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## GENERAL WILL LAW

### AND ITS PROBLEMS

Elsewhere I have tried to argue the value of Rousseau's theory of just law. In trying to get the argument correct, I postponed, overlooked, or somehow bracketed the problems of general will law. In this essay, whilst still holding the theory in highest regard, I wish to reveal its problems. Hence, my plan is to begin with a thought that motivates skepticism of any theory of just law, then to outline Rousseau's theory and, finally, to expose the problems. I will not, except incidentally, attempt to resolve them.

#### The Skeptical Background

In a famous essay entitled "Natural Rights", Margaret MacDonald expresses the skepticism that accompanies any attempt to claim unconditional obedience to law: "no existing social compulsion or relationship is self-justifying."<sup>1</sup> It is not enough to say that you ought to obey the law because it is the law. For those of this belief, it is not only an empirical truth that there are unjust laws, the possibility of moral disobedience to the law is itself morally necessary. The law says what we are obligated to do but if the citizen judges that the law is too evil to be obeyed then he or she is justified in disobeying it. Of course, Margaret MacDonald's remark does not quite apply to Rousseau's theory, at least not to the theory as I wish to consider it. For she speaks of "existing" relationships of social compulsion, whereas I wish to restrict consideration of general will law to theory, to what *could* be.

However, this difference by no means removes the problem of the right to morally disobey the law. It is important, therefore, to

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1. Margaret MacDonald, "Natural Rights", *Theories of Rights*, edited by Jeremy Waldron, Oxford University Press, Oxford, 1984, 23.

understand that general will law does not anywhere admit this right: the theory must not be made easier than it is merely for the sake of rendering it palatable. Amongst readers of Rousseau's *Social Contract*, it is readily agreed that every political obligation is a legal obligation: nothing can be politically obligatory unless it is legally obligatory.<sup>2</sup> What needs more consideration than it gets, is that everything that is legally and politically obligatory is also morally obligatory. But if every legal obligation is also a moral obligation then unjust law seems impossible and there cannot exist a moral obligation to disobey the law, nor can it be morally permissible. These marvels, to paraphrase Rousseau, are the work of law: in particular, general will law.

### General Will Law

Considered as a theory of just law, that is, putting aside concerns about whether it can work in the real world, Rousseau makes a strong case for what just law would be. Just law does not require a philosopher-king, divine wisdom and justice, universal justice, a ruler beyond the reach of law, natural rights or a supreme court. General will law begins from the principle of double universality: law must come from all citizens and apply to all citizens. But more specifically it seems that it incorporates four justificatory conditions:

(1) law must come from all: no citizen can be excluded from law-making.

(2) law applies to all who make law: no one is above the law.

(3) law affects equally all legislators.

(4) law is for the common good.

On the basis of these justificatory conditions, general will law encloses an idea that is essentially simple: if all make rules for the good of all then the result is just law.

But, of course, it turns out not to be that simple. To give a correct account of general will law, it is necessary to hold together

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2. Not quite. The Rousseauist citizen is obligated to obey government decrees. In general, the claim that one is obligated only by decisions of the general will, that is, law, is upheld in that the decrees should be particular applications of law. (III, 1,81)

three features: universality of subject, universality of object and the common good. Two things render it difficult to retain all three as necessary conditions of general will law. First, the ways in which the three conceptually crosscut one another. Second, the temptation, when general will law is under attack, to over-emphasize some of the conditions at the expense of the remainder. However, omit or lessen too much the emphasis on one or two of the features, and the theory is misrepresented.

Nonetheless, the greatest of these is that the law shall come from all or, as I will call it, citizen universality. Rousseau's words match the greatness of his thought:

To renounce one's freedom is to renounce one's status as a man, the rights of humanity and even its duties . . . Such a renunciation is incompatible with the nature of man, and taking away all his freedom of will is taking away all morality from his actions.<sup>3</sup>

Rousseau does not mean, or at any rate should not mean, that a slave is not morally responsible. Rather, persons must retain their decision-making powers for the sake of the most precious of human values, moral agency. That I be permitted to express my will in law-making is necessary to my nature as a moral agent. For this reason, Rousseau makes universal participation in legislation a definitional truth. There can be no general will, and thus no law, if any citizen is excluded from legislation. In a complicated way, object universality involves all of the remaining three justificatory conditions. As I will treat of object universality as a problem, I will postpone consideration of it.

