive law of the land. Critics of the legalistic approach point out that disagreement about the lawful government is not always solved when agreement is reached about the positive law of the land. For example, two people may disagree as to whether the Colonels' Government is the lawful government of Greece, while being in complete agreement that the post-coup law is the positive law of Greece. From this fact, which indeed should be admitted and explained by any theory on the subject, the moralists conclude that the lawfulness of a government is a matter of morality and not of law. It is determined by moral rules, by personal commitments, etc. Those who favor a compromise solution claim that in certain contexts sentences about lawful governments are used to make legal statements, while in other contexts they are used to make moral statements or express moral positions or attitudes.

In this paper I will first criticize one moralistic solution, that presented by R. M. Hare, and one compromise solution, the one put forward by J. G. Murphy, and then proceed to formulate and defend a variant of a legalistic position.

I

Professor Hare[1] accuses previous writers on the topic of committing the sin of descriptivism. All of them assumed that "to explain the meaning of any predicate is to give the criteria or conditions which have to be satisfied by a subject before this predicate is correctly predicated of it" (p. 158). He divides his predecessors into two camps, those who favor non-empirical criteria of lawfulness (e.g., natural law theories, hereditary theories) and those who defend empirical criteria (e.g., might-is-right theories, popular sovereignty theories).

Non-empirical criteria are rejected because they are too indeterminate and slippery to be of any value in settling concrete disputes about the lawfulness of certain governments. Empirical criteria are rejected because they entail a statement of the form 'The lawful government is the government F' (where F is an empirical predicate), which is an analytic statement. For example, some statement like 'The lawful government is the effective government or the government which enjoys popular support' is analytic according to these theories. According to Hare, however, no statement of the form 'X is the lawful government but is not F' is a contradiction, although some such statements are, perhaps, false.

Hare proceeds (pp. 163–64) to examine an ascriptive theory which he imputes to H. L. A. Hart.[2] According to this theory, legal sentences are often used to make "inverted commas" state-

ments about what the courts will decide. In general, according to Hare, a sentence is used in "inverted commas" if it is used to make a statement which is true if and only if the same sentence is actually used, or will be used, nondescriptively by some determinate person or group. Legal sentences, he claims, are used by solicitors in inverted commas to predict what the courts will decide. The primary use of such sentences, however, is by the courts in ascribing responsibility, rights, etc. By using such sentences, the courts do not describe or predict any situation; they create a new state of affairs. This use of sentences by the courts is called by Hare "ascriptive."

When applying this theory to the problem of lawful governments, it may seem that the courts in their decisions ascribe lawfulness to the government. Other people use sentences of the type 'X is the lawful government' to predict that the competent court will decide that X is the lawful government. Even though this theory is not guilty of the sin of descriptivism, Hare finds it unsatisfactory for it merely transfers the problem from the lawfulness of the government to the lawfulness of the court. To claim that a lawful court is a court which a lawful court will decide to be lawful does not clarify the issue and explains nothing (pp. 164–65).

Hare's own solution is a modified ascriptive theory. He suggests that, not only courts, but also ordinary people, can and do use such sentences ascriptively. The primary use of sentences about lawfulness is to declare allegiance to the government, not to make any statements. They have, however, also a secondary, "inverted commas," use. They can be used to make statements about the allegiance of the population (p. 166). The effect of a pledge of allegiance is to preclude the possibility of a certain kind of criticism of the government (p. 168). There is a second type of primary use, which is also ascriptive but has special features. This is recognition of a government according to international law (p. 166). The consequences of such acts of recognition are determined by international law and the laws of the recognizing countries.

By this theory Hare wishes to preserve the valid insight embodied in theories of popular sovereignty while avoiding the pitfall of descriptivism (p. 167). This aim is presumably achieved by interpreting the inverted commas use of the relevant sentences according to popular sovereignty theories but, nevertheless, maintaining that by expressing a sentence of the type 'X is the lawful government but does not enjoy popular support' one is not contradicting oneself, for the first part of the sentence is not used to make a statement. It is a declaration of personal allegiance to a government which does not enjoy popular support.

