

# interpretation

a journal of political philosophy

volume 6/3

october 1977

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martinus nijhoff, the hague

edited at

queens college of the city university  
of new york

# interpretation

a journal of political philosophy

volume 6

issue 3

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interpretation is a journal devoted to the study of political philosophy. it appears three times a year.

its editors welcome contributions from all those who take a serious interest in political philosophy regardless of their orientation.

all manuscripts and editorial correspondence and subscription correspondence should be addressed to the executive editor

interpretation

building g101 – queens college – flushing, n.y. 11367 – u.s.a.

martinus nijhoff

9-11 lange voorhout – p.o.b. 269 – the hague – netherlands.

## THE MORAL LEGITIMACY OF GOVERNMENTS

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What makes governments morally legitimate? This question could be regarded, as indeed it has been traditionally, as a special case of the more general question: what makes something morally right? It is often remarked that Lord Devlin (*The Enforcement of Morals*), treats this last question with profound skepticism. From the point of view of the lawmaker at least, he argues, what matters is not whether a moral belief is true but whether it is commonly held. Such moral beliefs provide society with a cohesion without which it cannot exist. This de facto positive morality of society, though worthy of legal enforcement, may yet be mistaken. Here is, then, a democratic empiricist doctrine designed to buttress a certain conservative view of society and of legislation without, however, claiming that the morality in question is rational and valid.

Professor Hart, Lord Devlin's chief antagonist, is a legal positivist insofar as he recognizes as legal any system of rules which exhibits that characteristic interaction between primary and secondary rules that his theory requires. Nevertheless, he leaves room for a domain of autonomous moral judgments outside the law and holds that this domain must be taken into account by the legislator, whose task thus goes beyond that accorded to him by Lord Devlin, i.e., the enacting into law of moral beliefs commonly held.

Professor R. S. Downie, in his *Roles and Values*, raises the question with which I opened this note.<sup>1</sup> In his attempt at an answer he makes use of both Devlin's democratic-empirical notion of morality and Hart's doctrine of primary and secondary rules. This answer, which I propose to criticize here, is interesting: it employs Devlin's purely descriptive democratic-empirical criterion as one of moral justifiability, arguing that a government is morally legitimate if its subjects have actually consented to Hart's secondary rules. I shall argue that Downie fails to justify the moral legitimacy of governments in this way. I shall also indicate why I think that Max Weber's doctrine of legitimacy is still preferable to that of Downie on both theoretical and empirical grounds.

Professor Downie distinguishes between legitimacy in the legal sense and legitimacy in the moral sense. A government, or rules made by a government, is legitimate in the legal sense if it satisfies the second-order rules of legal validity which are taken as given. But from this, Downie rightly argues, nothing can be inferred about moral legitimacy.

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<sup>1</sup> (London, 1971), pp. 76-86.

Fortunately, I need not argue here the question of whether the whole theory of first-order and second-order rules is viable or not. The late A. Harari has offered what seem to me conclusive arguments to the effect that it is not. Moreover, it seems that Downie himself has misgivings about the adequacy of the version of the theory under which he operates.<sup>2</sup> For example, it is at least doubtful whether a rule of change which prescribes the ways in which first-order rules must be altered or modified is that much different from any other first-order rule. The case does not seem to be different from that of the spelling of the word "spelling," which is not a case, as Wittgenstein remarked, of second-order spelling. However, I think it can be shown that Downie's account of what constitutes moral legitimacy is, in principle, not only inadequate but useless. As I understand it, this is his argument. Moral legitimacy cannot be made to rest on actual power to govern nor on a fictional contract: if it is to make good sense, its source must be located in consent. Logically enough, Downie's main effort is then directed at giving precise sense to the term "consent": a government rules by consent if and only if it is a necessary condition of its having a *right* to govern that those governed have *expressed a wish or have otherwise indicated acceptance that it should govern*. Consent is essentially the granting to someone the permission to do something he would not have a right to do without such permission; and government by consent therefore implies that the government's *right* to govern (not its power to do so, not its actual policies) is created by the *expression of the wishes of the subjects*.<sup>3</sup>

It is perfectly clear that what Downie is seeking here is an empirical criterion by which the moral legitimacy of any government can be established. This will be done by deciding whether or not the right of a government to govern was created by an actual expression or other clear indication of the wishes of its subjects. This point is important for Downie, for he specifically wants to exclude such governments as that of Elizabethan England, whose subjects tolerated and approved Elizabeth's rule but had no opportunity to express their approval. It is important for Downie to have a criterion which "fits the moral attitudes and views of our society," and it is for this reason that he insists on "the strict sense of consent."

Downie's next problem is to establish what it is that the people consent to. He says: "A government governs by consent, or is morally legitimate, when its people consent to the constitution, or (in other words) to the secondary rules operative in their society. A government, then, has authority, or is legitimately in authority, if but only if it is rightly constituted in terms of the constitution or the secondary rules, and if but only if the bulk of the people consent to the secondary rules."

