The “Right to the Event”
The Legality and Morality of Revolution and Resistance

Costas Douzinas
Birkbeck, University of London
c.douzinas@bbk.ac.uk

Abstract
The rights of modernity, first and foremost the right to resistance against oppression and domination, were created by revolution. The philosophical rejection and the removal of this right from law was an attempt to foreclose radical change by making a particular conception of legal rights the insurance policy for the established order. The attempt was doomed to fail. This essay examines the legal, jurisprudential and moral arguments for the right to resistance. It concludes that a “right to the event” has always accompanied legal rights in a ghostly form ensuring that the law is regularly shaken to its core and not allowed to become sclerotic.

1 Revolution is Dead but . . .

The modern free autonomous subject with his individual rights could emerge only through revolution. The French Déclaration des droits de l’homme and the American Declaration of Independence and Bill of Rights, the manifestos of modernity, legitimized retrospectively the great revolutions of the eighteenth century. The revolutionary documents marked the end of the operation of constituent power. They carry however, buried in the text, the violence of their foundation proclaiming, unsteadily and provisionally, the dual source of right: equality and resistance: «Men are born and remain free and equal in rights» states the first article of the French Declaration and adds that «these rights are liberty, property, security and resistance to oppression». Between 1789 and 1989, however, the nature of resistance as an independent right with priority over substantive rights was reversed. Kant was the first to dismiss the right to revolution as a contradiction in terms and most liberal philosophers followed suit. Politicians and lawyers eagerly adopted the philosophical objections. The 1793 version of the French Declaration removed the right to resistance from the list of foundational rights. Resistance was demoted to Article 33 and became ancillary. It was no longer available against oppression but only as last resort against the violation of the other rights. The 1795 version, introduced after the fall of Robespierre, goes further. The right to resistance disappeared, a number of duties were introduced and property was declared the foundation of the «whole social order». Finally, the gender ambiguities of the term ‘man’ were brutally clarified: «no one is a good citizen unless he is a good son, good father, good brother, good friend, good husband» (articles 8 and 4 of the list of duties).

In the United States, the revolutionary birth initially led to a healthy respect for resistance and revolution. The violence of the militias, so important in the war of independence, was perpetuated in the constitutionally protected right to bear arms of

\footnote{Kant [1792] 1991, 81; Kant [1795] 1991, 118.}
the Second Amendment, which, some two centuries after the revolution, still keeps the United States in a state of war. The idea that government is based on the consent of the people, the basic claim to legitimacy of the American polity, supported further the revolutionary right. The American Declaration of Independence recognizes the revolution both as historical necessity and as a right: «When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another», it is their «right, it is their duty, to throw off» an abusing, usurping despotic government. Governments secure the rights of man and derive their power from «the consent of the governed». It follows that «it is the Right of the People to abolish» a government that «becomes destructive of these ends». Similar statements appear in a number of state constitutions.

Abraham Lincoln famously stated in his Inaugural address that «whenever [the people] shall grow weary of the existing government, they can exercise their revolutionary right of amending, or their revolutionary right to dismember or overthrow it».

After the revolutionary wave had subsided however and the Constitution enacted, rebellion was seen as threatening. The right to revolution became dangerous for the young republic and many attempts were made to restrict or abolish it. You don’t need to be radical to realize that the constitution eternalises a temporary balance of power or, that the law formalises a dominant will. Liberal jurisprudence has monotonously repeated that law cannot tolerate challenges threatening the social order. As Harvey Mansfield put it, «the right to revolution’ appears embarrassingly naïve and rhetorical, an awkward enthusiasm of youth best wrapped in quotation marks and put away in an attic trunk».

A similar trajectory from rebellion to conformism can be detected in the human rights tradition. The Universal Declaration of Human Rights (1948) repeats the French statement of equal freedom but has no place for the right to resistance. On the contrary, the preamble states that these rights are essential «if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression». This reference means for some that the right to revolution has been sanctified by the Declaration. But the theory and history of human rights in the aftermath of the World War II as well as article 30, which prohibits radical challenges to the political and legal system, shows that their main task was to prevent revolution. As the “revisionist” historians of human rights have argued, the human rights tradition was invented by right wing ideologues and meant that rights and revolution are engaged in a zero sum game. The relationship between anti-colonialism and human rights is «one of displacement, rather than one of succession and fulfillment». The leaders and intellectuals of the decolonization struggles in the Fifties and Sixties, Ghandi, Fannon, Césaire, Nkrumah as well as the Bandung conference of non-aligned nations did not make use of the human rights language. Aimé Césaire writes in his Discourse on Colonialism that what he holds against «pseudo-humanism» is that «for far too long it has diminished the rights of man, that its concept of those rights has been – and still is – narrow, fragmentary, incomplete and biased and, all things considered, sordidly racist».

---

2 The American Declaration of Independence, paragraphs 3 and 4.
3 They include the constitutions of Arkansas, Ohio, Oregon, Tennessee, Texas, California and Utah. New Hampshire retains a “right of revolution” in its constitution to match the “live free or die” of the registration number plates.
4 Abraham Lincoln, First Inaugural Address in Lincoln Stories and Speeches 212 quoted in Faust 1983, 545.
5 Mansfield 1976, 151.
7 Quoted in Moyn 2010, 92.