II

For various reasons Hare's theory fails to account for the ways sentences concerning lawfulness are used. Ascriptive theories raise serious problems, and their applicability is much more limited than their first proponents once thought. This is not the place to deal with the general issues raised by ascriptivism and cognate theories.[3] I will restrict my comments to a few points raised by the application of the ascriptive theory to the problem of the lawfulness of governments.

1. Once a declaration of allegiance is made, the person who made it is bound by it until it is cancelled by his acts (e.g., emigration or naturalization

in a foreign country, or, perhaps, its mere repudiation by him) or by events (e.g., the fall of the government). A person who has declared his allegiance cannot repeat his declaration as long as the first declaration continues to bind him. If the effects of making such a declaration are that he incurs certain obligations and is debarred from making a certain kind of criticism, then by repeating the sentence 'X is the lawful government' he does not double his obligations nor does he further decrease his right to criticize the government. Therefore, by repeating the sentence he does not declare his allegiance for a second time. But, obviously a person can discuss the lawfulness of a certain government every day, repeating the sentence 'X is the lawful government' many times. How should his utterances, except for the first, be interpreted? Hare may claim that he is using the sentence in inverted commas to assert popular support for the government. This interpretation is unreasonable in many cases where people proceed to support claims made by the use of these sentences by reference to the positive law of the land or to international law. For these legal arguments are irrelevant to the extent of popular loyalty to the government. The 'inverted commas' use theory is also impossible if the person concerned is one arguing that the Bourbon heir is the lawful government of France, while admitting that he does not enjoy popular support.

It may be that this point can be met by modifying the theory of the 'inverted commas' use to allow for the use of sentences of the form 'X is the lawful government' for making statements about the allegiance of any group of people, not only about the allegiance of the general population. A supporter of the Bourbons as well as his opponent arguing for the legality of the present government of France will be understood as making statements about their own formerly declared allegiances, rather than declaring their allegiance over and over again.

2. Both when people declare allegiance and when they state it, what they say can neither be refuted nor substantiated by reference to any legal or moral rules, although such reference may perhaps move them to modify their stand. No doubt Hare regards this result of his theory as one of its attractions. Nevertheless, it leaves one unable to explain how courts debate and decide the lawfulness of governments, elections, or appointments by reference to the law. The judges cannot reasonably be said to be defending or declaring their own allegiance on purely legal grounds. Should one conclude that there is an allegiance of the courts which is different from that of the judges, and is a sort of institutional allegiance? Is this view tenable in view of the facts that the courts often are, and regard themselves as being, legally bound to recognize the lawfulness of governments and other institutions? Even if we are ready to extend the notion of allegiance that much, Hare's theory is not saved, for: (*a*) We have recognized by this extension of the notion a purely legal sense of "lawful government." Courts are under *legal* obligation to declare the lawfulness of a government, and ordinary people assert these *legal* obligations of the courts by the use of sentences concerning lawfulness. (*b*) Even so, we have difficulties in explaining repeated decisions of a court. Should we grant that in its first decision it *declared* its official legal allegiance and that in further decisions it *states* that it owes legal

allegiance to that government? Is there anything in legal practices which reflects this difference?

3. Neither can Hare's theory explain in what way people are using sentences concerned with lawfulness when discussing the lawfulness of a foreign government. They cannot and do not wish to pledge their allegiance to it. Consequently, they cannot be said to make statements about their own allegiance. If they are not interested in the degree to which the government under discussion is actually supported by anyone, they cannot be said to make any kind of inverted commas use of sentences.