The same holds for the common good, but it needs some mention here because of the tendency to downplay its significance. Obtaining a clear understanding of the relation between general will law and the common good or interest is important for two reasons. First, it is the common good or interest that differentiates general will law from natural law and from what is variously meant by Kantian

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3. Jean-Jacques Rousseau, *On The Social Contract*, edited by Roger Masters and translated by Judith Masters, St. Martin's Press, New York, 1978, 50. All references will be to this edition of the *Contract* since it contains The First Version (*Geneva MS*) of the *Contract*. I give references by book, chapter and page, e.g., I, 4, 50.

formalism or voluntarism or moral constructivism. Simply put, the condition of the common good limits the range of the universality to that of the common good of those to whom the law applies. Second, the common good or interest is the method by means of which Rousseau seeks to unite right and interest. But in this connection the common good or interest seems ambiguous. The ambiguities are most evident in two places in the *Geneva MS*. The one involves the "independent reasoner" who is prepared to be just only if it is in his interest to be just. (I, 2, 161) The other is to be found in the "fundamental law that flows directly from the social contract, that each man prefer the greatest good of all in all things." (II, 4, 190-91) Satisfying the independent reasoner implies grounding justice on an interest that he already has and in fact shares with all others. Grounding justice on an interest that each already has provides a plausible way of uniting right and interest. However, justice often requires acting for the good of others even if it is not in one's interest. This important aspect of justice may be satisfied if each prefers the greatest good of all. Hence, the first principle is congenial with the unity of right and interest, but not with justice itself, whereas the second principle more fully satisfies the demands of justice at the expense of uniting interest with justice. The unity is crafted most easily when the interest is common in the sense that it affects an interest that each already has. If an issue is not in the interest of each citizen, if the citizen cannot find his interest in it, then it is not easy to unite right and interest. Because of this ambiguity the common good or interest turns out to be a slippery concept. It is another of the places, moreover, where one is inclined to ease up on Rousseau. As I will argue later, one is inclined to put the emphasis on the good, rather than the common. If something is a good that someone should have, but doesn't, then the temptation is to hold that the general will shall render it unto him. But by succumbing to that temptation we move from one meaning of the common good or interest to the other (from the interest that ought to be shared to the one that is, or vice versa.)

An overall problem then, is whether one can logically hold together the three features of general will law: citizen universality, object universality and the common good, understood as uniting right and interest. But now I wish to begin consideration of four particular problems: the problem of the conscientious minority, that of the

morality of the franchise, the range of law and the ground of moral obligation.

### **Problem 1: The Dilemma of the Conscientious Minority**

In an oft-quoted passage from the chapter on voting, Rousseau argues that those who end up in the minority are not treated unjustly:

How can the opponents (the minority) be free yet subject to laws to which they have not consented? I reply that the question is badly put. The citizen consents to all the laws, even those passed against his will . . . . The constant will of all the members of the State is the general will, which makes them citizens and free. When a law is proposed in the assembly of people, what they are being asked is . . . whether it does or does not conform to the general will that is theirs . . . . Each one expresses his opinion on this . . . . Therefore when the opinion contrary to mine prevails, that proves nothing except that I was mistaken . . . . If my private will had prevailed, I would have done something other than what I wanted. It is then that I would not have been free. (IV, 2, 110-11)

As I understand Rousseau, he means at least the following. The aim of the general will is the common good, the good of all citizens. Each desires that the good of all be achieved. If the common good is not expressed in law then the will of any particular citizen is frustrated, he does not achieve what he wants; hence he is unfree.

