On the nature of the right to resist: a rights-based theory of the ius resistendi in liberal democracies

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CHAPTER III: THE OBLIGATION TO OBEY THE LAW

No regime has ever survived without the obedience, wilful or otherwise, of its subjects. The very constitution of a regime as a system entails the development and the enforcement of norms and mechanisms to ensure compliance with the authority's commands as means of preserving power and the very existence of the system. The strategies used to ensure compliance have taken different forms, from the threat of eternal damnation, to violent coercion, from recognition of different participatory processes, to pleads to loyalty based on primary human emotions that portray the state as "the Motherland, or the Fatherland, or the Founding Fathers, or Uncle Sam" (Zinn 2012)P911). In general terms, appeals to moral values, and to the duties of the good, law-abiding citizen, have served well the preservation of legal and political systems. Whether the Jewish *khata*, the Muslim *dhanb* or the Christian sin, most ideologies and religions continue to identify obedience with virtue, and disobedience with immorality.

The modern liberal notion of the obligation to obey the law is no different from that of the medieval notion of the *regnum legitimum*. Both affirm that it is of the nature of law to claim authority over its citizens and, in turn, it is of the nature of authority to demand obedience, which requires compliance, and not merely conformity, from those subject to it (Sevel 2018)P2)[171]. In the liberal formulation of the *regnum legitimum*, the King has been replaced by the law, the expression of the power of the sovereign, and rebellion has been replaced by external expressions of the right to resist, the manifestation of people´s power. Today, the ability to exert obedience from subjects, while nominally acknowledging their sovereignty, remains the key feature of a modern state that continues to function on the premise that to claim authority is to claim the right to be obeyed (Wolff 1970)P4) (Baaz et al. 2016)P140).

The obligation to obey the law (broadly understood), is considered by some as the most significant obligation that citizens have. This is in part consequence of the tendency of scholars to conflate respect for the rule of law with acceptance of the prevailing legal order (Scheuerman 2019)P52), which has derived into an equalization of the concept of law and that of state, and the merging of the concepts of the obligation to obey the law (in positive terms), with that of being a good citizen (in moral terms). That is, however, a false deduction. If disobeying a law does not make us bad citizens, and obeying the law does not necessarily make us good citizens, why do we obey?

[171] The legitimacy of the system depends on its ability to generate outcomes which are actually endorsed by citizens, and this means that citizens are generally motivated to act in conformity with the requirements imposed upon them by the law (Ellian and Molier 2015)P275).

3.1. Why do we obey the law?

In the western tradition, the debate around the obligation to obey the law re-emerged with force after the affirmation of the primacy of the rights of the individual as a constitutive principle of the emerging political organization. The enlightenment attempted to secularize public life through an innovative and disrupting theory that endeavoured to respond to the challenges of legitimation of power in the age of reason: the theory of the social contract. The social contract sought to establish the legitimacy of a new order based on an implausible agreement between power and the subject[172]. The theory of the social contract was disruptive because it meant that the will of the sovereign was no more the reason to obey the law. And it was innovative because it provided a philosophical explanation that continued to allow for the domination of a few, but with the formal acquiescence of the many. The social contract gave subjects the illusion of freedom and power, for people could identify the nature of the basic rules imbedded in the contact and demand their fulfilment independently of the decision, or the will, of the sovereign.

The question of obeyance to the law was central to the whole construct of the theory of the social contact[173] because it is a postulate that aimed at materializing the consensual understanding about the limits of sovereignties and the circumstances of validity of legal rules. For early advocates of the theory, particularly for John Locke, citizens (male property owners) had the obligation to obey the law for "every man that hath any possession or enjoyment of any part of the dominions of any government doth hereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government" (Locke 2017)P157). Locke believed that to give the individual the right to "plead exception" to the social contract would render the contract voidable (M. S. Green 2002)P121)[174]. This tacit consent, however, did not imply that citizens were to completely surrender their rights to the body social. The individual retained certain natural rights against the community, not

[172] I agree with Finnis in that the social contract theory fails in its attempt to "ground political obligation in a contract of self-imposed political allegiance, and which often fail to integrate rights to freedom with obligations both of self-restraint and of service to others" (Finnis 2002)P8).

[173] When I talk about obeying the law, I do not refer to coordination laws, but to those that affect fundamental rights, principles, dignity and moral stands, in other words, those that can assist in "articulating constituent power" (Niesen 2019b)P32).

[174] A void contract is null from the very beginning and cannot be enforced. A voidable contract suffers from a smaller defect and can be avoided through the action of the injured party (if it has been obtained by fraud, or misrepresentation), and can be void if the injured party goes to the court and asks for it. If declared void, its reality is eliminated, like it never happened. The social contract is voidable. It has defects that must be corrected. However, if continuous and successive attempts of society (the injured party) to seek redress for those failures do not find remedy, then the injured party could claim that the contract is not voidable, but void.

as pleads for exceptions, but as rights that were inherently reserved owing to the individual´s human nature.

Locke´s view about the generality of the contract and the preservation of men´s freedom created a paradox when disagreements between individuals and the state about the violation of a reserved right arose[175]. If the individual resolved the dispute whether a violation had taken place or not, then there would be no political authority, for authority would be denied the power of judging and punishing that violation. If the state decided, then there would be no freedom, for the individual would be deprived of her liberty to decide which rights had, or had not, been surrendered to the state[176]. This conundrum is still not resolved.

Today, the liberal claim to compliance is largely based on the principle that legality and legitimacy are equivalent notions that, together, form the foundation of a seemingly fair system that entitles the order to demand obedience. In illiberal systems, officials need to ensure a high correlativity between disobedience and punishment, otherwise the incentives for citizens to comply with the law diminishes. Theoretically, in liberal democracies it should be the opposite. A high correlativity between disobedience and punishment increases the incentives for disobedience because people associate the normative value of the law (and thus, its obligatoriness) with its justice and its righteousness. Something that it is not perceived as just carries no moral weight, and if the imposition of punishments manifestly bears very little relation to the legal culpability or innocence of each person, then the inclination of the law's addressees to abide by its requirements will dwindle (Kramer 2005)P184)[177].

Most liberal accounts on the obligation to obey the law are based on the understanding that there is a direct correlativity between political obligation and compliance, and that although political obligation is not entailed by law´s nature, it is, nevertheless, constrained by it (L. Green 2004)P523). Nonetheless, while the pairing of legality and legitimacy constitutes democracies' most important conceptual foundation, it is also its biggest vulnerability, for any disruption of that connection essentially challenges the balance between political authority and legal obligation, and hence, the very core of an order based on the claim that

[175] In concrete when rulers "exercise a power the people never put into their hands" (Locke 2017)P179).
[176] "If the government lacks [the authority to forbid civil disobedience], its authority as a whole seems to evaporate. For individuals have the power to escape its authority, even when their reserved rights have not been violated, simply by believing that these rights have been violated. On the other hand, if the government has the authority to forbid civil disobedience, then all limits on its authority seem to evaporate. For the government may do whatever it pleases to individuals, even when its actions violate their reserved rights, as long as it believes that these rights have not been violated (M. S. Green 2002)P117).
[177] In fact, the more subtle the rule, the less likely it is that it will generate ample resistance (Daase and Deitelhoff 2019)P24).

laws must be obeyed because they are essentially just and emanate from a legitimate authority.

The consequence of emphasizing legal obligations severed from the political responsibilities, of both people and the state, is a sort of hyper-constitutionalization of the entire legal system, a situation that generates a constitutional and a political anomie. The uncompromising focus on the authority of the constitution delegitimizes the normative authorities and the effectiveness and applicability of the norms because it detaches the legal and the political obligation, exposing in most cases the rigidity of the system and the lack of adequacy between legal objectives and social ends. The paradox is that hyper-constitutionalization, as a political recourse to emphasize rule by law, rather than securing the rule of law, provokes social non-compliance, thus defeating its very objective of a strict implementation of the constitution and of the law.

To save the order from this inherent vulnerability, liberalism has attempted to somehow disconnect the idea of legal obligation from that of moral obligation[178]. If one always depended on the other there would be no society because disagreements would find no means to be resolved, except for violence. Liberalism, in fact, vindicates unnatural appeals to obedience as necessary moral conditions for political existence on the basis that it is one thing to be morally obliged to obey the law, as a matter of principle, and another thing to actually obey it, as a matter of social practice. We follow the law, for the most part, because we have internalized the fact that we are supposed to follow it, because it is a habit, a social convention in place (Sillari 2013)P3) (Bedau 1961)P659), a custom that it is socially formed through a combination of practical and moral factors as "the sense of being morally required, and the sense of being legally required, and the sense of being required by social mores and social expectations, tend to merge with one another" (Zipursky 2006)P1231). We tend to be more compliant with the laws that we perceive are backed by the most power[179], and obey those laws that we identify as carrying the most negative or harmful consequences for noncompliance. We would rather obey a state law that carries a jail sentence, than a municipal law that carries an administrative penalty. We would usually comply with rules that may cost us a large sum of money (e.g., not obtaining a permit for construction), rather than with laws that may have a higher moral value, but that are seldom enforced (e.g., animal protection laws).