The recently independent former colonies saw human rights as the neo-colonialist version of the Western “mission civilisatrice”, trying to constrain their newly acquired independence. As Samuel Moyn argues, right-wing politicians and “personalist” Catholic theologians invented the European human rights tradition as a response to the post-war discrediting of conservative ideology.\(^8\)

In Germany, Kant’s ambivalent rejection of the morality of resistance and the legality of revolution has led to vigorous debate.\(^9\) For some, Kant’s rejection refers solely to positive law. When state law violates natural law, however, the right returns. For others, the absolute negation applies only when the state is perfectly moral and legitimate. Passive resistance may be permitted, if a corrupt or despotic ruler negates the duty to act morally.\(^10\) Again for others, the duty to obey retires when obedience leads to certain death or when there is no possibility of challenging governmental policies.\(^11\) Finally, disobedience can be justified if the law denies the fundamentals of personality. It follows that slaves or Jews «must be permitted» to violate the law enslaving them or ordering them to identify themselves and be transported to the camps by being allowed to «immigrate».\(^12\)

As the last example indicates, the rather scholastic neo-Kantian debate on the right to revolution had great practical importance in Germany. After the war, Karl Jaspers, one of the great Kantians of the twentieth century, was even more dismissive of a right to resistance than the master, despite the Nazi experience. Jaspers drew a sharp distinction between the Kantian conception of right and revolution. «The right of resistance and revolution by force cannot be proved for the people out of any right [...] Kant understands that with rebellion and tyranny as with war [...] action takes place no longer out of principle of right. The causality of nature, and in it perhaps providence, makes the decisions, which are never fully transparent to man. The principle of right is suspended».\(^13\) Right derives from state and belongs to law, even in their most odious versions. Resistance cannot be part of law. Revolution can only be justified if it acts as a tool of natural progress or a bolt of divine intervention in history. Wolfgang Schwarz, another prominent Kantian, objects that Jaspers misunderstands Kant. In a liberal universe the principle of right is the only spring for action, choice and freedom. Right and its fruit, freedom and property, are gifts of the “generality of rules”; it is not suspended even in the most despotic of states. For Schwarz, Kant would approve the passive resistance of non-compliance in rare cases. If the content of laws, despite their generality, undermines the duty to act morally, non-compliance with the law may be justified. Active resistance and revolution on the other hand are prohibited by the principle of right even in extreme cases. As Schwarz puts it, the “great burden” of the plotters against Hitler was that they were «attacking, by illegal means, a however corrupted order that still upheld the state [...] To maintain that the right was all along on their side belittles the gravity of their decisions. Legal reasoning cannot save them from the pronouncement ‘guilty’ even though this makes them even more heroic».\(^14\)

Neo-Kantian positivism prioritises the generality of form over (often) atrocious content and captures the poverty at the heart of liberal jurisprudence.\(^15\) Resistance

\(^8\)See Chapter 2 of MOYN 2010 and MOYN 2014.
\(^9\)DOUZINAS 2014.
\(^10\)WESTPHAL 1992, 401.
\(^12\)WESTPHAL 1992, 422.
\(^13\)Jaspers quoted in W. SCHWARZ 1964, 126.
\(^14\)W. SCHWARZ 1964, 133-4, fn 17.
\(^15\)DOUZINAS 2012.
and martyrdom can be never fully accepted by law. Is a moral and legal philosophy that cannot justify active resistance against slavery or Nazism worthy of the name? Kant (although not many neo-Kantians) is partly rescued by his philosophy of history. Resistance and revolution may violate current law and right but they often contribute to their eventual victory in actuality. In this sense, history and jurisprudence are both enemies and allies. As Lewis Beck puts it, «the moral aspirations of mankind are not satisfied by punctilious obedience to the powers that be; they demand that the powers that be should earn our respectful obedience, and they sometimes justify disobedience to the positive law out of obedience to a ‘higher law’». A spectral logic, a law beyond state law authorizes the event of revolution and contributes to moral law’s eventual triumph. For Illan Wall, Kant «in a rather complex manner asserts that the very ‘will to revolution’ is the sign of progress». This will to revolution is a second source of right, separate from the will legal rights enforce.

The rights of man started as normative marks of revolutionary will. Positive rights, their descendents, often turn into defense mechanisms for state power. Revolution created rights. The removal of the right to revolution was an attempt to foreclose radical change by making a particular conception of rights the insurance policy for the established order. The attempt was doomed to fail. The new emerges each time through a confrontation with dike, the order of the world.

2 The Legitimacy of Resistance

Can there ever be a legal right to revolution and resistance? Let me start with a clarification of the relationship between resistance and revolution. Most revolutions start with acts of individual disobedience, followed by collective resistance and insurrectional activities. A multitude with common political purpose takes to the streets and persists despite attacks by the forces of “law and order”. We define resistance as mass popular action, which rejects and confronts ideologies and structures of power which support domination or oppression. Whether it results in radical socio-political change - the formal definition of a successful revolution - depends on the balance of forces, the existence of a political subject prepared to take power and on contingent events. Individual disobedience, collective resistance and revolution form an uneven continuum. Irrespective of outcome, however, the emotional, physical and normative - moral and legal - pressures people feel when they stand up to power are similar even though the forms and outcome of action may differ.