<sup>2</sup> *Ibid.*, p. 81.

<sup>3</sup> *Ibid.*, p. 85; italics added.

It will be noted that there are two conditions here. The first, namely, that the government must be constituted in terms of the constitution, is the criterion of legal legitimacy; the satisfaction of the second, the consent of the bulk of the people, constitutes moral legitimacy.

Now the first and most obvious objection to this approach is that it is very difficult to envisage what such an expression of consent to the secondary rules could be like. Does Downie mean that there must be an actual expression of consent to all four kinds of secondary rules he lists? For example, there is a second-order rule that "empowers the Home Secretary to authorize policemen." Do subjects ever express anything about that? Of course, it is quite possible that subjects may have something to say about the Home Office in general, but when they do, they do not say it in any special way which is specifically appropriate to second-order rules but in the ordinary way in which they express their opinions about the government in office and about its opposition. Indeed, it would be very hard to find examples where there is a special expression of opinion, consent or otherwise, about second-order rules as such.

Perhaps the best example of such an expression of consent would be a referendum in a newly established state, in which people vote about a draft constitution. But even here one would have to be certain that the constitution indeed contains nothing but second-order rules and not substantive ones as well. Alternatively, even if it be argued that this distinction is a tenuous one in any case, and even if we accept this "constitutive" constitutional referendum as an expression of consent that fits Downie's bill, it would still be useless as a support for the claim to moral legitimacy of that government which is in office by virtue of the constitution approved by that referendum. Such a referendum is a once-and-for-all exercise. Governments will come and go in conformity with the second-order rules contained in the said constitution; their policies may become increasingly oppressive and may cause large-scale disaffection among the people: and yet, it could be claimed, on this interpretation of Downie, that their rule is morally legitimate. But if this were argued, what would this argument amount to but to a historical version of the contract theory? Would Downie hold that because a constitution was held morally legitimate, say, in 1848, when it was approved by referendum, the government which operates today in terms of that constitution is, therefore, also morally legitimate?

In established states, of course, not even this sort of thing can happen. There may be referenda on constitutional amendments, but many constitutions, notably that of the United Kingdom, have no provisions for such public performances. However, even where a referendum about a constitutional amendment *is* possible, it takes place within the legal framework of the constitution as a whole. That is, a person who wishes to dissent altogether from the second-order rules

implicit in the constitution has no opportunity to indicate his stand. He may withhold his consent from the proposed constitutional amendment but not from the constitution as such. Hence on the grounds of Downie's test, it would never be possible to say of a long-established political order that it is morally legitimate or that it is not.

Downie's theory is obviously meant as an alternative to Max Weber's theory about the three sources of, or three kinds of explanations for, the existence of authority. Specifically, he departs from Weber in his notion of moral legitimacy (as far as legal legitimacy goes, his thinking is pretty much in line with Weber's comments about legal-rational authority). The concept of moral legitimacy is meant to displace Weber's traditional and charismatic authority, presumably because it does not fit "the moral attitudes and views of our society." The difference here is philosophically radical. Weber did not ask what criteria must be satisfied before *we* can assent to the moral legitimacy of a government: rather, as a social scientist, he noted that some authorities are accepted as legitimate, and he gave an account of the kinds of grounds on which such acceptance can be explained. He did not think it his task to sit in judgment about the moral legitimacy of any government. It is not clear whether or not Downie is aware of or is concerned with this distinction between describing and judging moral legitimacy, but it is clear that his main aim is to enable us to make judgments about the moral legitimacy of governments. Downie's own criterion is empirical-descriptive, with, as it were, an evaluative application. His meaning is this: "If you want to make up your mind about whether to accept, as a person imbued with 'the moral attitudes and views of our society,' a given government as legitimate, then check to see whether the bulk of the population has consented to the secondary rules under which that government operates."

It has already been shown that such a test is impossible to apply. Now I want to add that Weber's purely descriptive classification is actually more helpful in making judgments about the moral legitimacy of governments than Downie's test, although the latter was designed for that very purpose. Our first step, as social scientists, should be to ask where the authority and presumed legitimacy of the government in question come from. We would find that it derives from tradition or would note that the leader is seen as a person having charisma. If we then wanted to deny legitimacy on these grounds, we could reject the tradition or argue that those who say that the leader has charismatic qualities suffer from mistaken perception because he is, in reality, a fraud. Note that we would agree that the leader's qualities are *perceived* by the bulk of the population as charismatic, yet we would deny that such a perception is accurate and thus is a ground for his legitimacy. So Weber's theory could be put to use.