Citizens in liberal democracies usually consider that the obligation to obey the law derives, for the most part, from the representative legitimacy of the parliament that enacts the law,

[178] In the Rawlsian tradition, some actually argue that by accepting the legitimacy of the law, the objector may be able to separate her personal objection to the law, from her political objection (Hutler 2018)P73).

[179] Compliance involves doing what the authority commands because the authority commands it, not because the subject necessarily recognizes the authority of the normative issuing institution (López Cuéllar 2011)P150).

for we have been told that in a regime of separation of powers, the legislative has the monopoly of law-making. That is clearly not the case. The executive power, administrative and multinational bodies, transnational corporations, or other local or international agencies all meddle in the business of law and rulemaking. The concept of institutionalized normative systems competing for citizens' loyalty goes hand-in-hand with the idea of simultaneous claims of authority (López Cuéllar 2011)P153). In modern societies, legal and political pluralism challenges the delicate balance between political authority and legal obligation, and questions traditional theories of compliance that portray consent as a direct correlation of the legitimacy and the representativeness of the lawmaker.

Those that consider that deliberative democracy has replaced the social contract theory as the prevailing account of political legitimacy, reject the notion that citizens have an overriding moral obligation to obey the law, because they do not believe that the citizen's relationship with the state is based on a contractual agreement. These scholars argue that although the citizen may accept some of the benefits of society, the acceptance in no way constitutes a promise, or an obligation, to perform in conformity with all of society's laws (Alton 1992)P51). In other words, since we have not (implicitly or otherwise), entered into a contract with most of the agents involved in law-making, or have in any way acceded to be bound by the rules enacted by non-representative (or not tacitly accepted) agents (e.g., regulatory bodies, international organizations, transitional corporations, or non-public interests), we cannot rely on traditional theories of consent that have sought to vindicate the basis of our submission to the legal order on a supposed agreement to explain why we normally obey the law. So why do we do it?

According to Susan Tiefenbrun, scholars have grounded the question of the obligation to obey the laws in six different legal theories; the duty to obey the law out of gratitude to an existing legal system (Socrates); the duty to obey the law because of the individual's contractual agreement or consent to obey (John Locke, Jean-Jacques Rousseau or Hannah Arendt); the duty to obey because of the negative consequences of disobedience (what most of us commonly call coercion); the duty to obey out of fairness (the fair play theory); the duty to obey in order to support just institutions (H.L.A. Hart and John Rawls), and the duty to obey in order to support one´s community (Ronald Dworkin) (Tiefenbrun 2003).

The fair-play theory of political obligation emphasizes that those who deny an obligation to obey the law in a just state take unfair advantage of others who submit to such an obligation (Dagger 2018)P78). I disagree[180]. Those that defend that the proper objective of

[180] One does not inherently consent to the system; one is born in it, and (mostly) consents to its rule because of the need of social interaction. Liberal democracies may be considered the closest, yet, to a "nearly just

law is to direct and coordinate human conduct, rather than to compel and constrain it (Marcic 1973)P104), also believe that laws must be obeyed, otherwise they would fail in their primary function, and inevitably, the lack of coordination would affect human conduct and order. For others, rule-following is understood as a regularity in the solution of coordination problems, an essential part of the mechanism to maintain the functions of the state (Sillari 2013)P7). Without the system, they argue, people would be subjected to the unilateral lawgiving, judgment, and enforcement of other private persons (Weinrib 2014)P717). This means that people could not just disregard the system or disobey its laws at the risk of inciting lawlessness and endangering their own freedom. Consequently, the obligation to obey the law derives from the presumption that government is necessary "to protect society from great evil" (M. B. E. Smith 1973)P265).

Because authority has a duty to protect society, positivists consider that the unqualified doctrine that an individual has the right to disobey any law he determines to be unjust "is simply a more sophisticated way of saying that a man is entitled to take the law into his own hands" (Johnson 1970)P7). Compliance, for this school, is merely part of the cost of making a constitutional democracy work. The duty to support just institutions, therefore, is what generates duties and obligations of citizenship (Loesch 2014)P1089). Hart used the notion of the internal point of view to preserve a philosophically tenable analysis of legal obligation that did not distort common sense (Zipursky 2006)P1229)[181]. He argued that along with its content-independent element, the duty to obey authority excludes deliberation, because a content-independent and deliberation-excluding duty to obey is the nucleus of the general notion of authority, and is the basis for legal authority (López Cuéllar 2011)P491-3). Hart and other positivists, however, maintained that there is always an element of basic justice and morality that must prevail since the "the certification of something as legally valid is not conclusive of the question of obedience (D. D. Smith 1968)P730) (Tamanaha 2005)P11) (Gandra Martins 2018)P328). Positivism, nevertheless, has oftentimes been unable to explain why anyone under an unjust, unfair, or unengaging system, even if formally labelled a democracy, would have an overriding political obligation to obey law[182].

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society". Yet gratitude is not necessarily the sentiment of many of the vulnerable, excluded, or working-poor citizens in democratic countries. Rather, I believe, it is a mixture of coercion, everyday needs, and their determination to be recognized that motivates people to obey. Not gratitude. It would indeed be excessive that, in systems deeply unequal and unjust, people would be asked to obey the law out of a sense of fair play.

[181] For John Finnis, Hart´s internal point of view is "the way of thinking of someone who treats a rule as a reason for action (and not simply as a prediction or a basis for prediction) (Finnis 2002)P27).

[182] Article 122-4 of the French Penal Code provides for an exemption from criminal liability for anyone who has performed an act authorized by law or regulation or ordered by the legitimate authority. However, there are two exceptions: criminal liability must be retained when the act of the legitimate authority was manifestly

Joseph Raz has taken an even more radical position, proclaiming that the right to rule entails a duty to obey (Raz 2012)P140), and that disobedience to the law is merely an action that undermines the government's ability to do good (Raz 2012)P148). For Raz, the moral obligatoriness of the law is directly related to the stability and to the order that it supports, although the extent of the obligation to obey varies from person to person (Raz 2012)P146). For him, the mere fact that an official declares that there is a legal duty implies that there is moral binding duty, even if the official that made the pronouncement does not believe in the moral bindingness of the duty (Kramer 2005)P182). Raz asserts that the "consent to obey is designed to bring greater conformity with the natural law and greater respect for the natural rights of men than is likely to be achieved in a state of nature" (Raz 2012)P153). For him, the essence of a legal order is not a norm-creating but a norm-applying institution (M. P. Golding and Edmundson 2005)P8) and, therefore, a non-coercive legal system is humanly impossible (Miotto 2020)P5), though logically plausible. Raz´s emphasis on the institutional as a necessity to set apart prosperous societies from the Hobbesian state of nature entails the acceptance of some sort of "consented coercion" from society.

In politics, coercion involves the manipulation of the tools of the system to impose, or to prevent the imposition of, one will over another will in the public domain[183]. If law is the representation of power, coercion is the actual expression of the discretional use of power when this power is unable (or unwilling) to set the conditions for consent. Coercion is the a-political constituent of the legal system. When coercion originates on the other side of the power spectrum, then it is simply labelled violence.

Coercion finds in Austin's hardcore command theory an appropriate conceptual justification[184]. The theory states that if one is politically obligated to obey the law, one ought to obey the law because of the law, not by virtue of the independent goodness of the law, or for the reason that the law requires, but because law itself commands it (Valentini 2018)(Sevel 2018)P5). When the law asks us to do, or to refrain from doing something, the reasons why we obey are irrelevant, "for authoritative orders do not even implicitly specify the reasons for which one must act" (Hershovitz 2011)P8). As Hans Kelsen argued, "legal

illegal or when, in accordance with article 213-4, the act authorized by law, regulation or legitimate authority leads to commit or to be complicit in a crime against humanity (Grosbon 2008).

[183] Certain expressions of resistance can also be a form of coercion (or of counter-coercion, if one will) intended to undermine the power of adversaries and pressure them to change course (Aitchison 2018a)P10), even if that course (e.g. the implementation of a law) is moral and legitimate. Coercion is nothing but a form of violence.

[184] Coercion and command are separate notions. Command, in its traditional view, "entails the subordination of the will of one person to that of another" because "law's distinctive normative force arises from, and is an expression of an unequal social relationship that is normatively charged" (Postema 2001)P485). There are hardly any instances in which people and the state (including the judiciary) are equal. Others define coercion as a "proposal" that people would not normally welcome, and which will make them significantly worse off if they do not behave that way (L. Green 2016)P19-20).

obligation is not, or not immediately, the behaviour that ought to be. Only the coercive act, functioning as a sanction, ought to be" (L. Green 2012)P3). The coercive command "do as you are told", is intended to instil a sense of infancy in society, where the "father state" commands us to obey, or else[185].