But let us consider more carefully the situation of the conscientious minority; that is, those who are trying to express the general will precisely as Rousseau would have them do, but then find themselves in the minority when the results are announced. They face a dilemma. One horn of the dilemma is the principle of citizen universality, the other, the real common good. On the one side, the conscientious citizen profoundly believes that moral agency is best respected by citizen universality, that each and every citizen participates in law-making. But on the other side, the conscientious citizen also believes that there is a real common good for all that is the essential object of every act of legislation. Necessarily, the conscientious minority have a problem. If they accept the decision of the majority because it is the majority then they sacrifice the real common good. But if they give priority to the real common good, then they renounce citizen universality.

There are a few suggestions one can make regarding this dilemma, but none are satisfactory. Suppose that in a particular instance

the real common good is relatively unimportant or that the decision of the majority is relatively good. In either case, the minority could judge that they should, in such a case, support citizen universality. But suppose instead that neither of these conditions holds and that the minority believe that the real common good has not been identified by the majority and that their decision has great evil as its result. To achieve this consequence, one doesn't need to doubt the good intentions of the majority. It is just that they have got it badly wrong. Surely then, the minority must hold that justice has not been done.

One might then argue for the other side of the dilemma. One could contend that there isn't a real common good if that means anything other than what the majority determines on a particular occasion. This alternative has at least two advantages. One could support citizen universality not as the magic method of identifying the real common good, but as the morally best method of producing just law, since it enables exercise of moral agency (obeying laws that one prescribes to oneself). This argument assumes, as John Plamenatz suggests, that Rousseau's state does not have permanent minorities made out of permanent interest groups. In their absence, one might reasonably give priority to citizen universality in the name of moral agency.

The other advantage proceeds from the claim that it is not unreasonable to assume that on some issues there may not be a real common good, or at least one that is discernible at the time of judgement. We are aware, often painfully, of this possibility in thinking of divisive moral issues such as abortion, euthanasia, biological engineering, nuclear disarmament, etc. Given either the absence of a real common good or the ability to discern one, we may be driven to accept majority opinion as the only source of moral insight. Some will find this conclusion unacceptable. Regarding morally divisive issues, one could believe that the majority is always in the right (wills the real common good) and yet believe that it is not always right.

## **Problem 2: The Morality of the Franchise**

A second problem concerns the morality of the franchise, those who are entitled to be legislators. According to the theory of general will law in the *Contract*, those who have a right to be legislators are those, and only those, capable of its obligations. That is to say, the necessary condition of being a lawmaker is that of being subject to



the laws that one makes as a member of the sovereign body. In this sense, one is obligated to obey only obligatory rules of which one is an author. Hence, only those capable of general will obligations are entitled to legislative rights. So understood, Rousseau's theory is powerful as a theory of just law. For if this obligatory capacity is the only condition of legislative right, then that nullifies many of the pretending conditions of wealth, rank, education, etc. that Rousseau rails against in the *Political Economy*, the *Discourse On Inequality*, and the *Discourse On The Arts and Sciences*.

However, that sole criterion raises our problem: what does "just law" mean in relation to women, children, mentally deficient persons, foreigners and animals? It seems likely that Rousseau excludes women from citizen universality.<sup>4</sup> If correct, this leaves behind a distinct aroma of Filmer's patriarchalism. With regard to the deep theory of general will law as just law, one has the impression that Rousseau does not so much address the subject as change it. On this matter, one does not want to know how and why the obligations of women differ from those of men but whether women are capable of the same general will obligations (and right) as men. If the answer is in the negative then perhaps one should merely contend that Rousseau is wrong about women, as Aristotle is wrong about slaves. One can guess what Rousseau thinks of justice in relation to foreigners. Whilst the just laws of one state are not binding on those of another, the actions of Balboa and other imperialists are unjust because they deny the obligation rights of native people.