Possibly Downie thinks that Weber's theory is not in accordance with "the moral attitudes and views of our society," but if so, this, as

I have tried to show just now, rests on a misconception of what Weber's theory is meant to do. At any rate, there seems to be no reason to prefer Downie's theory to Weber's, for even in the exceptional case where it seems, at least, that Downie's theory can be used, such as that of the government coming to power by way of a constitutional referendum, it will not give us what we want. We might find that even though the secondary rules have been consented to, a few years later the government in question is not accepted as morally legitimate. This is certainly odd. Weber, on the other hand, could explain the situation quite well by saying that the government has no legitimacy in the eyes of the governed because it is not perceived as having tradition or because the leader is not perceived as having charismatic qualities. The only disadvantage of Weber's theory is that from a moral point of view undesirable governments may be described as legitimate. But on this point Downie fares no better either. We have just seen how his test would force him to declare as legitimate a government which is not so regarded by the bulk of the population and which is thus, presumably, morally not quite acceptable.

Weber's theory does not aim at answering the question of what conditions need to be satisfied for a government to be accepted as legitimate, as Downie's seems to. This is just as well, for historical experience teaches that the most varied kinds of governments have been recognized as legitimate and also that other governments with the very same kinds of attributes have not been so recognized. The question of recognition—by *subjects*, not by philosophers imbued with the moral attitudes of our society—is quite independent of any specific factor, be it consent or any other morally approved circumstances. Hitler's regime was recognized as legitimate while the Weimar Republic was not. Admiral Horthy's rule over Hungary was recognized as legitimate; that of the present communist leadership is very likely not so recognized generally. It is not surprising that this should be so. Moral decisions are individual, as is the decision or tacit acceptance that goes into a subject's accordance of moral legitimacy to his government. Decisions and political attitudes in general are not governed by universal and rational rules, even though Downie thinks that they should be. Undoubtedly, it would be nicer if they were, especially if the rules involved were also agreeable. The great advantage of Weber's theory is that it accepts the fact that decisions and political responses are what they are and asks only what kinds of things can be said, in a manner significant for social science, about attitudes that exist.

The question of whether a particular government is morally legitimate or not is a political question of the first order. Here the role of the political philosopher is no different from the role of the moral philosopher considering an actual moral problem. He can explain, analyze, and perhaps even help along a decision, but he can no more pronounce upon the moral legitimacy of a particular government than

the moral philosopher can tell us what to do here and now. It might be objected that Downie's test is universal and not directed at particular cases. But if a universal test cannot be applied in particular cases, then it is not much of a test. What reason is there to take seriously a criterion like the one offered by Downie? If I wanted to deny moral legitimacy to a government, I would not be impressed if I were told that the secondary rules have been consented to. I could say that they were not understood when the vote was taken, that the people were misled, that had the people known what kind of first-order rules were going to be made on the basis of the second-order rules agreed upon they would not have consented, etc., etc. I could argue that the secondary rules that have been consented to are not being observed. Or, more important, I could say that the secondary rules, although consented to, are morally evil. These are political and not philosophical arguments. Thus Downie's test does not put an end to political arguments about legitimacy. There are many moralities, but *my* moral judgment about any government does not derive from any of them. Downie's concern with the moral attitudes and views of our society dimly suggests that his criterion may have been meant politically, i.e., that he is expressing his commitment to a particular kind of government and inviting his readers to follow him. It is difficult to be certain about this, but if this is the right interpretation, his point should be stated more clearly and elaborated in much more detail than has been done so far.

If there is a general conclusion to be drawn from these critical remarks directed at Downie's theory, it is perhaps that the term "legitimacy" may not be a particularly useful one to indicate the conceptually elusive yet perfectly recognizable phenomenon that some governments—irrespective of their legal and political antecedents and present modes of operation—are recognized by the governed as acceptable (sometimes even as the natural order of things), while others are viewed as impositions. Downie knows only too well that this distinction cannot be made with the help of the legal notion of legitimacy; otherwise, he would not have needed to call upon a moral notion. But if my arguments are correct, the moral notion of legitimacy cannot do the job either. Downie's moral legitimacy is defined by him as the legitimacy of the legal legitimacy in cases in which the question of whether the first legitimacy obtains would have to be decided empirically. But since the consent to the second-order rules would have to be expressed in an already existing social, and most likely political, context, there must therefore exist some other set of rules in terms of which this expression of consent must be organized. So, in addition to the previous objections, we also have the logical problem of infinite regress and the philosophical problem of the need to postulate a state of nature in which the second-order rules can freely,—i.e., without interference from existing order,—be consented to. In fact, we know that there is no

state of nature and that analysis does not commit us to infinite regress. Infinite regress stops not at the apparently empirical, yet, upon analysis, mythical expression of consent but at something which seems mythical yet is often clearly discernible: the actual feelings and attitudes of the governed. As has often been said, moral judgments are not made by counting heads. Hart cannot be turned into Devlin, and Weber still holds the field.