Although liberal democracies have also relied on a system of power backed by coercion to enforce legal obligations and to ensure stability (or rather, enforced stability[186]), theories of command are at odds with the principles of democratic practice, and with reason. In the democratic framework, normative ideals get their hierarchically superior status because their content is regarded as good, right, just or moral. The rightness of their nature is what gives norms the ability to impose duties on subjects[187]. In what is perhaps one of his most significant passages, Thoreau argued that if the injustice inherent in government "is of such a nature that requires you to be the agent of injustice to another, then I say, break the law" (Estrada Tanck 2019)P376)(Alton 1992)P43). With this, he instils the concept of disobedience with a profound sense of moral responsibility, self-respect, and intellectual autonomy.

The authority of power, on the other hand, does not necessarily derive from the norms that it applies, but on its ability to impose obligations on subjects, regardless of the rightness or the justice of a norm. Power does not derive from the content of the norms, but from extraneous circumstances that endow an actor to coerce others into complying. Oftentimes, therefore, the obligation to obey the law emanates from an external source rather than from the fairness of the norms, or even from the rational or moral acceptance by subjects of the bindingness of the rules. Democracy cannot reconcile the command theory with the principles of accountability and recognition.

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[185] Because coercive commands deny people´s autonomy and society´s sense of political maturity, the emphasis on the inflexible enforcement of law results in nothing more than an act of extraordinary dogmatism, pure injustice (Gargarella 2003), and injustice leads to resistance.

[186] In the last fifteen years, coinciding with the profound crisis of legitimacy of liberal economies, OECD countries have experienced a shift from a system based on consent to a return to more visible repression of increasingly broad sections of the population (Wood and Fortier 2016)P147).

[187] The conflict of conscience between obeying national law and upholding a higher ethical principle acknowledged by the international community has been articulated through judgements of the ECHR. In K.-H. W. v. Germany (Application no. 37201/97) of 22 March 2001, para 105 the European Court of Human Rights hold that "In the light of all of the above considerations, the Court considers that at the time when it was committed the applicant's act constituted an offence defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights". Decision as to the Admissibility of Application no. 2615/10 by Ludmila Polednová against the Czech Republic of 21 June 2011 "The Court also cannot accept the applicant's argument that she had simply been obeying the instructions of her more experienced superiors whom she had trusted completely. (…) Having already held that even a private soldier should not show total, blind obedience to orders which so flagrantly infringed the principles of national legislation but also internationally recognized human rights, in particular the right to life". In these particular cases, the Court criticized the applicants precisely for their inability to uphold a higher ethical standard contrary to the one affirmed by national law.

In fact, many scholars question Austin´s command theory because "the mere receipt of an order backed by force seems, if anything, to give rise to the duty of resisting, rather than obeying" (M. B. E. Smith 1973)P950)[188]. Defending Austin, Raz´s or other positivist' view of consented coercion would require empirical and conclusive evidence that security and stability result from absolute obedience, and this evidence is not readily available (D. D. Smith 1968)P710), nor likely to ever be[189]. Unlike consent, therefore, coercion carries a presumption of illegitimacy and a special justificatory burden (Miotto 2020).

Those that believe that it is a feature of our concept of law that law is coercive if necessary, though not necessarily coercive (L. Green 2016)P7), provide a more nuanced interpretation. In this approach, the authority's right to rule consists in having the power to change the subject's normative condition, if necessary, but this normative power, to obligate subjects to do as instructed at the risk of suffering reprisal, is only effective when it is legitimately asserted. We may disobey the law for different reasons, but we are nevertheless reliant on a system of rights that protects us from the indiscriminate and the excessive use of power. Legitimate power is constrained by the principles of democratic practice, despite our disobedience. This restrain must, however, be reciprocated, not only in the nature of our disobedience, but also in its form. Political liberalism holds that at least some kinds of disagreement give rise to the people´s, and not only the state´s, duty of restrain when they engage in political advocacy (Pallikkathayil 2021)P73).

Many of the above accounts about the obligation to obey the law are, nonetheless, limited (Caney 2015)P8). Legal scholars have frequently reflected the belief that the system is sustained though compliance, but have not, normally, addressed issues of moral and political allegiance to the order and people´s commitment to the values of the ideology. That has been left to political theory, as if legal theory was not part of political theory. And yet, our sense of obligatoriness to obey the law is determined, in large part, by the degree to which we internalize the ideological narratives about the obligation to obey the law. If we recognize that laws have a force of legal and moral obligation, then we accept, in principle, that the system that enacts them is politically or morally entitled to rule, to enact and to enforce laws. Our political allegiance, on the other hand, is contingent on our moral recognition of the order and its values, not only of its normative system, and cannot be

[188] Rawls argued that to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions, is itself a form of illegitimate force that men in due course have a right to resist (Rawls 1991)P121).
[189] On the contrary, some actually argue that "if emergency rule relies on securitization, such that exceptional measures are advocated as necessary responses to urgent threats, then disobedience can be seen as a step towards de-securitization and re-politicization" (White 2017)P8).

presumed from our compliance with the law[190]. One thing is to accept that one is morally bound by the order, and another is to consider the morality of the laws within that order.

Some suggest that if we do not accept that we owe political allegiance to the system, then we must accept the right of people to freely adopt the condition of outlaw (Koubi 2008). And yet, this argument does nothing to vindicate the value of the *ius resistendi* in liberal democracies. Being an outlaw is not just being noncompliant, is to voluntarily disengage from the political, the space where rights are formed and contested, and to renounce the capacity of being an agent (with will and reason). Both the duty to obey and the duty to disobey are associative obligations insofar as they originate in membership (Delmas 2015)P1145). It is the quality of that membership and the ability to engage in the political that defines whether one is morally obliged to obey the law as a political agent, not whether one simply chooses to withdraw from its political obligations or retract from the legal system. Jurgen Habermas argued that legitimate laws must be able to elicit enough quasi-voluntary compliance to maintain social integration. "The modern constitutional state can only expect of its citizens obedience to the laws if and in so far as it rests on principles worthy of recognition, in light of which that which is legal can be justified as legitimate and, if necessary, can be rejected as illegitimate" (Habermas 1985)P102). I am convinced, too, that the moral obligation to obey a particular law, and the legal obligation to obey that law are not, and cannot be, of equal intensity (Christie 1990)P1333). Not all laws are equal, and not all of them deserve the same consideration. There are laws, and then there are important laws. And there are rights, and then there are those that matter the most because their violation would significantly diminish the enjoyment of other rights or freedoms or damage the foundations of the democratic ideology. Obligation is not only a legal or a political term, it is essentially a moral term. We would not speak of the *prima facie* obligation to obey the law if we did not believe that there is a moral determinacy in that conduct, otherwise we would simply sustain that all laws must be obeyed all the time. The same goes for the moral imperative of resisting a *prima facie* immoral law. Michael Walzer argues that the key issue is not to justify disobedience against the background presumption of a moral duty to obey the law, it is, instead, to justify obedience to the state, when one has a duty to disobey (Delmas 2015)P1146). Perhaps, as Candice Delmas argues, "given our less-than-ideal polities, obeying the law is neither the sole, nor necessarily the most important, of our political obligations" (Delmas 2019a)P106). There are other moral obligations that matter most.

[190] Some of the laws the state makes and enforces are not morally binding for their purported subjects (Viehoff 2014)P338).

In any event, if we have a moral claim that laws must be (*prima facie*) obeyed, is because we also have a moral certainty that those laws are (*prima facie*) just. We do not murder or torture not because the law says so, even if that law is *prima facie* just, but because of the moral prohibition that we recognize as binding (Hershovitz 2011)P18). The moral character of the law, therefore, goes hand in hand with the moral discretion of people to obey it, as anyone's obligation to obey any law is pretty clearly contingent on what the law happens to be (Bedau 1961)P662). Laws or commands that put a person in a direct conflict with her own freedom in a way that compliance with that law would annihilate her as a person (and as a citizen), are void of obligatory power, and must be resisted (Schwarz 1964)P129).

The legal acceptability of disobedience is thus closely associated with the acceptance of the moral imperative to not obey the law. Dworkin urged judges to engage in an open dialogue with civil disobedients (Delmas 2019b)P176) in an attempt, one thinks, to compel judges to understand the extra-legal (principled) perspective of a resistance engagement. If the law is doubtful, he argued, the citizen may follow his or her own judgment about obeying the law (in a prudent manner), even if a contrary decision had been reached by the highest court (Alton 1992)P66). Dworkin maintained that if considerations of justice are critical to the deliberations that integrity demands, they must outweigh any contrary arguments of political morality when the threatened injustice is grave, and contended that the unjust law may be invalid because it fails to reflect the best (moral) reading of the principles that ground the law (Bellamy 2015)P7). Considerations of justice must be taken, at least, in the case of each interpreter who wishes to preserve her allegiance to law without sacrificing her prior commitment to ideals of freedom and justice, a commitment that forms the very ground of that allegiance (Allan 2017)P12). So if the basic justification to obey the law is that the law is just, then it follows that the violation, or noncompliance, with a law that serves purposes contrary to those that justify its existence is comprehensible, and even worthy (Estrada Tanck 2019)P391)[191].