4. Finally, one can apply Hare's own master argument against himself. Suppose that someone uses a sentence of the type 'X is the lawful government though I do not owe it allegiance, I am not declaring my allegiance to it, and it is not supported by the population.' Far from being a contradiction or in any way paradoxical, such sentences can be used to make true statements. This presumably would happen if I used such a sentence to make a statement about the government of East Germany. But, according to Hare, if the sentence is used in its primary use, it is paradoxical; and if used in 'inverted commas,' the statement made is contradictory.

III

J. G. Murphy[4] favors what I have called a compromise solution. He claims that sentences about the lawfulness of government are sometimes used to make legal statements, and sometimes to express moral claims of a special kind: ". . . the concept of lawfulness or legitimacy is, I submit, a pedigree concept. By this I mean that it focuses upon the origin of a government, the procedure which brought it about and not upon the content of the enactments of that government. . . . Though lawfulness or legitimacy claims are moral, then, they are a special kind of moral claim. They are claims about pedigree rather than content" (p. 67). Legal statements about the lawfulness of governments are true if and only if these governments are authorized by the legal rules.[5] It would seem that according to Murphy moral claims about lawfulness or legitimacy of governments are true or justified if and only if these governments have been established in accordance with certain moral rules.

Murphy is mistaken in thinking that a standard use of sentences about lawfulness is to make statements which can be justified or sustained by exclusive reference to moral rules. Reference to legal rules is always necessary to the complete justification of such statements.[6]

A government is not a government unless its actions have legal effect. If there is no legal system according to which the acts of a certain body of persons have legal consequences different from the consequences of similar acts of ordinary citizens, then this body is not a government. It may be morally entitled to be the government of a certain country. But moral right does not make it into a government. Its claim to this title has to be supported also by reference to a legal system in which its acts are recognized as acts of government. This legal system may be a legal system overthrown in a revolution or a coup d'état. It may be the legal system of a revolutionary movement which has not yet succeeded in establishing its control over the country, and perhaps never will. But reference to some legal

system there must be. For governments by their very nature are bodies operating by legal means. And lawful governments are governments. Any adequate account of the concept of a lawful government has to account for this fact. Consequently, only the legalistic approach to the problem provides the key to its solution. It is within the frame set by this approach that one will have to account for the use of sentences about lawfulness to express a moral stand.

IV

A legalistic explanation of the lawfulness of governments has to satisfy two conditions:

1. Statements about lawfulness have to be explained as legal statements, that is, the fact that certain laws belong to certain legal systems must be a necessary condition of the truth of such statements.[7]

2. The explanation has to include two parts: (*a*) spelling out the conditions which have to be satisfied if a body of persons is to be a lawful government; (*b*) specifying the legal effects of the actions of a body constituting a lawful government.

This second condition explains what is wrong with descriptivist explanations. Specifying "the criteria or conditions which have to be satisfied by a subject before a predicate is correctly applied to it" is indeed not a complete explanation of legal or moral or any other normative predicate. This is not because these criteria are not relevant to the explanation. They form only a part of it, though an essential part. To understand what 'good' or 'a right' or 'a duty,' etc., mean one has to know not only the criteria for their application but also what their application entails. One has to know what is entailed by statements like "John has a right to leave the country," "This is a good car," "His was a virtuous action."

When the explanation of legal terms is at issue, the explanation is incomplete unless the legal effects of the correct application of the terms are explained. Knowing that ownership can be acquired by sale, gift, etc., is part of the explanation of ownership. But an essential part of the explanation of ownership is that the owner is at liberty to use his property, has power to dispose of it or to grant partial rights in it, and so on, all of which are the legal consequences of ownership.

An explanation of the lawfulness of governments can be either particular or general. It may be correct relative to a certain legal system or true of any legal system. If it is relative to a particular legal system, it will specify the conditions and procedures of setting up a government according to that system, and the powers and rights accorded to a government by that system, as well as the obligations imposed on it.