The Russian and Chinese revolutions defined the meaning of revolution in the twentieth century. In the second part of the century, the cold war determined domestic and international politics. In the West, McCarthyism and the anti-communist witch-hunts dampened the revolutionary memories and turned all resistance to state policies into sedition. Liberal judges, such as the Americans Learned Hand, Black and Douglas, kept recalling the revolutionary tradition. Judicial statements supporting the right to revolution can be found in domestic case law usually in dissenting opinions. Justice Douglas, in his dissent from the Supreme Court’s decision upholding the Smith Act under which the Communist Party was outlawed, stated that the right to revolution, “has been and is a part of the fabric of our institutions.” Justice Black, supporting a

---

16 Beck 1971, 420.
17 Wall 2012, 57.
18 Douzinas 2011.
persecuted communist, went further:

Thomas Jefferson was not disclaiming a belief in the ‘right to revolution’ when he wrote the Declaration of Independence. And Patrick Henry was certainly not disclaiming such a belief when he declared in impassioned words that have come down through the years: ‘Give me liberty or give me death […].’ Since the beginning of history there have been governments that have engaged in practices against the people so bad, so cruel, so unjust and so destructive of the individual dignity of men and women that the ‘right to revolution’ was all the people had left to give themselves.\(^{21}\)

In the German tradition, Hermann Weinkauf, a former President of the West German Federal Court of Justice, similarly defended a positive right to resistance including tyranicide, which turns from murder into lawful execution. If the state abandons the principles and limitations of “natural law”, its violent overthrow is permissible. For Weinkauf, when the citizen judges that «the state’s leadership against which [he] proceed[s] offends right and duty so much that resistance by force against it is required and indispensable, and also a judgment on the degree to which resistance is necessary».\(^{22}\)

Despite attacks the revolutionary right did not disappear. As Marjorie Kornhauser puts it, «the right to revolution survived the twentieth century and persists in the twenty-first, largely domesticated, but not entirely tame».\(^{23}\) This position is even clearer in international law which recognises a victorious revolution after it has overthrown the previous constitutional order. The right to self-determination in both UN Covenants recognises that a people is entitled to resist their government and overthrow the ruling order. Hans Kelsen insisted that a revolution becomes lawful if successful. The revolutionary legal order deserves recognition and its laws must be lawfully enforced if the people comply.\(^{24}\) As Ali Khan puts it, «Kelsen does not preclude the right of revolution from the domain of law».\(^{25}\)

The claim that a successful revolution creates a valid duty of obedience on the international stage has understandably met with judicial unease. In a case arising out of detention without trial of a black nationalist in state of emergency Rhodesia (now Zimbabwe) the court held that «nothing can encourage instability more than for any revolutionary movement to know that if it succeeds in snatching power it will be entitled to completer support of the pre-existing judiciary».\(^{26}\) But one can also find statements to the effect that «today the right of revolution is an important international precept and a part of available strategies for the assurance of both the authority of the people […] and of the process of national self-determination».\(^{27}\) The pragmatism of international law, particularly in periods of broad equivalence of the great powers, meant that revolutions were treated with a degree of toleration. Let us turn to domestic law and politics.

\(^{21}\)In re Anastaplo, 366 US 82, 113 (1961).
\(^{22}\)Weinkauf quoted in W. Schwarz 1964, 128-9, fn. 13.
\(^{23}\)Kornhauser 2002, 819-59.
\(^{24}\)Kelsen 2012, 117.
\(^{25}\)Khan 1987, 1-12.
\(^{26}\)Madzimabuto, 1968 2 S.A. at 430.
\(^{27}\)Paust 1983, 562.
3 The Right to Resistance Returns

The attack on the right to revolution and its rejection by legal positivism led to its deletion from the legal archive in the relative prosperity after the Second World War. Protest returned to the streets and the law-courts in the Sixties and Seventies in the great campaigns against discrimination and the Vietnam war. The American courts treated dissent under the headings of free speech and civil disobedience. Demonstrations, marches and rallies had been accepted by the courts as an exercise of free speech before the Sixties. Similarly, trade unions strikes had been legalised by the law. Direct or indirect disobedience on the other hand involves an aspect of law-breaking. Acts of direct disobedience violate a morally odious law in an effort to make it unworkable. The non-payment of taxes by Henry David Thoreau in a protest against slavery or Rosa Parks sitting in a seat reserved for whites in a segregated bus are cases of direct disobedience. Indirect disobedience, on the other hand, such as the occupation of government buildings, sit-ins or the blocking of roads breaches public order regulations in order to publicise a grievance, show solidarity with others and attract media interest.

The terminological slide from resistance to disobedience indicates a lowering of sights. The right to resistance presumes that a law or ideal exists standing higher than state law and demanding its repeal in whole or part. Disobedience, on the other hand, with its emphasis on civility, seeks its justification in extant law. There is a change of perspective, a parallax view that places emphasis on the individual dissident, her moral conscience and the specifics of the act. Disobedience can offer at most a technical defence against conviction. For jurisprudence, the revolutionary and resister fight to replace current law and appeal to a different legality. The disobedient asks that legality be observed.

The protests of the Sixties and Seventies sparked a major debate in the United States. At its conclusion in 1985, Ronald Dworkin claimed that «we can say something now we could not have said three decades ago: that Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community». Liberal assumptions, however, seriously restrict justified disobedience. John Locke and the social contract tradition accepted a limited right to revolution. It becomes activated if the government violates the social contract, mainly its guarantee of private property. This remains the liberal position today suitably adjusted to contemporary conditions. Acceptable disobedience provides a mechanism ensuring that the political and social order remains true to the values of the free market and individual freedom. It expresses, alongside the judicial review of legislation, an enduring fear of democracy. Disobedience is not seen as an expression of democratic activism but as a limitation on democratic decision-making and a constraint on the “tyranny of the majority”. As a necessary evil, it aims to keep the rulers, including democratic bodies, within the parameters of liberal legitimacy.