Considerations about the strained relationship between obedience and the principles of democratic practice, freedom and justice, as well as the changing roles of the state and the subjects in a democracy, have led some to conclude that although there is a moral obligation to obey the law, there is no *prima facie* moral obligation to obey the law, and that even though one has a moral obligation to obey the law, that does not mean that one must necessarily obey the law (Christie 1990)P1312)[192]. Some deny the existence of an obligation

[191] I agree that the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law (Quigley 2003)P11).

[192] For Raz, there is a voluntary *prima facie* obligation to obey the law. He consents, however, that if it this view is no longer true today is because the societies we live in are less homogeneous, more troubled about their own identity, and about the role of government and the law in the social fabric (Raz 2012) P155).

to obey the law on the ground that no state can be just, and that nothing could possibly justify a content independent obligation to do as the law requires, since this would violate our duty to be autonomous and always act on our judgement (Wolff 1970)P34). In other words, the lack of critical interrogation makes us lose our essence as rational beings, and therefore, as political agents. Even more, many contemporary legal and political philosophers have abandoned altogether the effort to demonstrate the existence of a blanket obligation to obey the law (Kramer 2005)P181) (L. Green 2004)P515). The current complexity and interdependency of political, social and legal systems, and of what some call "philosophical anarchism" (Dagger 2018), results in an ever-increasing exercise from scholars, but most significantly from citizens, to re-evaluate the moral and even the legal obligation to obey the law, and with it, question the political foundations of the order. This is a fundamental argument, because if we were to agree that there is no such blanket obligation, then we would be right in assuming that external expressions of the *ius resistendi* would not require any moral or legal justifications, simply because it could not be assumed that there is a moral obligation to obey the law (Milligan 2013)P144). To the continuing philosophical quest to determine the conditions for a democratic liberal state to produce legitimate laws and policies, we are now adding the quest to determine those conditions in a changing society.

Legal obligations are associated with the law. Moral obligations are not associated with the law, but with the principles that underly the law. I sustain that there is a *prima facie* obligation to obey the outcome of our own artificial construct, the law, because we, as a body politic, declare and accept so through social mores. A *non prima facie* obligation to obey the law would infer that we created something that we reject from its inception. It would be senseless to do so because it would be "self-contradictory not to keep a promise one has made" (Finnis 2002)P6). That does not mean, in the least, that the *prima facie* argument of obligation suppresses the freedom of the body politic (in its whole or in part), to resolve that there is no obligation to obey the law when the outcome of the artificial construct (the law), violates the fundamental terms of the original agreement by which we declared and accepted that the law must be obeyed (our moral recognition of the order and its values), or when the body politic (in its whole or in part), is denied the recognition as an agent able to amend the artificial construct that violates primary (non-construed) rights.

This argument does not compromise the legal order. Not obeying *a* law is a concept that legally speaking is not incompatible with *the* law[193], as non-cooperation in certain matters is not inconsistent with continued cooperation in others (Honoré 1988)P53). But even if we

[193] There seems to be no inconsistency in saying that the requirement to obey the law can have exceptions built into it (Davis 1993)P45). In fact, for some political theorist civil disobedience constitutes "one of a short list of exceptions to an otherwise binding obligation to obey the law" (Pineda 2019)P2).

disobey *the* law (understood as the actualization of a power), it does not mean that we reject the legal order[194]. Although a measure of compliance with the law is a necessary condition for law, it does not follow that all legal duties and obligations are necessarily enforceable, since the conditions for the required measure of compliance may arise from sources other than legal enforcement (Herstein 2013)P10). In other words, while legally speaking the nature of *the* law (and of the legal system), requires compliance, the fact that some laws (or their corresponding duties) are not complied with, does not render the law (as a concept), or the legal system invalid, because other considerations (themselves forming part of the legal system, such a principles), create complementary conditions for obeyance, not only for compliance.

Some argue that if a man can only obey and not disobey, he is a slave; if he can only disobey and not obey, he is a rebel (Falcon Tella 2008)P67). If the nature of power is to rule, the nature of man is to resist being ruled. It is in man´s nature to question obligations that are external to his will, but it is also in his nature to examine whether complying with those external obligations can harm his, and his group's, political, social or physical survival[195]. Obedience and disobedience, following or breaking the rules, are political rational acts that cannot be simply justified on dogmatic arguments.

I hold that there is a middle ground between the tenacity of moral self and the submission of an automata. My position on the *prima facie* obligation to obey the law recognizes the rational agents´ obligation to comply with laws that are considered important for the functioning of basic coordination mechanisms of society (accepting obligations outside of man´s will as he acknowledges that their acceptance improve his chances of survival as a social agent), while recognizing his legitimate right to resist laws that directly and negatively affect his normative status and the basic values of the political order (dignity, justice, freedom, equality, recognition…), conditions that determine man´s chances of survival as a moral agent. If one cannot demand obedience for the mere fact that an obligation stems from the will of power, one cannot justify resistance just because that obligation stems from the will of power.

3.2. Blame it on the state.

Rousseau argued that "at the moment the government usurps sovereignty, the social pact is broken, and all the ordinary citizens, recovering by right their natural freedom, are

[194] Resistance is not about a Marcusean "great refusal", but rather, as Foucault argued, about a plurality of point of resistance (D. C. Barnett 2016)P269).

[195] "The nature of human beings is such that fulfilment is a matter of self-determination by free choices (and accompanying judgments of worth)" (Finnis 2002)P37).

compelled by force, but not morally obliged to obey" (Lippman 1990)P355)[196]. When the sovereign's commands violate the basic laws of the polity (established in the second contract), the obligation to obey the command disappears (Maliks 2018)P452). The traditional construction of the social contract establishes a direct correlation between non-compliance (of the state) and resistance (of the people), because it assumes that when the state breaks the basic principles that sustain the ideological order, then there is nothing left on which to ground the citizen's duty to observe the rules (Lovett 2015)P40). When the bonds are broken, it means that the system has failed in its enterprise of subjecting human conduct to the governance of rules (Lovett 2015)P2)P5), and by violating those principles and rules, the system itself legitimizes the existence and the exercise of the right to resist (Ugartemendía 1999)P215).

Scholars have traditionally considered that the social contract is broken if the state does not fulfil its obligations[197]. But then, except for revolution, people can never really break away from a neglecting state. If the (second) social contract is, theoretically, an agreement between two parties (between people and the state), should not we consider that the violation by any of the parties (whether people or the state) would (at least technically) void the contract[198]? Why are we still subjected to the contract, and to the duress of the authority of the state, even if we purposedly endeavour to free ourselves of the pact by expressively violating its terms (that is, by disobeying the law or challenging the authority)? The Lockean paradox was never a paradox. The consent-based nature the social contract served as a basis to vindicate, in rational terms acceptable to the people of the enlightenment, the inexorable submission of the individual to the decision of the authority about the degree to which reserved rights, and which ones, were (and are) actually reserved. With the social contract, people continued surrendering their sovereignty, albeit to a kinder form of Leviathan. Perhaps this softer appearance of the Leviathan could not forsake Rousseau's "ordinary citizens", since it was never meant to protect them. Perhaps the government could never usurp people´s sovereignty because people were never meant to retain it. And perhaps the

[196] In other words, when sovereignty has been usurped by forces that are not the intended original signatories of the social contract (non-public interests, unaccountable officials, multinationals, etc.) that do not have the interest of the common good as purpose, then the contract invalid.

[197] There are of course different levels of obligations of the state, and not all of them warrant the breaking of the contract.

[198] The purpose of the question is to expose the shortcomings of consent theories and the inherent inequality they perpetuate. Criminal law punishes behaviors forbidden by the law. But criminal law does not provide an answer to the overall question of responsibly of men in fulfilling their part of the social contract beyond individual responsibility for acts contrary to positive law. The *ius politicum* does not provide specific reasons, either, as to why if men (as the body politic) break the agreement, the agreement is not broken.

contract never intended to count those that were not in a position to directly consent to it through the exercise of power[199].

Because the social contract renders people powerless to free themselves of the agreement through predetermined means, the only alternative is oftentimes to resist. And because mainstream liberal scholarship has generally rejected the "right to", and instead has focused on demanding a "justification for", the burden of justification for the assertion of the *ius resistendi* has always cripplingly fallen on those that exercise their right. Many accept that responsibility for endangering the civil condition lies with those who revolt (Niesen 2019b)P34) and thus, the responsibility towards others is also theirs. In spite of the theoretical consensual basis of the social contract, and of the professed duty of the state in fulfilling its obligations, liberal states have traditionally been suspicious of any initiative which seeks to shift the emphasis to responsibilities (Clapham 2006). This has resulted in a system in which we are judged by the role that we play as duty-bearers (as good citizens), rather than on our capacity to assert our rights.

