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Fabien Jobard

Among the academics, police is defined as one of the institutions in charge of the “monopoly of legitimate violence”, following then the definition of the state given by the German social scientist Max Weber. The central part of this definition is not that much the term “violence”, which is often linked with imaginaries of destruction, fear, unilateral power. The attributive adjective is the very centre of the German sociologist’s authoritative sentence: “legitimate”. What is a “legitimate violence” and to what consequences is leading such an oxymoron, such an apparent contradiction as far as police are concerned?

One could answer: “legitimate” is what is the law properly defines as being “the use of force by the police”. In that sense, “legitimate” is nothing else than “legal”. And then “police violence” encompasses all cases the law sees as “police use of force”. The trouble is that the law never precisely defines the “police use of force”. On the contrary: Police use of force refers in the law to three cases. The first one foresees the situation where police officers are threaten by an actual and immediate violence, and must defend themselves or their immediate neighbour. This case does not differ from the common case of “private defence”, which is the doctrine to which every citizen can refer to if he is been asked about the force he might have used in order to prevent injury to oneself or others and in the absence of any other mean to do so. Nothing specific here for police officers. More precisely, the use of force by the police must be like for any other citizen “reasonable”, that is to say: proportionate to the actual danger embodied by the assailant.

Some derived case of the “private defence” is the arrest (and the necessary use of force to implement it) of a felon committing a crime, of somebody caught in the act. Here also the force must be reasonable. An escaping thief must not be shot dead, taken he is in no way immediately threatening the life of others. English jurisprudence on it is an ancient one (R. v. Dadson, 1850), almost accepted by the English society. In France, (military) National Gendarmerie’s provision on the use of force (1903) have long given larger powers to use deadly force (especially against fleeing felons), but the gendarmes made very few use of these provision, and are now under the same provision like the (civil) French National Police. In the USA, the provision about the use of deadly force against people who just committed a crime but do not pose an significant threat of death or serious injury to others has only been implemented through a 1985 Supreme Court decision (Tennessee v. Garner). And this decision is still a controversial matter in the US society. Anyway, police officers must use a reasonable degree of force in arresting someone and doing so, they are subjected to the same kind of overall provision like all other citizens.

The third case refers to the enforcement of a legitimate order, for instance an order given by a judge (police officers have the right to use force in order to bring a defendant up to a judge) or an order given by the hierarchy. The order must be legitimate: It must be conform to the law, but it also must be bound to supra-legal orders like the constitution, the bill of right, the international declarations on human rights, etc. As a

consequence, police officers enjoy a margin of appreciation here: They have the right to resist not only an illegal, but also an illegitimate order. This right of resistance has been defined very restrictively by most of the courts, but it shows the crucial importance of the notion of legitimacy in the use of force in front of the mere legal definition of the use of force.

But who defines what is legitimate and what not? What authority is the source of police powers, if not strictly the law?

Analysing the jurisprudence on suspected abuse of force by the police, taking into account how the courts deal with such cases, some clear patterns are obvious. To be illegitimate, a violent handling by a police officer must show the four following aspects, and the four together. First of all, the magnitude of the abuse has to be remarkable. Police use of force is illegitimate if force has been tremendously disproportionate to the pursued (and perhaps) goal to be reached by the police. This first case can in extreme cases lead to a “dirty Harry case”: a case in which a police officer, Harry Callaghan, is up to torture a given Scorpio, who claims to have abducted a little girl and impounded her with a little volume of air. In such a case, most of political systems would make any attempt of a police officer a legitimate one considering the danger at stake. It is worth to note, anyway, that the German Supreme court recently refused to consider as legitimate the use of force to obtain a confession in order to prevent a danger to occur. As we shall see later on, the “tremendous disproportionality” between the police use of force and the goal to be reached is no objective gap, but a discrepancy which is given by the society as a whole.

The second element of an illegitimate case of police use of force is related to the context of the abuse, the situational context. Converting an alleged case of police violence into a recorded case implies establishing beyond doubt that the police acted without being in danger or threatened in any way. US examples clearly show that the most little danger the police could claim leads to a dismissal of the allegation, specifically in front of citizens’ juries (as shown in the 1992 decision in the Rodney King’s file, and the 2014 decision to drop any charge in the Ferguson case). In France, where the use of deadly force is extraordinarily lower than in the USA, allegations of police abuse brought up to the prosecutor have almost no chance to lead to charges if the complainant is, to take the most frequent cases, accused of (verbal) abuse against the police. Or the level of force used by the police must be very high, resulting in undisputable injuries.