For contemporary liberals, the most important duty of the state is to protect individual rights. Mild disobedience is justified only if policies and laws violate the principles of equal liberty (Rawls) or fundamental rights (Dworkin). For John Rawls, «there is a presumption in favour of restricting civil disobedience to serious infringements of […] the principle of equal liberty, and to blatant violations of […] the principle of fair equality of opportunity». Disobedience confronts «especially the infringement of the fundamental equal liberties», Rawls 1971a, 366. See also Rawls 1971b, 29-45.

---

28Dworkin 1985, 105.
of conditions disobedience must meet. The breaking of laws must be motivated by respect in the rule of law, it must be undertaken as a last resort and, it must appeal to society’s sense of justice as incorporated in the legal system. Disobedience to the letter of the law is a way of obeying its spirit. 30 Ronald Dworkin’s conditions for valid disobedience are equally stringent and derive from his wider jurisprudence. The dissidents must accept the morality and integrity of constitution and law and protest against specific governmental acts. Their aims classify disobedience into three categories: conscientious objection, proper disobedience that defends the spirit of the constitution, finally, acts which challenge policies adopted by the government. 31 This final category is mostly “illegitimate”, because policies are based on a cost-benefit analysis, which invites disagreement but does not justify law breaking.

The combination of liberal and democratic approaches gives the most advanced mainstream argument for disobedience. Citizens have given their implicit consent to the constitution in a real or virtual social contract and have pledged their obedience to laws enacted by their representatives after public deliberation and a democratic “will formation”. In return, laws must respect fundamental freedoms (the Kantian component) and promote the public interest and social justice (the social-democratic component). For neo-Kantians like Jurgen Habermas, democracy and morality, legitimacy and legality form an inseparable couple. When one is lost, the other atrophies. When both retreat, the duty of obedience weakens. But the preconditions Habermas sets for justified disobedience are more onerous than those of Rawls: «A democratic constitution can tolerate resistance from dissidents who, after exhausting all legal avenues, nonetheless oppose legitimately reached decisions. It only imposes the condition that this rule-breaking resistance be plausibly justified in the spirit and the wording of the constitutions and conducted by symbolic means that lend the fight the character of a nonviolent appeal to the majority». 32 This was also in broad terms the position adopted by Martin Luther King, the iconic figure of American civil disobedience. For King, disobedience was a matter of mediation between democracy and the rule of law. Citizens could break the law “lovingly” and accept the punishment for disobedience. By doing so, they show the “highest respect for the law” and democracy. Disobedience rejects immoral governmental policies but it upholds the majesty of law and the wisdom of the constitution. 33 We can conclude that liberal philosophy reluctantly accepts that non-violent civil disobedience to defend fundamental rights is justified, if the disobedient is prepared to accept punishment. Attacks on laws and policies on the other hand are disapproved.

The civil disobedience debate rests on a fragile compromise between constitution-alism and popular sovereignty. Democratic theory has a more refined attitude than liberalism. According to Jean-Jacques Rousseau, the people are both legislators and subjects, masters and servants of the law. 34 Democratic theory emphasises therefore the way popular will controls state institutions. Ultimate sovereignty belongs to the people, both as the constituent power which institutes the law and, as a superior interpretative power standing above constituted institutions. It can be argued therefore that if democracy becomes a mechanism for vote aggregation and active citizen participation is discouraged the legitimacy of law and policy withdraws and disobedience becomes a democratic right. This is Sheldon Wolin’s “fugitive” eruption.

---

30 Rawls 1971a, 360 ff.
31 Dworkin 1977, 186 ff; Dworkin 1985, 104 ff.
32 Borradori 2003, 41.
33 Luther King 1964, 84.
of democracy or Larry Kramer’s “popular constitutionalism” where people have ultimate interpretive authority ensuring that the law expresses and materialises its only legitimate source. Yet both horns of the constitutionalism-democracy couple have diverged from their stereotypical theoretical presentation. Constitutionalism pays lip service to popular will which is allegedly split into its supreme manifestation enshrined in the constitution and inferior expressions in legislative or executive acts. When a court declares a law unconstitutional, it enforces the ultimate sovereignty entombed in the constitutional text instead of the preferences of the interpreters.

Similarly, popular sovereignty has become the legitimation myth of liberal democracy and belongs only notionally to the people. Indeed in late capitalism, the decline of interest in politics and the passivity of citizens has been hailed as marks of a well-functioning democracy. According to this argument, the complexity of economic and social problems today means that they should be removed from the uncertainty of democratic consultation and entrusted into experts and markets. Real sovereignty – the ultimate power to turn policy proposals into binding legislation and enforce them – rests with the government. Its hold on representative institutions through party loyalty legitimises policy decisions and guarantees their legislative enactment. Constitutional adjudication on the other hand places a stamp of approval and legitimacy on legislation and executive action. In this long line of substitutions and replacements, the people have changed from a material gathering and decision-making of citizens in a constitutional assembly to an abstract principle of legitimacy with little if any political relevance or material manifestation beyond elections.