The doctrine of the liberal state has removed moral references to obedience to stress the need for (good citizen) compliance, and through a logic of market choices (and economic survival), has kept people excessively occupied and preoccupied with the immediate to insist on their rights. Those that have insisted, have always felt the pressure to justify their actions. Those that have asserted their *ius resistendi* to insist even further, have always been confronted with the argument that whoever wants to morally appeal to the right to resist has to bear the burden of justification and the burden of proof (Mirete Navarro 1999)P278). But why? Why must the individual engaging in disobedience as a result of an external condition for which she is not responsible bear the burden to justify an action which seeks to redress the injustice? Why shouldn't the initial justificatory burden be borne by those that oppose, arrest, try, convict, sentence, and punish the conscientious disobedient? (Bedau 1972)P185). Instead of resisters having to disobey the law and bear the legal and political burden for doing so, why not insist that the state do its part? Why not hold the state accountably for its own errors?

In a nearly just society with functioning institutions, fair and inclusive laws, independent powers, and genuine concern for the common good, there would hardly be any need for resistance[200]. Most people agree that a human artifact that is immoral and illegal creates no duties or obligations, and thus it can be safely dismissed. For Rawls, the principle of fairness does not generate any obligations in institutions that are not "reasonably just" (Rawls

[199] After all, the basic feature of a contract is that it is enforceable (Roberts 2004)P225), and only those with power are able to enforce it, or to preclude its enforcement.

[200] Clearly, the right of individuals and groups to resist is in abeyance so long as the rule of law functions without friction (Marcic 1973)P108).

1999)P96) and vice versa, when the basic structure of society is reasonably just, we are to recognize unjust laws as binding[201], provided that they do not exceed certain limits of injustice, or when the burden of the injustice falls on certain minorities, or when that law that infringes on certain basic liberties guaranteed to the people (Rawls 1999)P308-310-312). Many also share the view that there is no constant need to disobey the law or to challenge the political order as long as the oppression has some degree of Rawlsian acceptability, in the sense of being "bearable". A liberal nearly just society requires obedience, and only in situations where noncompliance would withhold benefits from someone or harm the enterprise (M. B. E. Smith 1973)P957), disobedience could be considered[202].

Liberalism holds that states have duties in respect of their citizens, and citizens have them in relation to the state. These duties must be fulfilled, according to Fuller´s principles of legality[203], as specific principles that must necessarily respond to the constraints of reciprocity and of good faith, that is, in full compliance with the principles of democratic practice, accountability and recognition. In other words, it requires that the state be responsive (J. Butler 2009)P50)[204]. Although individuals and states are encouraged not to exercise their legal rights in ways that violate moral norms (Wenar 2020), the increasingly blurry terms of the moral boundaries of liberal democracies create the grounds for disputation of the moral rightness of normative standards, and with it, the grounds of the system that sustains the legality of the norms. In democratic theory it would then seem pointless to examine the ethical obligation of the individual to obey the law without referring to the ethical obligations of authorities to do so, ethical obligations that "even beats their constitutional obligations" (Pelloni 2000)P4).

The state is not infallible, it cannot be[205]. And while being the maker of an artifact (the law) does not provide the legislator, the enforcer or the adjudicator "with a grant of immunity

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[201] And in case we are uncertain whether a society is reasonably just we apply the principle that "*lex in dubio praesumitur justa*", when it is doubtful, the law is also presumed to be just (MacGuigan 1965)P124).

[202] Everyone has the right, and especially the responsibility, to identify their own thresholds of bearability, and to make their own political, strategic, and ethical choices in that regard (Conway 2003))P511). The state does not have (or should not have) delegated authority to choose the threshold of acceptability of injustice for us, and while perceived injustice cannot serve as a *carte blanche* for anyone to disobey the law, as it would mean anarchy, most laws assigning thresholds of acceptably of an injustice, are unjust and violent in themselves.

[203] For Lon Fuller, compliance with the law requires that the legal subject must be able to anticipate that government will itself abide by its own declared rules when it comes to judge his actions (Postema 1994)P369).

[204] It seems, however, somehow illogical to believe that power would be subjected to its own assessment regarding its own behaviour and declare itself deviant. To suggest that the state is completely bound by the law, or the constitution in the same way that citizens are, something over which the state has the power to amend, it amounts to a paradox ((Majumdar 2009)P22) because power is, after all, the capacity to enforce rules on everyone, except on oneself.

[205] In its ruling 238/2012 of 13 December 2013 (BOE núm. 10, de 11 de enero de 2013), para 7, the Spanish Constitutional Court reaffirmed its view, expressed in several other rulings, that "The mere possibility of a

to error" (Thomasson 2007)P64), being the maker of the artifact does provide the legislator, the enforcer, or the adjudicator with a certain immunity from their own error, an immunity that it is often at odds with the principles of democratic practice. The lack of state responsibility and responsiveness endangers democracy because the political is then negated. And when the state fails to create the conditions that enable the enjoyment of rights and freedoms in a common space, or appallingly restricts that space, some suggest that that situation may loosen the proportionality requirement of inflicting defensive harm against the state and render it liable to revolutionary attack (Kapelner 2019)P445).

While not reaching the point of endorsing revolution, many scholars have vindicated the *ius resistendi* as a response of the failure of the state to live up to its responsibilities. For Tony Honoré, the special feature of the right to rebel as a counter-social right is that it is predicated on a breach of duty on the part of the state, so serious and sustained, that it can properly be treated by the subject, if he so chooses, as dissolving the bonds between them (Honoré 1988)P53). Dworkin argues that when the state passes a law or creates a situation that infringes a fundamental moral right which an individual has against the government, the individual has the right to disobey the law, because the government does wrong in infringing that right. Such a fundamental moral right exists when the right is necessary to protect the individual's dignity, or his standing as equally entitled to the concern and respect of the law (Davis 1993)P47). Habermas considered that when the representative system breaks down, "it puts its legality at the disposition of those who are in a position to care for its legitimacy. Whether this situation exists, cannot with any consistency be made dependent upon the determinations of a constitutional state organ" (Habermas 1985)P106). For others, "state sovereignty can be partially bypassed only as a state stops fulfilling the basic responsibilities and functions that go along with sovereignty" (Fixdal and Smith 1998)P303). John Simmons contends that when those injustices exceed reasonable limits, governments forfeit the rights with which they were entrusted, and "no longer have any moral standing beyond that of a powerful bully" (Simmons 2010)P1811)[206]. Others proclaim that "when the duty bearers fail in their responsibilities to right holders, the rights-holders are entitled (in certain yet-to-be-fully-specified conditions) to enforce their own rights" (Caney 2020)P7) and still, that claims of violations of rights are, in their very nature,

tortious use of the rules can never in itself be sufficient reason to declare them unconstitutional, because although the Rule of Law tends to replace the government by men with the government of laws, there is no legislature, however wise it may be, capable of producing laws that a ruler cannot misuse". A constitutional court thus recognizing the politization (and its lack of preventive action) of the law. See also Spanish Constitutional Court rulings STC 58/1982, de 27 de July, FJ 2, SSTC 132/1989, de 18 de July FJ 14; 204/1994, de 11 de July, FJ 6; 235/2000, de 5 de October, FJ 5; y 134/2006, de 27 de April, FJ 4).

[206] The receipt to restore the trust of people in the system is straightforward: enhance democratic governance and the rule of law by strengthening transparent and accountable governance and independent judicial institutions (Our Common Agenda 2021)P64).

grounds for dissent and, other things being equal, disobedience and forms of resistance, "the claimants of rights themselves bearing a primary responsibility in making and enforcing such rights" (D. A. J. Richards 1983)P420-423). In these accounts, the moral obligation to dissent or to resist arises out of the nature of the acts or practices of those who govern (Wand 1970)P161) as claims against specific violations of principles or rights. The virtually total inability of ordinary citizens to affect decision making leaves resistance as the only possible response to the misuse of governmental power and to decisions wrongly made (Walzer 1960). There is, to put it briefly, a solid theoretical basis to vindicate the right, even the duty to resist[207], when the state does wrong, when it acts without accountability, uses illegal means[208] or is unresponsible to appeals for recognition.

Whether one subscribes to a consensual or a deliberative idea of democracy, it seems reasonable to concede that, in liberal democracies, political authorities cannot claim that all laws must be obeyed all the time by all people, because democracies cannot comply with all their obligations either. Yet even if one accepted that the state is not strictly bound by the law in the same manner that citizens are, it still must be bound to something, to some kind of standard of conduct, otherwise, as Saint Augustine argued, the state would be nothing but a bunch of thieves (Desmons 2015)P29). The likely explanation is that the source of the bound condition must be found in the extra-legal, that is, not in the letter of the law, but in the values of the ideology grounded in a broader conception of rights, an innovative concept that advances a distinct perspective on obligation, and on resisting.

3.3. Blame it on non-public interests.

With the shift from sovereign ruler to sovereign state, sovereignty was depersonalized (Tamanaha 2017)P160)[209]. With depersonalization, it becomes harder to categorize the object of a grievance, to identify the source of the injustice, or to explain an engagement which is generally aimed at a collectivized, multi-agency, multi-level sovereign. According to Foucault, one of the reasons that makes the explanation of a grievance more complex is that power now looks kind, but it is not, whereas in the past, it clearly wasn't kind, and therefore

[207] Some scholars wonder whether to resist is a duty or a right (Delmas 2019a) (Silvermint 2013) as a contribution to a larger debate about the moral duty to oppose injustice and oppression regardless of whether this action derives from a specific right, or if it constitutes a "moral virtue".