There are no universally accepted procedures for establishing governments. In this respect the concept of government differs from that of ownership and many other legal concepts. There are certain ways of acquiring ownership. Not every legal system has to recognize all of them, and legal systems may differ in their detailed regulation of sales, gifts, wills, etc. Nevertheless, ways of acquiring and disposing of ownership are part of this concept. For example, a legal system which does not allow for any voluntary and agreed transfer of property rights does not recognize the institution of ownership. It may, of course, have other means for regulating property rights. Because

there are no universally accepted procedures for establishing governments, the general characterization of the concept of a lawful government will state only that a body is a government according to a given legal system if according to that system it is recognized as possessing certain powers and rights and is subject to certain duties. The brunt of a general characterization of a lawful government will rest in the specification of the rights, powers, and duties which a body must have, according to some legal system, if it is to be a government according to that legal system.

The important point to notice is that every particular characterization is relative to a particular legal system and that the general characterization also defines what it is to be a government according to a specific legal system. Statements of the form 'X is the lawful government of Y' refer implicitly to a given legal system. Usually the reference is clear from the context in which the statement is made, although occasionally misunderstandings may arise.

One may assert that a government is lawful according to legal systems which are, at the time of assertion, the positive law of a certain country or a certain population. But the lawfulness of a government may also be judged according to a system which is no longer in force or which has not yet established itself. The lawfulness of a government may be judged relative to the Roman legal system or the legal system of France in the time of Louis XV, etc. In such cases, very often the only correct assertion is that there is at present no body of persons which is the lawful government according to such and such a legal system.

This program for an explanation of the concept of a legal system is fairly simple. The difficulties arise not in the explanation of the concept itself but from the fact that it is used in a great variety of contexts. A few words have to be said about some of these contexts, and the rest of this article is a brief discussion of three important types of contexts in which the concept is used. They may be termed the 'legal', the 'jurisprudential', and the 'moral' context. These names indicate the kinds of issues at stake in each context. They do not imply that the truth-conditions of statements about lawfulness vary with the context, only that the point of making the statements differs.

Before turning to the examination of the three contexts, one final remark should be made about the concept of lawfulness itself. What is the difference between a government and a lawful government? It is analogous to the difference between a law and a valid law. Just as any law, if it is a law, is valid, so any government, if it is a government, is lawful. It is, however, expedient to be able to discuss the validity of a law, or the lawfulness of a government and to be able to distinguish clearly, by the use of words like 'validity' and 'lawfulness' between such discussions and discussions of the content or merit of a law or the composition or acts of a government. To say of a government that it is lawful is to state an opinion on the question of its lawfulness. To state that the lawful government did so and so or is composed of X and Y, or has proved itself, etc., is, inter alia, to intimate emphatically an opinion on the question of its lawfulness. There are, of course, other devices serving similar purposes. One may ask whether the putative government is the government; or whether what is apparently the

government is really the government, and so forth.

V

A. THE LEGAL CONTEXT

When controversies about the lawfulness of governments and other institutions do not involve disputes as to which is the relevant legal system, the controversy is a legal one. Problems of this nature are very common. Disputes may arise about the legality of an appointment or an election. Their legality may be objected to because one or more of the conditions laid down by law were not observed. Claims that the elections were rigged, or the appointment biased or secured by improper means, may be made. Disagreement may also arise about the interpretation of the election law or other relevant laws. Even the validity of the election law or some other relevant law may be doubted.

In all these cases there are commonly accepted rules, canons of interpretation, and, ultimately, courts bound to use these rules, by recourse to which such disputes can be settled. This does not mean that there always is one correct solution to such controversies. The relevant law may be ambiguous or vague. But such cases are common to all branches of the law and are not peculiar to problems of lawfulness. Lawyers and courts have ways of dealing with them. Ultimately they are solved by the courts using their discretion, which is guided by general legal policies and principles.