Conservatives and radicals, starting from opposing premises, do not accept the liberal arguments in favor of a well-policed protection of mild disobedience. At one end, Robert Bork is typical of the “law and order” lobby. Disobedience is anarchy and criminality and «there is no reason for courts to protect any advocacy of law violation since that is merely advocacy of a piecemeal overthrow of the democratic system». A review of jurisprudence concludes that «scholars have grounded an obligation to obey unjust laws in six different legal theories» and assumes that such a plethora of theoretical argumentation must rule out disobedience. A review of the case law agrees: «The US Constitution does not protect civil disobedients from imposition of punishment for their crimes (sic), and to do otherwise would 'subvert the rule of law upon which the United States constitutional democracy is based'» quoting the liberal Justice Abe Fortas.

At the other end of the spectrum, dissidents have not accepted the nice distinctions and qualifications of legal and moral philosophy. The rebelling students of 1968, the feminists, the Campaign for Nuclear Disarmament and the mass protests against the communist states, attacked both the fundamentals of the social order and more transient state policies. A new type of “democratic disobedience” emerged in response to the decay of liberal democracy. Its animating principle states that laws do not deserve automatic or unhesitating loyalty. If state policies conflict with basic constitutional values, the supposed highest expression of popular sovereignty, legality and legitimacy diverge. Opposition parties try to repeal the law; ordinary citizens take their campaign to the streets because the obligation to obey disappears; dissent supports the constitution. The same happens when a government enacts policies and laws that

36Crozier et al. 1975. For critiques of our democratic malaise see Ranciere 2009b; Crouch 2004.
37Bork 1990, 334.
38Tiefenbrum 2003, 693.
39Tiefenbrum 2003, 697.
reverse basic promises and manifesto commitments or are in manifest conflict with popular will. In such cases, the mandate to rule has been falsely obtained or has been annulled by governmental action.

Democratic disobedience combats the atrophy of democracy and the decay of “post-democracy”. Following republican theory, it prioritizes the democratic will of the people ahead of fundamental rights. Justified disobedience erupts when a large number of citizens realize that the democratic process malfunctions and major policy decisions seriously affecting their lives have no democratic or moral legitimacy. The academic Daniel Markovits has tried to operationalize democratic disobedience in a more technical direction. He starts by identifying the weaknesses of civil disobedience. Disobedience challenges the lack of participation in decision-making but cannot attack the policies agreed. Its justification “expires if the disobedience successfully triggers a political reengagement with the policy it protests against, including one in which the sovereign [people] reaffirms this policy”. In periods of great crisis however the democratic deficit cannot be easily redressed. Citizen passivity and indifference, control of the media by economic power, endemic corruption and lack of party democracy hinder “political reengagement”. The republican belief that people are “sovereign” is routinely refuted. Markovits rightly argues that the liberal justification for civil disobedience does not apply to the anti-globalization protests, the most massive movement at the time he was writing, «because the policies of international co-ordination and exchange that the anti-globalization movement protests cannot plausibly be cast as violating basic liberal principles of equality or individual freedom».

Similarly, however, his type of democratic disobedience does not extend to the contemporary acts of resistance, insurrection and revolt. Tunis, Cairo, Athens and Istanbul did not demand the reopening of debate. The dramatic democratic deficit, the disenfranchisement of large parts of the population and the turning away from politics makes the reopening of wrong decisions useless. Democratic disobedience challenges social hierarchies and the flawed democracy that reproduces them; its motto is that «action does not mean a failure of politics. Action is the very nature of politics».

Etienne Balibar has argued that democracy survives because it has an integral “insurrectionary” moment. «Any effective democratic constitution remains dependent on the idea of insurrection», Balibar insists. Citizenship becomes active only when opposition and dissent create a «counter power». Power’s legitimacy depends on the ability of citizens occasionally to reject laws and policies. Established powers condemn such acts as illegal and criminal; but their effective exercise is the necessary prerequisite of the political system’s survival. Citizenship is paradoxical: it is “conflictual or nothing”. The post-democratic decline of politics into governance and expert rule has made disobedience even more important. Supposed remedies to democratic sclerosis such as referenda, minority rights and judicial remedies are palliatives only.

40Crouch 2004.
41Markovits 2005, 1897 and 1941.
43May 2008, 52.
44Balibar 1994, xiii.
Conflict, division and active citizenship are the only hope of democracy. The right to insubordination, turning the city against itself, is the «true right to rights, a kind of right to law».

Balibar’s argument reminds us the beginning of Athenian democracy. The legislator Solo laid down a law according to which «whoever when civic strife prevailed did not join forces with either party was to be disenfranchised and not to be a member of the city». Conflict, resistance, insurrection is an enduring reality; it responds to the sense of injustice and keeps democratic rule alive. Despite its ban, the right to resistance survived in a ghostly, persecuted form.

4 The Legality of Disobedience

Was Ronald Dworkin right when he claimed that disobedience has a legitimate place in American political culture? The case law offers a mixed image. In the United States most challenges of disobedience convictions rely on the First Amendment’s protection of free speech. The cases offer a panorama of ideological strategies, legal techniques and fears mobilized by resisters and by the forces of law and order against dissent.

Disobedience is a form of resistance. As I have argued elsewhere resistances are always locally situated and concrete. They arise in specific historical conditions and social situations reacting, responding and re-arranging the extant relations of power. It is therefore difficult to develop universal principles beyond the specific circumstances of resistance. The forms, subjects and strategies of resistance reply, resort and react to the specific operations of power. The breaking of machines and sabotage, for example, responded to early capitalism’s enclosures and destruction of traditional skills and crafts. The mass movement of undocumented immigrants towards prosperous states leads to claims for free travel and establishment and for a minimum income. Excessive indebtedness leads to repayment strikes. Intensification of work and unemployment give rise to demands for a right to leisure.