[208] For Marx, the very concept of illegality cannot be explained or reformed without addressing the central question of political power, the state and its methods of social control (Clement 2016)P137). Legality and illegality are man-made concepts.

[209] Some argue that because liberal democracies believe that the sovereignty of the state is now in good hands (not in a monarch's but in the people's hands) the problem of adequately limiting sovereign power presents itself with less urgency" (Van Duffel 2003)P14). That is, in essence, how democracies have banished the right to resist to the periphery of the system.

could encourage open rebellion and protest. Because now one can no longer see what the state is doing, it has become harder to find objective reasons to resist (Sokhi-Bulley 2016).

As the primary rights-granting and rights-recognizing agent, the state has traditionally been the object of acts of resistance. But we now live in a world with multiple sources of rights, where we find actual instances of political obligation without legitimacy, and where power is asserted by numerous actors who are not subject to public accountability. Power is not only a matter of designed public authority. For Thomas Aquinas, a key benchmark to measure the legitimacy of the government of the prince was to assess whether he worked toward the common good, and not for his private interest. This is a distinction that has always been hard to ascertain, and increasingly so since the liberal order intertwined the concept of the legitimacy of the state with that of the material wellbeing of people. This interconnectedness of interests is reflected in biased regulatory frameworks, ambiguous legislative acts and political-economic alliances that makes it difficult to clearly separate the public from the private. The deliberated non-realization of legal clarity serves the system to maintain the discretion in the law´s application and implementation, although that, in turn, undermines the legitimacy of a legal order that is increasingly unable to substantiate moral and ethical reasons for people to abide by it beyond coercion and fear. For some, the common good has actually become an abstraction, while the private interests are the reality (Wolin 2008)P110)[210].

In the Foucauldian perspective, because biopolitical norms cannot be represented as a sovereign's declaration of will (Brännström 2014)P174), these are more difficult to oppose. In this context, then, who is to be resisted? For some, the response is clear; those who are morally responsible (and not simply the agents) for causing the injustice (Caney 2015)P15)[211]. Resistance should indeed be directed to those that have the capacity to change the normative status of people (or the individual) in a way that can significantly affect their basic rights and the enjoyment of their freedoms. Not necessarily those that cause the injustice, but those that occupy the space where effective power is asserted[212]. Disobeying,

[210] The Declaration of the Occupation of New York City notes that "a democratic government derives its just power from the people, but corporations do not seek consent to extract wealth from the people and the Earth; and that no true democracy is attainable when the process is determined by economic power" (Square 2011). Even the veterans of the WWII French Résistance, called on the political, economic and intellectual leaders and on the whole of society to "not resign, nor be impressed by the current international dictatorship of the financial markets which threatens peace and democracy" (Aubrac, Cordie, and Others 2004).

[211] Cohen asserts that "not only a society's positive laws, but any institutional practices (whether governmental or not, and including an institution's failure to have laws or rules of a certain sort) can be proper objects of protest through civil disobedience" (Bedau 1972)P181).

[212] In this context it is worth recalling the concept of "*eisangelia*", the right to prosecute any individual found to have damaged the common interests of the *polis* as a result of criminal, incorrupt conduct or the expression of incompetence, which was considered a vital component of the democratic regime itself in classical Athenian

dissenting, or claiming rights does not automatically end injustice, but serves as a mechanism to identify some of its causes and those that are behind the perpetuation of the conditions of injustice.

From a cosmopolitan viewpoint, resistance is legitimate against any authority (financial, political or individual) that endangers live in its different forms (Zarka 2014)[213]. Critical scholars and activists find in the non-achievement of the benchmark of the common good a direct causality to assert the *ius resistendi* against public and non-public interests, especially when the wellbeing of society (the public body), is put at risk because of the interests and the profit of a few[214]. The consequence of this causation is that critical theory emphatically denies any legitimacy to acts of resistance motivated by special or individual interests, but it does not necessarily deny the legitimacy of acts of resistance against non-public, special or individual interests.

I argue that if the change in the normative status of a person, or of people, or the limitation in the enjoyment of their rights and freedoms, is caused (directly or otherwise) by the action or by the domination of the interests of non-public actors[215], external expressions of the right to resist against them should be considered legitimate[216] when, 1) compliance with the law[217] by a non-public party is openly and bluntly immoral or dangerous for the majority of society, and makes that party co-responsible of the immorality of the law or the policies enacted by the state that could, by themselves, be the object of resistance, and, 2) when the non-public interest or party usurps the functions of the state (Locke 2017)Para 225) or

democracy (de Lucas and Añón 2013). Today, impeachment or motions of censure, have lost the spirit of the *eisangelia* to become tools of political bargaining.

[213] The grievances expressed in "The Declaration of the Occupation of New York City of 29 September 2011" are directed to corporations and their occupation of the public interest. The Declaration starts with "We write so that all people who feel wronged by the corporate forces of the world can know that we are your allies" (Square 2011).

[214] On January 6, 2011, Aaron Swartz was arrested for breaking and entering with the intent to commit a felony downloading millions of research articles from JSTOR. His motivation to do so was that he considered that the world's entire scientific and cultural heritage was being digitalized and locked up by a handful of private corporations and declared his opposition to the private theft of public culture (Edyvane and Kulenovic 2017)P1).

[215] Of the 2809 protests that occurred between 2006 and 2020 in 101 countries, people protested against distant and unaccountable systems or institutions such as the political and economic system (30%), corporations/employers (23%), the European Union/European Central Bank (16%), elites (14%) and others (Ortiz et al. 2022)P115).

[216] The UN has acknowledged that "serious and urgent ethical, social and regulatory questions confront us, including with respect to the lack of accountability in cyberspace; the emergence of large technology companies as geopolitical actors and arbiters of difficult social questions without the responsibilities commensurate with their outsized profits" (Our Common Agenda 2021)P62-63).

[217] Noncompliance with the law would not need an act of resistance but of law enforcement.

appropriates its powers, resources or purpose, undermining the common good[218] or affecting the rights of others without accountability (for instance by evading taxes[219], or when private interest regulate access to essential rights, like health). It is important to stress that while one may have some moral ground to assert the *ius resistendi* against non-public interests that misappropriate public resources to affect the will or the rights of the people without any accountability as part of a political strategy (Clement 2016), it is never justified to target the persons owning that property (Jeff Shantz 2014)P20)[220].

As long as non-public actors have the power to change not only our normative status but our fundamental rights (to free air, to labour conditions, to development, etc.…)[221], then there may be a justificatory basis to assert our right to resist in the same manner we would do against public authorities having the same power to affect our rights[222]. Asserting the *ius resistendi* against those non-public interest does not challenge the existence (or the recognition) of those interests, rather, it opposes the non-public decision-making process in public matters and appeals to the fundamental democratic principle of accountably.

3.4. Blame it on the people.

Aristotle used the term *akrasia* to refer to the weakness of the will, the lack of command, and the acting against one´s better judgment. In his Discourse on Voluntary Servitude, Étienne de la Boétie unmasked people´s enduring habit of voluntary servitude to the tyrant. Rousseau spoke of the blind multitude (Cusher 2016)P226), Martin Luther King feared the "white moderate" (King 1963), and Hannah Arendt referred to Eichmann as "the little man" (Douzinas 2019)P183) and the "common man" (Useche Aldana 2014)P149). Michel Foucault

[218] One account of the common good is that it is some benefit done for the sake of helping others, with no regard for who those people are in particular beyond their membership in some community, including future generations (Etzioni 2014)P246).

[219] In the UK, for instance, groups of people blocked the entry and sat inside shops owned by major transnational companies that reportedly evaded tax payment at a time of government austerity cuts, like Vodafone, Starbucks, Amazon or Google These actions have had some success, as indicated partly by Starbucks agreeing to pay corporate tax in 2013 and 2014 at least. (Canaan, Hill, and Maisuria 2013).

[220] "I am justified in resisting unlawful arrest, but I have no authority over the offending officer (L. Green 2004)P522). I may be justified in resisting a harmful malpractice of some non-public interest, but that gives me no authority over the owner (as a person) of that entity.

[221] As Brian Tamanaha notes, "courts depend on private forums to carry a major load of legal disputes. This is part of a broader trend in society of government organizations relying on private actors to complete public functions. Regulation of the environment, the internet and other domains involve the participation, expertise and monitoring by private actors. (…) Legal procedures, functions and modes of operation are thus diffusing outward from governmental legal organizations and being picked up by private actors" (Tamanaha 2017)P147). The lines between public and private are increasingly blurred, and their logics tend to merge.

