Yale Law School
Yale Law School Legal Scholarship Repository

SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers

Yale Law School SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers

1-1-2003

The Last Resort: The Right of Resistance in Situations of Legal Alienation.

Roberto Gargarella

Follow this and additional works at: http://digitalcommons.law.yale.edu/yls_sela

Recommended Citation
Gargarella, Roberto, "The Last Resort: The Right of Resistance in Situations of Legal Alienation." (2003). *SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers.* Paper 23.
http://digitalcommons.law.yale.edu/yls_sela/23

This Article is brought to you for free and open access by the Yale Law School SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

The Last Resort: The Right of Resistance in Situations of Legal Alienation.

Roberto Gargarella[1]

Introduction

It is possible that in situations of crisis and juridical instability we have additional reasons to enforce law implacably: we wish law to gain the force it does not have; we want it to root in everybody's habits; we want to grant our juridical life, once and for all, some predictability. It depends, however, on the sort of crisis we face. In fact, in my mind, our reaction ought to be fundamentally different if the situation we face is one of *legal alienation*, in other words, a situation where the law does not represent a more or less faithful expression of our will as a community. Instead, it appears as a set of rules alien to our designs and control, which affects the most basic interests of the majority of a population that happens to be subjected to it.[2] If our juridical crisis has more to do with this last situation, then it seems to be unfair to deal with all violations of the law as if performed by individuals who want to take advantage of others' efforts. On the contrary, many of those violations could be comprehensible and possibly worthy reactions performed by certain groups facing a law that wrongfully ignores and excludes them. In such cases, that emphasis on the inflexible enforcement of law results in nothing more than an act of extraordinary dogmatism –pure injustice– which ends up turning the law upside down. Instead of rescuing those who are victims of the law, it is demanded that norms be imposed which aim at maltreating them –norms in whose creation and modification those individuals have not taken part as they should have as members of a community which seeks to set its members on an equal footing.

Of course, when we concede the poverty of the law –when the existence of a situation of legal alienation such as the one we would be suffering is admitted– huge risks appear. There will, no doubt, be people who will take advantage of such a statement and use it as a *carte blanche* to commit acts of disobedience, invoking the existence of a fundamentally unfair law. There will be those who think that, in this manner, the only thing achieved is the encouragement of anarchy and violence –a situation lacking legal regulation where everything is permitted. There will be those who reject the plausibility of such a statement because of the absence of a 'third party' (between public officials and citizens) able to determine the seriousness of the juridical crisis and its consequences firmly and authoritatively. We could be asked, then: who can assume the right to tell us that we are in a situation of legal alienation?

---

[1] Agradezco especialmente a Marcelo Alegre y a Félix Ovejero por sus comentarios a una version anterior de este texto.

[2] Se podría sostener para el derecho, entonces, lo que Karl Marx sostuvo para el trabajo, en cuanto a que, "the object that labour produces, its product, confronts it as an alien being, as a power independent of the producer…[the] externalization of the worker in his product implies not only that his labour becomes an object, an exterior existence but also that it exists outside him, independent and alien, and becomes a self-sufficient power opposite him, that the life that he has lent to the object affronts him, hostile and alien…the worker becomes a slave to his object" (Marx 2002: 86-7).

It is a fact, however, that similar questions and fears have been commented on for centuries, and that they have received lucid and thoughtful answers. It follows that if there is something remarkable in today's constitutionalism, it is the way this study has feigned ignorance of such crucial reflections, which makes it difficult today to think about this central phenomenon of the judicial system. As a consequence of such carelessness, today we face the risk of penalizing those who are, to a good extent at least, mere victims of law –individuals who need protection and restitution instead of punishment.

In what follows, and to better understand the kind of phenomenon the present juridical crisis facing us, I will focus on the analysis of the idea of *resistance* to power, an idea born in the Middle Ages, central to constitutionalism from then until well into the eighteenth century, and basically forgotten since then. Such a concept, according to my understanding, can help us shed light on the sort of problems pertaining to situations of legal alienation like the one we are possibly confronting today.

Constitutional Resistance and Other Related Concepts.

As I understand it, we do not now have good theoretical tools, such as the ones here described, to think about situations of legal alienation. Here, I am interested in reflecting upon episodes of protest that, according to my assumptions, are indicative of these situations of legal alienation and which I will call episodes of *constitutional resistance.* These episodes, in my opinion, are distinguished by the presence of violations of positive law, often taking a violent character, which are destined to frustrate laws, policies, or decisions taken by the government of the moment.[3] In order to determine if such actions are legitimate and eventually justifiable actions, many variables should be consulted, but one, in particular, is especially relevant—it is the existence, or not, of a context of legal alienation. This variable generates huge problems, given the obvious difficulties that we have, and will always have, in determining when we face a situation of legal alienation, or what response is acceptable—what kind of constitutional resistance is justifiable—in such a context. In the face of such doubts and so as to find some kind of basis to begin the inquiry, I will refer to prior theoretical reflections produced as responses to situations analogous to the one described above. All these reflections will clearly make us inquire into the limits of constitutionalism itself.