Let me mention a few exemplary court cases, which give a snapshot of the judicial positions on disobedience. First, the United States in the period of great unrest. The judicial responses move from total repudiation of disobedience to partial protection when its manifestation comes close to the current definition of protected speech under First Amendment doctrine. In Walker v City of Birmingham, Alabama, the Southern Christian Leadership and Martin Luther King called for mass rallies on Good Friday and Easter Day 1963, to protest the breakup of previous rallies and the arrest of protesters under a local law that required advance local authority permit for public protests. As these local laws were often found wanting under constitutional challenge, the City authorities obtained a temporary injunction the day before the rally enjoining the group from participating or encouraging it. King and eight others went ahead with the rally, were arrested and cited for contempt of court. The Supreme Court upheld the convictions, despite the fact that the local law demanding prior permit for marches was found to be unconstitutionally vague. The court’s reasoning fully justified the tactics of the Alabama authorities:

The rule of law that Alabama followed reflects a belief that [...] no man can be judge in his case, however exalted is his station, however righteous his motives and irrespective of his race, color, politics, or religion [...]. One may sympathize with the petitioners’ impatient commitment to their cause. But respect for the judicial
process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.\textsuperscript{48}

The court’s judgment was an elegant essay on the rule of law. The conflict was between the law \textit{tout court} and the institutional racism the protesters attacked. This way, law’s acceptance of appalling racism becomes a secondary matter to the civilizing influence of law; those protesting this grave legal injustice are presented as ordinary criminals disrespecting the law.

\textit{Brown v Louisiana} is another typical case. Five black people were convicted for sitting-in at a segregated public library in 1963. Justice Black, the most liberal judge in the New Deal and cold war cases, dissenting reversed his earlier position totally:

> It is high time to challenge the assumption, that groups that think they have been mistreated have a constitution right to use the public’s street, building and property to protest whatever, wherever, whenever they want, without regard to whom such conduct may disturb [...]. The peaceful songs of love can become as stirring as provocative as the Marseillaise did in the days when a noble revolution gave way to rule my successive mobs.\textsuperscript{49}

If we turn to Britain, the last thirty years have been characterized by the increasing criminalization of protest.\textsuperscript{50} A number of Public Order and Terrorism Acts increased the police powers to restrict protest, “kettle”, arrest and remove protesters and attack alternative life-styles.\textsuperscript{51} This has been accompanied with increasing police violence against protesters, particularly green activists and students.\textsuperscript{52} In 2008, a jury in Maidstone acquitted six Greenpeace activists of criminal damage for occupying the Kingsnorth coalfield power station.\textsuperscript{53} But in 2011, twenty environmentalists were convicted in Nottingham for aggravated trespassing for planning to occupy the similar Radcliffe power station. Both sets of defendants argued that they had a lawful excuse or that their acts were necessary in order prevent the greater harm of death and serious injury caused by carbon dioxide emissions leading to climate change.

Why the difference? The defense of necessity or lawful excuse is legally disputed. Indeed in the Radcliffe case, the prosecution tried unsuccessfully to prevent it from being put to the jury. In the first case, the judge asked the jury to consider the line between legitimate protest and damage to property. The overwhelming evidence of climate change and the damage it causes was found more important than minor damage to the power station’s chimney. In the second, the prosecution argued that the defendants instead of taking direct action, they should have used their money to pay a celebrity to “front their action”; or, that they should have installed a biodegradable toilet in their homes as the prosecutor had.\textsuperscript{54} It has been some time coming but we have moved from Antigone to Bono, from Rosa Parks to Bob Geldof and from the agora or the forum to the shopping mall.\textsuperscript{55}

\textsuperscript{48}388 US 307 (1967), at 320-1.
\textsuperscript{49}383 US 131 (1966), at 162,168.
\textsuperscript{50}Shantz 2012.
\textsuperscript{51}The controversial tactic of “kettling” involves the police surrounding protesters in a small area and not allowing them to leave for long periods of time. In \textit{Austin and others v UK} [2012] ECHR 459, the European Court of Human Rights found that the practice does not violate the protesters’ liberty.
\textsuperscript{52}Martin 2012, 17; Power 2011, 412.
\textsuperscript{53}Vidal 11 September 2008.
\textsuperscript{54}M. Schwarz 16 December 2010.
\textsuperscript{55}In a 2013 case, the court convicted but gave no custodial sentences to twenty-one activists who occupied a West Burton power plant in Nottinghamshire. Several protesters remained strapped to a cooling tower at the site for more than a week. The power company tried to bring a civil suit against them demanding £5 million in compensation. It was withdrawn after 64,000 people signed a petition against the power
In general terms, law’s reaction to disobedience moves on a relatively short spectrum. At one end, dissent is seen as somewhat justified and disobedience becomes a defence against conviction or is offered in mitigation in sentencing. Secondly and most often, the law treats disobedience as a normal criminal offence bypassing the protesting motives. Finally and regularly, disobedience is seen as a threat to the social order. The dissidents are demonized by courts and media and receive harsh sentences for deterrence. Disobedience case-law tells us more about the state of the nation than about law’s consistency. The cases reflect the fears of dominant powers that their hegemony is threatened. Law’s arsenal is mobilized not so much for punishing law-breaking but for indicating the threat perceived by the dominant forces and the limits of official tolerance. In this sense, disobedience cases are primarily ideological: they depoliticize dissent and disarticulate the collective nature of resistance. Prosecutions freeze a particular event in an ongoing sequence, focus on the individuals involved in the incident with scarce reference to the mass character of action. They disregard the dissidents’ motives focusing exclusively on their intent. This way, ideological and political struggles turn into technical legal disputes and lose their collective character and political import.