[222] In its Judgment T-571/08 of 4 June 2008, the Constitutional Court of Colombia argued that although the right of resistance is directed primarily against the organs that hold the highest power of the State, it is also directed to other forms of social power in the hands of individuals and social groups.

explored the disciplinary power fostering "docile bodies", "pliable" entities able to be "manipulated, shaped, trained" (Loadenthal 2020)P5)(Muller 2011)P3), and Jacques Rancière claimed that "despite everything, there is a certain national consensus that people can live very well for a long time in a rotten system" (Ranciere 2018)P50). Others use the concept of "internalized oppression" to refer to the stage when people come to believe, and so actually endorse, the social norms and stereotypes that are responsible for their oppression, making oppression appear not to be oppression at all (Hay 2011)P22-26). In her Ethics of Ambiguity, Simone de Beauvoir argued that the oppressor would not be so strong if he did not have accomplices among the oppressed. Max Horkheimer´s conformity, encouraged by capitalism and the sameness fostered by a system that seeks consumer standardization, or Marcuse´s one dimensional man, are all representations of the same; the fading of the self through the domination of no one, a system without a face against which it is hard to resist.

In politics, as in life generally, men frequently forfeit their autonomy (Wolff 1970)P9), and too often, the fallibility of human judgment has led to submission to authority from a misguided sense of duty where this was a morally reprehensible attitude (Raz 2012)P151)[223]. Some believe that "contemporary, post-industrial societies, with their increase in population and technology, also increase the loss of autonomy and of critical sense. This makes of them a likely breeding ground for the exercise of authoritarian power" (Falcon Tella 2008)P66). The capitalist logic is so deeply embedded in the conscience of people, that they believe that competition and individualism is natural to man, not an ideological notion[224]. For others, the dictatorship of what's "politically correct" threatens, in general, all forms of legitimate dissidence (…), it makes it harder for the individual to intervene in political life" (Pereira Sáez 2015). Law also contributes to this generalized state of surrender by means of supporting a process of justification that requires the obfuscation of reality (Sypnowich 2019). For instance, positivism, as legal theory, is satisfied with an understanding of the "facticity of appearances" and so, it contributes to preserving

[223] Some justify acts or resistance for the mere fact that one is in a subordinate position in relation to the state (Baaz et al. 2016)P142), thus broadening the range of justification of resistance to a point where one could endorse anarchy, misinterpreting the concept of resistance to any engagement that a subordinate would perform, regardless of the aim.

[224] The right to resist is not an anti-capitalist right nor a right of the left. But it is not usually asserted by those that benefit from the system or that want to keep the status quo. On 7 July 2020, over 150 intellectuals published "A Letter on Justice and Open Debate" in Harper´s Magazine (Chomsky et al. 2020) in which the signatories, referring to the rise of protests for racial and social justice note with preoccupation that "this needed reckoning has also intensified a new set of moral attitudes and political commitments that tend to weaken our norms of open debate and toleration of differences in favor of ideological conformity. As we applaud the first development (the protest), we also raise our voices against the second (the intolerance)". The signatories criticize both the forces of illiberalism and Donald Trump as a real threat to democracy and warn that "resistance must not be allowed to harden into its own brand of dogma or coercion".

Marcuse´s one-dimensionality (Winter 2017)P73). And in other instances, law has come to represent the sole will of the ruler, distinctively serving the purpose of power with the acquiesce of the oppressed. From the Weimar republic to Hungary, some parliaments have reached the point of renouncing the power of the people assembled through collective abdication (Ellian and Rijkpema 2018)P9). A society in fear is a society paralyzed, a society that does not resist is a dead society.

No circumstances excuse a person from being responsible for her actions, and ultimately, for sustaining the *status quo* of her own domination. It is not that the individual cannot change her circumstances, it is generally that she is unaware of her own situation, uninterested in engaging, or unwilling to change the conditions of her own oppression. Many people have simply renounced their agency, even in the face of injustice, and take the side of the oppressor when conflict erupts. In fact, disruptive confrontation seems ill-equipped to move privileged onlookers who are wilfully blind to their complicity in structural injustice (Livingston 2019)P6). By renouncing to resist, people renounce their moral responsibility to prevent the aggressor´s use of their sovereignty as mere means to achieve a particular aim (Ohlin 2014)P21)[225]. They renounce their Kantian right of self-defence, and their duty of preservation (Hay 2011)P21).

The condition of victimhood imposes duties on the oppressed. Those that can, but fail to resist their oppression, particularly in liberal democracies, are subject to blame. People capable of resisting have a duty to resist their own oppression to ensure that their rights are upheld (Caney 2015)P9), and that their capacity to act rationally is not harmed (Hay 2011)P23). Not willing to oppose what can hurt us goes against all laws, not only of nature and of man, but also of reason, and without reason, there is no politics. Non-resistance is a wrongful conduct, because when a victim is compliant or complicit in the face of oppression, they fail to respect the moral law (Silvermint 2013)P415), and they fail to respect themselves as actors endowed with agency, and with dignity. They oust themselves from the space where rights are formed and contested. They do not become outlaws, but a-political. It is one thing to have one´s voice silenced, but to voluntarily curb one's own voice it to leave the silence to be filled by the voice of those that may not have our best interest in mind. Injustice is then justified.

[225] "Refraining from acting to protect one's rational capacities might actually be the best way to protect them in certain circumstances" (Hay 2011)P37) Refraining from action because of political or other considerations also engages the right to resist. There is a difference from willfully refraining from acting and surrendering. In the first scenario, the right to resist is asserted in its political and communicative form because some have made the calculation that resistance is not in their best interest. In the second, there is no resistance, and thus no right.

Insubordination, on the other hand, unravels sovereignty's hold on ordinary people (Douzinas 2013)P105). It reveals the true face of the system and its tangible control of the polis, and helps to penetrate the psychic numbing which facilitates the acceptance and involvement in evil (Lippman 2012)P970). For critical legal theorists, primarily interested in the forces that can negate and subversively circumvent the system and contribute to emancipation (Winter 2017)P71), the *ius resistendi* has an emancipatory and liberating role, one that is planned and sought, giving the right of voice to de disempowered[226]. It is only when we assert the right to resist to capture normative spaces that the *ius resistendi* can have an emancipatory character, not in the sense of seeking liberation from the rule, but in expanding the possibilities of recognition of new rights within a normative system capable of reflecting the changing ideological parameters. Marcuse´s emancipation, for instance, is about imagining another world, not just tweaking the existing one.

But that is only a partial interpretation of the *ius resistendi*. Many people, even in liberal democracies, do not regard the right to resist as being emancipatory, but rather, as a right to protection from uncertainty and change. The instinct of submission, an ardent desire to obey and be ruled by some strong man, is at least as prominent in human psychology as the will-to-power, and politically perhaps more relevant (Arendt 1969)P8). For some, in fact, rational agents will view life under a regulated system of punishment as preferable to the perils of a state of nature, and will not willingly gamble away the security that system provides (M. P. Golding and Edmundson 2005)P8). This is true even in non-liberal regimes. Fitzpatrick argues that during colonial times, "resistance involved, against great odds, sustained and effective demands on colonial law for it to honour its attenuated promise of liberal legality" (Fitzpatrick 1995)P112).

Especially since the 9/11 terrorist attacks, the steadiness between freedom and submission that liberal democracies attempted to balance since the enlightenment has clearly tilted toward the latter. The shift to biopolitics has increased the gap between emancipation and material security, exposing the true face of a system that has replaced its moral appeal in favor of measurable material protection and security. When asserted in its function of guardian of the constitutional order, the *ius resistendi* is an expression of the willingness of people to be bound by norms that provide them with security, fairness, and equal opportunities, as long as the obligations imposed in that pursual are (in theory) respectful of the principles and values of the democratic ideology. But any promise to protect people against the enemy, in whatever form the enemy may take, and however it may be defined

[226] For Costas Douzinas, humankind is free to die of freedom, but only collective political action can lead to emancipation (Douzinas 2014a)P91).

(ISIS, covid, or unemployment[227]), seems to significantly lower the value-based standards of acceptability of the bound-condition.

3.5. The right to do wrong.

To do a morally right thing, and to do a legally right thing are separate concepts. One is always morally entitled to do the right thing, but that does not mean that one is always legally entitled to do so. What is morally right cannot be morally wrong (at least when referring to the same object) but can be illegal. What is legally right can be morally right, but it can also be morally wrong without ceasing to be legally right. For some, like Jeremy Waldron, there is no paradox in the suggestion that someone may have a legal right to do an act that is morally wrong, just as individuals may have legal duties that require them to perform wrong acts. For him, an action may be morally wrong (for instance, abortion), but nevertheless it is an action that the agent in question has a moral right to do (for instance, abortion) (Waldron 1981)P22-23). For others, however, the fact that an action would be wrong constitutes sufficient reason not to do it, no matter what other considerations there might be in its favor (Scanlon 1998)P148).

Morality is relative, a product of human history and circumstances, and since law is a human product, law is also permeated by the relativeness of morality[228]. If there is no absolute universal certitude of what is morally right or morally wrong, but nevertheless we can agree that we have a moral right to do the right thing, then we should also conclude, for argument's sake, that there must be a moral right no to do the right thing. In some circumstances, and within certain limits, people may indeed have a moral right to be immoral (Van Duffel 2003)P3), that is, people may have the right not to do the right thing, for instance, they may have the right to not obey the law.