But none of these responses decide the issue with respect to children, deficient persons and animals. These present a problem for such a theory as Rousseau's. On moral grounds, one wants to argue that just law is significant to them and should be established in terms of their respective rights. But in general will law, rights are a *consequence of obligations* and those incapable of obligations do not qualify for rights. We might revert to the criterion of *Inequality*, namely, that all that suffer pain have rights (upon which just law could be based). But it is not clear how the capacity of suffering pain constitutes a

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4. See Lynda Lange, "Women and The General Will", *Trent Rousseau Papers*, edited by J. MacAdam, M. Neumann and G. Lafrance, University of Ottawa Press, Ottawa, 1980, 147-57.

right, rather than an obligation for human beings. If this latter path is followed, however, then just law is based only on what is good for them.

### **Problem 3: The Range of Law**

Object universality involves the claim that the law applies to all. Earlier I suggested that a difficulty in Rousseau's theory arises from conceptual crosscutting. Perhaps it would be better to focus upon the way in which object universality includes the three justificatory conditions of applying to all, affecting all equally and satisfying the common good or interest. The difficulty could then be explained on the analogy of burs that stick together despite one's efforts to disentangle them and keep them apart.

The initial problem with laws applying to all and affecting all equally is that in any mature and workable system of law, laws do neither. Typically laws apply to assigned classes of legal agents or legal officials in specific legal relationships such as officers of corporations, importers, judges, parents, debtors, educators, trustees and legal guardians, travellers and so on. Even constitutional law which most plausibly fits the categories of applying to all, and to all equally, applies only in specified circumstances and not in all. Hence, one has to ask: how is object universality to be understood?

John Noone has tried to help Rousseau deal with this problem. The essential features of Rousseau's theory of law, he holds, are universality and equality. Thus, we should understand Rousseau to mean not only actual but potential subjects of law, and laws as applying not at all times but at some time. If I understand Noone rightly, these emendations yield the following: perhaps you are not now a traveller on a certain type of vehicle, such as a ship, but potentially you are at some time; therefore, there should be laws that ensure that anyone so travelling is treated equally. So far as they go, these friendly amendments are acceptable but one must be careful that they not be taken too far, for they harbour problems. If one accepts them, and adds in the not unreasonable assumption that laws using the amendments have a cost, one that may be hefty, then it is quite possible that a legislator (even a majority of them) can think that such a law will never apply to that particular legislator (or majority) and thus not be able to find his (or its) interest in that law.

We should remind ourselves of the way in which this consideration matters to Rousseau. As a reader of *Inequality, Political Economy* and the *Contract* will agree, Rousseau is concerned that law should benefit the poor and the disadvantaged. Yet, plausibly, even though their plight may be severe, the poor may not be the majority. In consequence, a law to help the minority of seriously disadvantaged would not apply to all citizens and would not affect all equally.

It is at this point in the argument that one begins to think of fudging the meaning of the common good or interest. The initial, straightforward meaning is "that interest that all have in common." Roger Masters expresses it correctly:

the enlightened, common interest is a really existent component of the will of each man . . . . If citizen A wants objects a,b,c,d, whereas citizen B wants d,e,f,g, . . . (then) . . . there is a part of the private interest of both A and B which is truly common (namely, object d).<sup>5</sup>

The problem is whether this clear understanding of common good or interest can do two jobs at once: satisfy the independent reasoner in the *Geneva MS* and the disadvantaged. The position of the independent reasoner is that he must be able to perceive his interest in the common interest before he agrees to act justly. This point must be highlighted if we are to take seriously Rousseau's claim to unite right and interest in the argument of the *Contract*. (I,46) Masters' definition works well for the independent reasoner if we suppose that "d" is security, since all, independent reasoner included, can perceive that interest in the common interest. The problem is emphatic when an interest is not "d", not shared by all, but is an interest or good of justice, such as aiding persons disadvantaged in a certain way. Suppose the independent reasoner is a healthy, wealthy bachelor. Suppose that laws are proposed concerning public support of the sickly, of education and safe births. For him, there is no "d" to be perceived.