More generally the debate about the legitimacy of disobedience, a debate that had died down after the Seventies and returned recently, is part of a wider ideological antagonism. Attitudes are influenced by the views of commentators about the justice of the cause. Those who support state policies tend to emphasize the illegality or violence of acts of resistance. This allows the debate to be diverted from the content of the grievance, from race discrimination, war, the catastrophes of deregulated capitalism or austerity, into an argument about the majesty of the law or the acceptability of violence.

Let me conclude this part with a controversial point: Resistance is first and foremost a fact not an obligation. It is not the idea or of justice, equality or communism that leads to resistance but the sense of injustice, the bodily reaction to hurt, hunger, despair. The idea of justice and equality are maintained or lost as a direct result of the existence and extent of acts of resistance. Indeed resistance is a law of being. It is internal to its object. From the moment being takes form or a power asymmetry is established, it encounters resistances, which irreversibly fissure and twist it. In this sense, whatever the legal impediments and punishments, resistance emerges every time that people say “enough is enough” “we cannot take it any more”.

5 The Morality of Disobedience

Let me finally turn to the phenomenology of disobedience and resistance. For the ordinary person, disobedience is the deeply moral decision to break the law. It is the strongest mark that the morality of citizens has not atrophied. It happens when someone reaches breaking point: «enough is enough – I can’t take it any more» is the cry of the dissident who is prepared to risk punishment. It may follow an extreme injustice, like the police killing of Alexis Grigoropoulos in December 2008 in Athens or of Marc Duggan in London in August 2012. Alternatively it may result after a series of humiliations that eventually exhaust moral tolerance as was the case with the civil rights or anti-austerity movements. In normal circumstances, morality and legality represent two different types of overlapping but not identical duty: the external duty to obey the law (in formal terms a heteronomous duty) and the internal moral
responsibility that binds the self to a conception of the good (autonomy). Conflicts are usually solved in favor of law. In disobedience, the duties collide and morality takes over. If both morality and legality become simple obedience to external codes autonomy dies. The duty to obey the law is absolute only when accompanied by a free judgment that the law is morally right and democratically legitimate. If that were not the case, Hannah Arendt sarcastically comments, Kant’s categorical imperative would read: «Act as if the principle of your actions were the same as that of the legislator or of the law of the land». It would be the perfect maxim «for the household use of the little man». This is of course the credo of positivists and failed governments. The autonomous citizen does not just obey the law; she also judges the “legality” of the law and its relationship with justice. In acts of disobedience, autonomy and existential freedom temporarily coincide.

The decision to break the law is hard, unavoidable and traumatic at the same time. Resistance on the other hand is collective; it is addressed at everyone and aims to reconstruct the hurt community, writes Etienne Balibar. But «at the moment of decision, of the risk of making a mistake» that will be paid by all, «the subject is facing just himself». At such moments, the self is wrestling in solitude. What makes an ordinary person take such a decision? Radical philosophy must give an account of the motivational force to follow morality and break the law. Without such an account and without a conception of the ethical and political self, moral reflection becomes cynical theorizing. Simon Critchley, following Alain Badiou, has argued that the disobedient subject «commits itself ethically in terms of a demand that is received from a situation, for example a situation of political injustice». The “demand” arises in specific circumstances (the killing of a young man, a deeply unjust policy) but is addressed in principle to everyone and anyone. The moral force of positive law derives from its universal form, which allows its application to a myriad future cases. The moral demand, on the contrary, draws its force from the content of the situation, which acquires universal form. Law operates deductively, from norm to fact, situational morality inductively. The moral demand’s universality makes it formally equivalent to the law but, unlike law, this is a “situated universality”. It emanates from a unique instance or event that requires a response engaging potentially everyone (the rejection of police brutality or the claim to equality). To put it differently, the moral act responds to a wrong that takes the form of a concrete universal. «Wrong institutes the singular universal, a polemical universal, by tying the presentation of equality, as the part of those who have no part, to the conflict between parts of society». Those who remain true to the demand become moral subjects. The wrong, its demand and the moral subject emerge together, Critchley claims. It is not previous edification or ideology that creates the radical subject but his answer to a unique event and its moral “call”.

Critchley’s argument emphasizes the moral significance of the situation. Philosophy knows, since the Platonic dialogues, that the rational acceptance of morality’s demands does not lead necessarily to moral action. «I may know the good», says Racine’s Phaedre, «but I keep following evil». The same applies to radical action. The link between radical ideology and militant action is fragile. The decision to disobey the law rises rarely on some radical road to Damascus. The militant does not emerge ex nihilo. Disobedient subjects cultivate, according to late Foucault,
l’art de n’être pas tellement gouverné. Unlike Badiou’s “subjects of truth”, they are prepared by values, beliefs and actions preceding the dramatic event. As Ernesto Laclau puts it, «the subject is only partially the subject inspired by the event [...] social agents share, at the level of a situation, values, ideas, beliefs, etc. that the truth [...] does not put entirely into question». Reasons and unreason, emotions and intuition, memories and testament give rise to acts of insubordination. Disobedience negates, resistance creates. The importance of disobedience lies precisely in starting the process of production of new subjectivities. It raises people from takers of orders and commands into self-legislating citizens. If power operates as control of conduct, counter-power attacks the channeling of conduct. Puerta del Sol, Syntagma or Taksim become places where people state that «we don’t want to be ruled like that».