Most legal systems contain rules laying down conditions of recognition of foreign governments and the effects of such recognition. According to such rules, it is possible to judge which body is recognized by the Israeli law or by international law as the French government. Such rules dictate (*a*) which legal system should be taken account of, which legal system should be recognized; (*b*) which body should be recognized by the system as the government according to a certain foreign legal system. For example, the question may arise whether, according to Israeli law, Ian Smith's government (or putative government) is a legal government (or a government). Its solution depends on Israeli rules determining (*a*) whether the post-UDI or the pre-UDI Rhodesian legal system should be recognized; (*b*) is Smith's government the government to be recognized by Israeli law as lawful under the recognized legal system?

Nowadays it is the universal practice of legal systems to recognize only one legal system in force in any territory. This is a fundamental policy, but it is not logically necessary. Two legal systems can be recognized by a third as applying to the same territory but to different groups of persons or in different matters (religious vs. other matters), etc.

B. THE JURISPRUDENTIAL CONTEXT

Occasionally a person is interested in knowing which is the lawful government in a certain country pure and simple. He is not satisfied when told that it depends on which legal system he takes as his criterion. He insists that there surely must be one and only one government in every country, and he wants to know which it is. His interest in the question may be factual or moral. He may be simply interested in learning the legal situation in that country, or he may be interested in deciding which government he is morally bound to respect and obey. Let us examine the matter-of-fact question first.

The question is misconceived if one assumes that of necessity there is only one lawful government in a country and that the question can be answered in an absolute way which is not relative to a certain legal system. Nevertheless, the kind of information the inquirer is after is usually clear and, if not, can be ascertained by questioning him. If his interest is factual, it will usually be discovered that he wished to learn which body is the government according to the positive law of the land. Usually there will be no difficulty in providing him with the required information. But occasionally there may be some doubt as to the right answer. If there is no doubt which legal system is the positive law of that country, any problems there are are typical legal-context problems. But sometimes the problem is which legal system is the positive law of that country. When such problems arise within a legal context, that is, when the problem is which legal system is recognized as the law of country A according to the law of country B, then it is settled according to the rules of the legal system of B. But if one is not interested in the judgment of one legal system on another, then the problem is a jurisprudential one. It is to be settled by applying the jurisprudential criterion of existence, which lays down necessary and sufficient conditions for the existence of legal systems. This is not the place to discuss what is the correct criterion of existence. But it is worth pointing out that it must allow for undetermined situations. It must recognize that sometimes the situation is unsettled; so that even though all the relevant information is known, no legal system can be said to be the legal system of the country.

C. THE MORAL CONTEXT

When, by asking which is the lawful government, the question meant is which government is entitled to our allegiance, it can be sensibly raised in this way only if two governments, each lawful according to a different legal system, compete for our allegiance. It is overtly a legal question, but obliquely it raises a moral issue. It can be reformulated as a question of which legal system one should accept or promote, etc. The question is to be decided by applying moral rules and criteria. This does not mean that no legal rules are relevant to the truth of the answer. It means merely that the legal situation is not in dispute.[8] When two people disagree in this sense about whether or not Smith's government is the lawful government of Rhodesia, their dispute really turns on which legal system one should support. The only way to promote the discussion is to agree that Smith's government is lawful according to the post-UDI legal system, while unlawful according to the pre-UDI legal system. That settles the legal dispute and with it the dispute about which is the lawful government. The discussion should then proceed to examine the merits of the competing legal systems and their claims to the allegiance of the people of Rhodesia or of the disputants.

It may be claimed that, in admitting that moral disputes are occasionally expressed as disputes about the lawfulness of governments, and asserting that when expressed in this way they are miscast, I have admitted in fact that the legalistic approach fails to account for the ordinary meaning of the expression 'a lawful government.' Even if true this objection is not fatal. Conceptual anal-

ysis aims at the clarification and systematization of concepts and is not bound to reflect usage where that usage is confused and liable to mislead. Anyone who has witnessed discussions of the lawfulness of governments in complicated cases knows how moral, jurisprudential, and legal considerations tend to be inexorably entangled, and consequently the discussion is bogged down in confusions. If the analysis offered above does anything to disentangle the various strands of the problem, it has served its purpose.