The third element comes to the evidence: a victim of police abuse of force needs to gather technical evidence supporting his claims. Medical testimonies are pieces of evidence, but also video materials. But the evidence gathered needs to establish not only the physical damage claimed by the victim, but also the undisputable link between the damage and the immediate police handling. In a recent case of a deadly use of force in France, where a hand grenade thrown by a military police officer instantly killed a protestor named Rémi Fraisse, government officials, who could not defend against the overall action (a police intervention against protestors) and the death, first attempted to sketch another story about the death of the young man: the grenade landed between his shoulder and his bag, but the bag was full of explosive powder intended to be used against the police. The victim could (posthumously) regain his statute as a credible victim once this story was definitely wished out of the table by material evidence. But it

shows that the definition of what is legitimate is strongly linked with struggles around narratives.

The fourth element is the penal purity of the victim and of the witnesses. Only unblemished victims of police violence have a chance to see a case of police abuse been attested. "Unblemished" or "pure" means in the first hand that the victim enjoys no mention of a previous sentence in his criminal record: his criminal record is as white as snow. This condition is a more and more difficult one to reach. That more and more people are ever sentenced is a first aspect of the problem. But technological and legislative transformations are also at stake. As far as technological transformation is concerned, one must recall the increased capacity of police agencies to record and keep trace of "police events": arrests that did not lead to criminal proceedings, for instance. Beside a growing penal clientele, a much larger population of police clientele is now kept in police records and, like the police use to tell the prosecutor in France, its members are "well known of us": even if not once sentenced or condemned, these people are tainted. And this characteristic is definitely a weigh on their chance to successfully claim. This problem of tainted populations touches not only the claimants, but their peers as well: the people with them they use to live together (family at the first place, school or work or idleness companions, etc.). This has a social consequence: in relegated urban areas ("ghettos" in the US language), where chances of social mobility are weak, places are almost exclusively made of groups of peers, where no one is able to play the role of the "non-unclean" third party. One of the most notorious case of police violence in France was the death of Malik Oussekinge, a young Arab male beaten to death by police officers during a huge demonstration in Paris. The place where he had been beaten up was no slum around Paris or Lyon, but a very rich area at the centre of Paris and one of the witnesses was a member of the government's teams. Two police officers were sentenced to (suspended...) jail years.

So to sum up with, it is worth to note that there is a specific social space for the occurrence of illegitimate police violence. But this space is very exiguous, and quite unfair, since the most probable victims (the ones at the lower ranks of the social ladder, or the ones at the periphery of national space) are the most improbable members of this space... To sum it up, a young Black male living in a Black area has almost no chance to establish any illegitimate use of deadly force by the police in the United States; a young Arab male in a "banlieue" area in France has only a few chances to establish any illegitimate use of force by the police. Justice passes so rarely in these places, that these places are places of exception in the sense the philosopher (and former national-socialist) Carl Schmitt gave to this term: exception is the situation which has no contradiction. And in fact, no contradiction is opposed to these cases of use of force: The judges will fail to gather materials that lead to charges, and if, that lead to a dismissal of the cases of uses of force. In these places, police enjoy, to follow up with Carl Schmitt's constitutional thoughts, sovereign powers.

Do these consideration lead to the conclusion that we now live in an era of exception, in a wide place where powers the authorities exert overt the subjects force the subjects to only have a "bare life" comparable to a permanent and borderless ban, like it is said in some contemporary philosophy?

Certainly not. Places we are talking about are places of exception, but exception is not the common place of the world. In given social spaces, police enjoys this kind of

sovereignty. These social places differ from society to society. Black ghettos are such places in the United States, “banlieue” places in France. But as we suggested, the level of admitted force differ from one country to the other: in France, the use of deadly force is rare, and is more and more prone to lead to a criminal sentence (even if only a suspended one).

Moreover, the society as a whole has an influence on the size, the borders and the inhabitants of the places. It was a common practice in the United States up to the 1960s to beat up the smallest gathering of gay people, frequently at the occasion of some raids against gay bars or places. From a given day (Christopher Street Day), this practice was rebuked by society, and the “morale division” of the New York Police Department disbanded. Conversely, only from the 1940s on the Chicanos community in California was subject to police abuse, due to changes in the collective perception of this community. Italian, Spanish or Portuguese communities do not suffer any prejudice from the French police anymore, and forms of violence have certainly diminished against Arab minorities in France, due to the rise of (judicial) education of the concerned population, the rise of social mobility of the young Arab populations, specifically among the women (despite a structural disadvantage towards the majority’s society), the rise of the overall concern of police brutality as a political issue, etc.

Police discretion, and more specifically police willingness to use force, are constantly assessed by the police during the course of the interaction. Police officers must ask themselves if what they are doing is expected to be a source of difficulty for the police community once back to the station. Police officers act as political members of a larger political community: they evaluate what the political society in which they live is liable to either endorse, or reject as constituting pure departure from the legitimacy. The police endorse a mandate, and this mandate is not intangible given: it gets tested by the police with each of the interactions they undertake. That is the reason why police can not be a topic as such: there are police officers dealing in specific societies, and the nature of the mandate of the police is actually given by the society. That is the reason why, far from being the subject of discouraging positions on “the state of exception” and on “bare life”, the characteristics of what is legitimate use of force and what if illegitimate clearly show the power of the society.