Cynicism and nihilism is the common pathology of rulers for whom punishment is unknown and the common good is often a euphemism for personal interests. The moral quality control of disobedience, on the other hand, is strict. The first test is the willing acceptance of the risk and possibility (nowadays probability) of punishment. The second brings the specific grievance or demand under the control of a ethic-political principle. The moral litmus test of disobedience is simple: can the good or principle, the disobedient obeys, be addressed to everyone and anyone? Can it be universalized? The answer takes account of normative and empirical considerations, the legitimacy of democracy and the moral validity of the rule of law. It is a tough anxiety-producing moral test; if absent, it is replaced by empty moralizing, which turns private vice into public virtue.

There is nothing wrong in principle in a campaign of disobedience that starts from particular interests. Finite demands can become “infinite” and transcend their immediate concerns. «Infinite’ here does not consist in the demands that I make, but in finding something in the situation that exceeds its limits [...] the finite demand around which a struggle organizes itself extends itself beyond the limits of the identity of the concerned group and becomes something more radical and far-reaching». In this sense, the specific campaign opens to demands that leave behind local interests and specific identities. Disobedience is transformed from a personal moral act to collective political resistance. It disarticulates actions, behaviors and comportment from the political economy of consumption and debt and, the moral economy of personal responsibility and freedom of choice. This is what power fears most.

After a long period of low-key activity, syncopated by acts of civil disobedience, the right to resistance, Balibar’s “right to rights”, has returned. Resistance challenges current policies but goes beyond them to the institutional arrangements that allowed their dominance. Resistance is both a fact and a right. This right does not derive from positive law, domestic state or international. The “higher” law justifying resistance is both immanent and transcendent. Resistance emerges in the historical conditions of crisis and the response of people all over the world. Its normative force and form as “right” draws from a conception of the good that lies on the horizon of our current state. Two conflicting conceptions of the universal characterize our age. The first accepts the order of things and identifies ought and is or, according to Hegel, the rational and the real, dressing the dominant particular with the mantle of the universal. The dissident will rests on a diagonal scission that divides the rulers from the ruled and the excluded. As a negation of the existing order, it forms an agonistic universality. It does not emerge from neo-Kantian philosophy but from the struggle of people excluded from social distribution and invisible to political representation. The right

---

60 Rawls 2004, 134-5.
61 Critchley 2007, 244.

to resistance, like all proper rights, is both real and ideal. It “sublates” civil and democratic disobedience both taking up and transcending them. Its appearance in authoritarian as well as democratic regimes turns ours into the age of resistance.

6 The Right to the Event

The eternal return of resistance and revolution despite the desperate attempts to ban it indicates that right has two metaphysical sources. As a claim accepted or seeking admission to the law, right is a publicly recognized will, which finds itself at peace with the world, a world made in its image and for its service. But secondly, right is a will that wills what does not exist, a will that finds its force in itself and its effect in a world not yet determined all the way to the end. This second right is founded contra fatum, in the perspective of an open cosmos that cannot be fully determined by economic, political or military might. It eventually confronts domination and oppression, including those instituted and tolerated by the first legalized will. These two conceptions of right or the universal confront each other as the two sides of law. On one side, an acceptance of the order of things raised to the dignity of general will, dresses the dominant particular with the mantle of the universal. The second universality is founded on a will created by a diagonal division of the social world separating rulers from the ruled and the excluded. It forms an agonistic universality emerging from the struggle of the excluded from social distribution and political representation. The excluded, Hegel’s contemporary rabble, are the only universal today in a legal and social system that proclaims incessantly its egalitarian credentials. Legal right enforces individual will. The second type of will matures into the collective resistance of a “we, the people”. As long as the dissidents ask for this or that reform, this or that concession, the state can accommodate them. When will no longer recognizes itself in existing social relations and their legal codification, disobedience becomes a collective emancipatory will. What the state fears is the fundamental challenge by a force that can transform the relations of power and present itself as having a “right to law”.

The right to resistance can be written off constitutions and bills but cannot be wished away. Permanent revolution is the condition in modern science and art. In politics, it has turned into a ghostly normativity, a void at the core of law that keeps it from ossifying. Despite the reservations of liberal philosophers, revolution is not only radical socio-political change. It has become a normative principle, the modern expression of free action against the decaying and suffocating order of the world. The “right to resistance to oppression” may have been deleted from most constitutions, but it remains the highest form of political freedom. Like the violence buried in the constitutional text, this right is like the ghost that supports all other rights and returns from time to time like the repressed. The normative weight of this right is felt every time a Bastille is taken, a Tahrir or Syntagma Square filled. In the same way that the psychoanalytical real, a void in human existence, is both impossible and banned but sustains subjectivity, the right to revolution is the void that sustains and transforms the legal system. It is the paradoxical “right to the event” or the “pull of the real”, which eternally returns as an important moral command. Without it the law becomes ossified, sclerotic, moribund. Paraphrasing Alain Badiou, we can say that rights are about recognition and distribution among individuals and communities; except that additionally there is an indelible right to resistance and revolution.

63 Douzinas 2000, fn 18.
References


Metodo. International Studies in Phenomenology and Philosophy

Ranciere, J. 2009a, Disagreement, University of Minnesota Press, Minneapolis.