The legalistic approach is, however, quite successful in explaining ordinary usage. It has not been suggested that it is wrong to raise moral issues by asserting or denying the lawfulness of governments. It has only been suggested that this is an oblique way of raising such issues and that confusion results if this fact is overlooked. The possibility of making or intimating judgments in this way is not, and should not be, explained by the meaning of the expression 'a lawful government' but by pragmatical conventions governing the use of this as well as any other legal expression.[9] In many contexts making a legal statement pragmatically implies an acceptance of the legal system presupposed by the statement. When stating 'One ought to pay one's taxes punctually,' or 'One ought to notify the police of a planned demonstration,' or 'One can get married by taking such and such steps,' etc., the speaker will usually be taken to accept the legal system according to which these statements are alleged to be true. Surely, in some contexts the presumption does not apply. It does not apply or is greatly modified when one is discussing foreign law. It is, at least, very much weakened when the speaker is a lawyer pursuing his profession. In all contexts there are verbal devices for avoiding the presumption. Often even explicitly mentioning that this is the case according to this or that legal system is enough to prevent the presumption from arising.

Statements about the lawfulness of governments give rise to the same presumption. Again the presumption is particularly strong when the speakers are not talking while pursuing professional legal activities, when they are referring to their own government, and when they do not refer explicitly to the presupposed legal system but are talking about 'the' legal government. This pragmatic convention explains most cases of the 'moralistic' use of statements about lawfulness.[10] It clarifies the point that this is an oblique way of raising moral issues and that every fruitful discussion of them must soon abandon the problem of lawfulness, which is a legal problem, and turn on the moral considerations at stake.

THE HEBREW UNIVERSITY OF JERUSALEM

NOTES

1. "The Lawful Government," in *Philosophy, Politics and Society,* ed. P. Laslett and W. G. Runciman, 3d ed. (New York, 1967), pp. 157–72.

2. In his article "The Ascription of Responsibility and Rights," in *Logic and Language,* ed. A. G. N. Flew, 1st ser. (New York, 1951). Hart has since rejected much of what he said in this article.

3. Cf. Peter Geach's criticism of Hart's article mentioned above in his "Ascriptivism," *Philosophical Review* 49 (1960): 221–25, also published in R. Rorty, ed., *The Linguistic Turn* (Chicago, 1967), pp. 224–26.

4. "Allegiance and Lawful Government," *Ethics* 79 (1968): 56–69.

5. I hesitate to attribute this view to Murphy, for his account of the legal use of such sentences is somewhat confused. I will not deal with this part of his theory.

6. Murphy is wrong in identifying lawfulness

with legitimacy. The latter concept is much less closely connected with the law than the former. However, as the concept of government is a legal concept, even statements about the legitimacy of governments have to be substantiated by reference to the law, though, perhaps, not to the exclusion of morality.

7. On legal statements, see Hart, "Definition and Theory in Jurisprudence," in Aristotelian Society Suppl. vol. (1955); H. Kelsen, *The Pure Theory of Law,* 2d ed. (Berkeley, Calif., 1927), sect. 16; and my *The Concept of a Legal System* (Oxford, 1970). For a criticism of the explanation of legal statements as predictions, see Hart, *The Concept of Law* (New York, 1961), pp. 132–44.

8. Certain legal points may be in dispute insofar as they affect the moral decision.

9. An example of a pragmatical presumption is the presumption mentioned above that when referring to the lawful government one refers implicitly to the effective legal system of the country.

10. It does not explain those relatively few cases where no legal system, but rather 'natural law' or the laws of God are presupposed. These cases are remnants of belief in natural law and should be discarded with these beliefs.