There are, of course, plenty of nuances in the reasons behind one´s moral behavior. When we describe someone as a responsible individual, we do not imply that she always does what is right, but only that she does not neglect the duty of attempting to ascertain what is right (Wolff 1970)P8), which does not necessarily mean legally right. One may concede that a law may be immoral, but nevertheless attempt to do the right thing by obeying that law (that is, be a responsible law-abiding citizen). The opposite is also true. A man may take responsibility for his actions and act wrongly, as the duty to obey the law may not always entail the moral impermissibility of illegal conduct (Lefkowitz 2007)P206). If one is morally

[227] For some, if modernity has lost the attributes of classical politics, is because one of the features of the state was the ability to define the enemy, and this is no longer the case (Sandoval 2017)P25).

[228] All reasons for action have subjective conditions, or as in Bernard Williams terms, "all external reason claims are false" (Scanlon 1998)P363).

inclined to do the right (moral) thing when there is a (legal) obligation to do wrong (for instance participate in an illegal war), shouldn't there be some sort of immunity right to allow the individual, and the collective, to oppose the wrongness of what may be legally right? In other words, should we not have a protection from the legal obligation to do legally wrong (as long as we do morally right)? If that was not the case and we were to be punished for doing the right thing, as T. M. Scanlon put it, "why be moral?" (Scanlon 1998)P148). If a person has a legal obligation to do wrong, and she insists on not complying with or resisting that obligation, is she simply disobeying? or is she asserting her right to do wrong, as immunity right not to comply with what may be legally right, but morally wrong?

For some, the right to do wrong offers protection (if not immunity) because a holder of a right to do wrong enjoys a right against certain interferences by others with the right-holder's wrongdoing (Herstein 2013)P2)[229]. The right to do wrong is a right pertaining to the sphere of personal freedom because obeying or resisting a legal obligation is ultimately a matter of rational moral choice, and freedom, as I have argued, is the premise for rational action. We all have a right of conduct understood as a certain sphere of liberty or autonomy, a defeasible normative protection, with which interference by others is restricted (Brownlee 2008)P713). Within the space of freedom, therefore, one should have the right to choose how to advance one´s claims, that is, how to determine how best to ensure one´s survival as a moral and social agent. If a person was forced to do the right thing, her freedom would be coerced and her right to choose violated[230], and with the violation of freedom, the enforcing agent would inevitably lose its moral position to enforce the right choice. That also means that one cannot purportedly do morally wrong under the pretext of asserting one´s right to do wrong, since the immorality of the intent would annul the only justification to assert the right to do wrong, which is to act in a way that vindicates the moral rightness of the wrongdoing[231].

In some instances, the relationship between the rightness and the wrongness of action in relation to an obligation is linear. If the wrongness of an action is in direct opposition to the

[229] The literature has consistently characterized the right to do wrong as a claim-right (Herstein 2013)P17).
[230] "Even though the person has no (privilege-) right to perform an action that is wrong, it would nevertheless violate an important (claim-) right of hers for others to compel her not to do that thing. To take the speech example, we respect the autonomy of speakers when we allow them to speak unmolested—even when they do wrong by expressing themselves in disrespectful ways" (Wenar 2020).
[231] A distinction must also be made between having a right to do something (even the right to do wrong) and the way that right is asserted. Liberal political philosophers have in fact distinguished the right to civil disobedience from its wise exercise, a distinction that implies that the relevant right covers cases of unwise exercises of the right (Haksar 2003)P414). I however disagree. I may have a right to do wrong, or a right to resist, but that does not mean I always resist wisely, or that I am entitled to do wrong things (for instance use body violence) even if I am entitled to the right to do wrong.

set normative value of a given right (e.g., the right to life), then there is little space for both a positive and a negative correlativity between the right to do (legally or morally) right, and the right to do (legally or morally) wrong at the same time. It is illegal to kill, and it is morally wrong to kill. In some very exceptional circumstances one may be legally or even morally exonerated for killing someone, but that does not make it morally right, and it continues to be legally wrong. Yet, if the normative value of a right is not pre-determined or variable in relation to its normative value (as most moral rights), then the correlativity between right and wrong becomes more complex. If, for instance, the *ius resistendi* is asserted as a "right to do wrong" (that is, as immunity right to the obligation to do legal wrong) in relation not to a specific obligation (to a single-issue linear correlativity), but to a set of incidents (for instance the obligation to denounce an immigrant to the police), one could find oneself in the situation of having a claim to doing legally wrong (e.g., protesting the obligation by cutting traffic in a major road), while also doing legally right (defending the constitutional right of assembly), while doing morally right (defending the right of immigrants to a dignified life), and morally wrong (denouncing the immigrant to the police). In situations where moral discrepancies occur, one would expect (at least in liberal democracies) that one would be legally entitled to do wrong (assert the right to resist), and that the state would have an obligation to not interfere with the legal wrong, because there may be higher-value legal and moral rights to protect, for instance, the lives and dignity of people or even the right of assembly.

The paradox of the multiplicity of right-wrong correlations is not only generated by those that assert their right to do wrong. If the state did attempt to remove people from blocking the street it would not be doing legally wrong (as long as there was a positive norm or other legally binding instrument forbidding the act). The action (the assertion of the right of the state to remove people to assure the security of the street and the safe passage of non-protestors) would be morally wrong in the eyes of the protestors, but possibly morally right in the eyes of a third party affected by the demonstration (the morally disengaged from the demonstration). The action could also be morally right if the cause of the protest was morally wrong (e.g., a racist gathering demanding the removal of all immigrants). It could also be legally wrong if the removal of people had violated other rights, or it had been done using illegal methods or excessive force. It is precisely the indeterminacy of the right to do wrong, and thus of the *ius resistendi*, that allows for legal and moral adjustments in each particular context.

But what is a wrong act? In ideal conditions, "an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced, general agreement" (Scanlon 1998)P153). When one exercises the right to do wrong (or the right to

resist), one is rationally and willingly "rejecting the principles that set regulation of behaviour". The "general agreement" about the regulation of behaviour (the social contract in terms of political behaviour) is thus undermined through rational and unforced intent. Logic then dictates that the performance of the (wrong) act should not be disallowed, because the generally accepted regulation of what constitutes a behaviour that is wrong would no longer exist (under those circumstances). In non-ideal conditions, because acceptance of the regulation of behaviour would no longer be informed, unforced, or generally agreed, the right to do wrong, or to resist a "forced agreement" would then have to be, if not right, at least not wrong. It is unclear whether Scanlon's definition of wrongness implies that there must be a large number of people (e.g., "society") that determines that the act is wrong, of whether "those who can reasonably reject" the engagement are (only) those expressly vested with the power to interpret the "general principles". In non-ideal conditions (in the real world) what constitutes a wrong is not determined by a general agreement but by those with the power to interpret, adjudicate or execute the set of principles that regulate society, that is, those that have "the weapon of law" (Ogien 2015)P582).

People are compelled to obey the law because they are subjected to an external (legal o political) decision about the extent to which their behaviour is deviant. As a concept, however, behaviour is not inherently deviant, it is only so by reference to a normative sense that notices transgression (Pottage 2013)P264). It is only deviant in relation to a set of norms[232]. Resistance, as an external expression of the right to resist, follows the same logic. Resistance does not form an own perspective, it is always only resistance, it is, rather, defined by that which it turns against (Demirović 2017)P33). The assessment of the degree to which behaviour is divergent, an expression of the right to resist, or an assertion of the right to so wrong, is ultimately a matter of political judgement and opportunity, not of legal orthodoxy[233].

Similarly, to acknowledge the notion that one is entitled to do wrong, one also needs to dismiss the generalized pre-set conception that wrong acts are, by nature, immoral. In the domain of the *ius politicum*, an action which is morally wrong is an action that directly conflicts with democratic values. The justification for non-interference in the conduct of an

[232] Sevel argues that "a person subject to the law must, to some extent and at some level of description, adopt the understanding which the law provides of a given action or range of actions, in order to act with, and be motivated by, the knowledge or awareness that one is or is not doing something which corresponds to that understanding" (Sevel 2018)P35).

[233] Brian Tamanaha argues that "beliefs, theories and concepts are given meaning by and evaluated in terms of the consequences that follow from actions based thereon" (Tamanaha 2017)P3). The *ius resistendi* is ignored not because of a legal impossibility, but because no power willingly chooses to take on the consequences of granting the right to oppose power itself.

agent disappears when the group acts immorally against the fundamental values of the ideology, not when the group acts in legally wrong ways. In the latter case, the group is not asserting a genuine right to resist (or to do wrong) and cannot claim immunity from the state's non-interference. A protest, a sit in, the burning of objects or of flags, the boycott to certain non-public interests, blocking streets, destroying a statue, or the non-compliance with specific norms may be illegal (and certainly merit state intervention if the rights or the security of others are at risk), and they may perhaps even be immoral in the sense of societal rules of behaviour, but they are not necessarily politically immoral.