Here one begins to make fudge: "Given the theory of the general will, it is difficult to imagine an assembly legislating contrary to natural law. For if natural law is directed to man's perfection and good as man, it can hardly be thought of as prescribing something all

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5. R. Masters, *The Political Philosophy of Rousseau*, Princeton, Princeton University Press, 1968, 326. See also J. MacAdam, "What Rousseau Meant by the General Will", *Dialogue*, Vol. V, no. 4, 1967, 498-515.

men judging with a spirit of generality would proscribe or vice versa.”<sup>6</sup> This quotation presupposes that “everyone prefer, in all things, the greatest good of all” rather than the meaning given to the independent reasoner. What justice seems to require is an interest in interests that persons ought to have satisfied or goods they ought to have. If legislators come to have that interest then there is a good chance that justice will be done. But that amounts to the independent reasoner saying to himself: “although I don’t have an interest (*qua* bachelor) in safe births, none the less it is just that births be made safe.” If he does, well and good, but the common interest has changed its meaning.

Of course, the reply to the argument above is that in the *Contract* Rousseau will teach the independent reasoner to prefer his interest well understood to his apparent interests and that change will bring about acceptance of a preference for the greatest good of all. But if that is so then how is one to interpret the following passage from the *Contract*?

The engagements that bind us to the social body are obligatory only because they are mutual, and their nature is such that in fulfilling them one cannot work for someone else without also working for oneself. Why is the general will always right and why do all constantly want the happiness of each, if not because there is no one who does not apply this word each to himself, and does not think of himself as he votes for all? Which proves that the equality of right, and the concept of justice it produces, are derived from each man’s preference for himself . . . (II,4,62)

#### Problem 4: The Ground of Obligation

Suppose we agree, as has been claimed, that a significant feature of general will law is that every legal obligation is a moral obligation and that this entails that moral disobedience of law is excluded.

6. J. Noone, *Rousseau’s Social Contract, A Conceptual Analysis*, The University of Georgia Press, Athens, 1980, 165. Rousseau himself equivocates:

- (A) . . . when the entire people enacts something concerning the entire people . . . (t)hen the subject matter of the enactment is general like the will that enacts. It is *this* act [my emphasis] that I call a law. (II,6, 66)  
 (B) When I say that the object of the laws is always general, I mean that the law considers the subjects as a body and actions in the abstract, never a man as an individual . . . (II,6, 66)

Plainly (A) and (B) have different referents. (B) licenses helping the impoverished minority; (A) doesn’t.

However, even if every legal obligation is a moral obligation, it doesn't follow that every moral obligation is a legal obligation. To draw that conclusion would be to commit the logical fallacy of the converse. Further, if not every moral obligation is a legal obligation then those moral obligations that are not legal ones could provide a ground for moral disobedience.

On occasion, Rousseau's commentators seem to deny this disassociation of legality and morality. According to Roger Masters: "moral duty and virtue are derived from the principle of the general will and not vice-versa." John Noone is equally confident: "In an ideal state the question of a moral law becomes in a sense superfluous. Given the theory of the general will, it is difficult to imagine an assembly legislating contrary to natural law."<sup>7</sup> Both statements suggest that all moral obligations of Rousseau's citizens are established by the general will. I cannot think of a place in the *Contract* where Rousseau says that all are. It would be arbitrary to hold that in the just state all our moral obligations are determined by the general will, and that any remaining obligations are merely prudential. I may well have a moral obligation that arises out of family relationships. And if I do, it is implausible to think that I should wait until the next assembly to put the matter before the general will. I may believe that the family matter is not appropriate business for the general will and is yet a moral obligation. Family matters, as one example, thusly provide a ground for moral disobedience of the law. So thought Antigone, which is where it all began.

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7. R. Masters, *The Political Philosophy of Rousseau*, 350; J. Noone, *Rousseau's Social Contract*, 165. Although I am critical, it is evident that I am indebted to both authors. In particular, I am grateful to Noone for specification of some of the problems. Chapters five and seven of *Rousseau* by John C. Hall are also helpful (The MacMillan Press, London, 1973).