Contemporaneously, some of the closest ideas to us that we can use to explore such a phenomenon are civil disobedience and conscientious objection. Therefore, before going any further, I would like to stop and distinguish the phenomenon I am dealing with from situations of violations of the law as the two mentioned.

To begin with, while one of the distinctive concepts that the literature has associated with concepts such as civil disobedience and conscientious objection is that of non-violence, violence seems to be a central aspect of the phenomena under examination here. Let's take, for example, a rather standard definition of civil disobedience, given once by Hugo Bedau (Bedau 1961: 661).

[3] Esta definición está moldeada a partir de la definición que da Hugo Bedau sobre la desobediencia civil, y a la que me refiero más abajo.

In the opinion of the Harvard professor, "Anyone commits an act of civil disobedience if and only if he acts illegally, publicly, nonviolently, and conscientiously with the intent to frustrate (one of) the laws, policies, or decisions of his government."

As a result of such a definition, the similarities and differences between the actions I call constitutional resistance and civil disobedience seem obvious. On the one hand, both kinds of actions take on a public character, include behaviors that are considered contrary to positive law in its nucleus, and directly confront some of the government's norms, policies or decisions. On the other hand, and as minimum, the actions under examination here can involve a much lower degree of reflection and awareness than those associated with civil disobedience; besides, they are usually accompanied by acts of violence alien to civil disobedience.

Authors like John Rawls—who rely on the classical analysis by H. Bedau for their definitions of civil disobedience—strengthen those differences by holding that civil disobedience "arises only within a more or less just democratic state for those citizens who *recognize and accept the legitimacy of the constitution*" (Rawls 1971: 363, my italics). It is because of this acknowledgement that those who get involved in civil disobedience (or conscientious objection) actions are willing to suffer the penalties law has in store for them—there is an ultimate acceptance of the general validity of law, which is questioned only in some specific respect (Cohen 1971). Here however, as we have said, we find a situation that is particularly distinguished by a debate on the validity of the constitutional organization itself.[4] The same occurs if we take the studies carried out by Ronald Dworkin to this respect as a benchmark. According to him, those who are involved in acts of civil disobedience "*accept the fundamental legitimacy of both government and community*; they act to acquit rather than to challenge their duty as citizens" (Dworkin 1985: 105, my italics). The differences between these cases of civil disobedience and those under examination here are, therefore, significant.

Conceptual distances are even wider if what we compare are these cases of constitutional resistance with the so-called conscientious objections (conscientious refusal[5]). According to John Rawls, conscientious refusal implies "noncompliance with a more or less direct legal injunction or administrative order" (Rawls 1971: 368). This would be the case, for example, of the individual who refuses to do military service because he rejects the violence intrinsic to it. Unlike the case of civil disobedience, there is no appeal here to the community's convictions of justice, but to the individual's. There is no attempt in this case (at least primarily) to call upon "the majority's sense of justice"; nor to act, necessarily, from political principles—the usual case being to act, for example, on religious or other principles (Rawls 1971: 369).

Once again, we are faced with fundamentally pacifist and individualistic acts, products of contemplative reflection, which contrast with the usually non-pacific, collective, and more or less spontaneous traits of anti-institutional actions. This contrast should take us beyond those concepts in order to better comprehend the kind of phenomenon we face, and not to read new

---

[4] En su análisis de la desobediencia civil, Rawls explícitamente no trata de este tipo de casos, a los que asocia con formas de "acción militante." La acción militante, dice Rawls, "is not within the bounds of fidelity to law, but represents a more profound opposition to the legal order. The basic structure is thought to be…unjust or else to depart…widely from its own professed ideals" (Rawls 1971: 367-8).

[5] Aquí asimilo las ideas de objeción de consciencia con lo que John Rawls describe como "conscientious refusal."

situations through theoretical lenses made to tackle fundamentally different problems. In order to do so, I will now pay attention to the concept of *resistance* to authority, which seems to share a much greater affinity with the phenomena that are the object of this study.

Resistance to Authority at the Heart of Constitutionalism.

As opposed to the seeming usefulness of concepts such as civil disobedience and conscientious objection—which, despite having been thought to deal with legal crises related to the ones we consider here—were too narrow to help us understand the phenomenon of constitutional resistance. The medieval concept of "resistance to authority" does seem to be productive for our purposes. Indeed, in spite of the variety of approaches to the matter that we can find, all of them tend to deal with usually violent and illegal actions carried out by individuals who feel that the legal order works against them. Strictly speaking, such resistance tended to occur during moments that we here label "legal alienation;" for example, situations where the law seemed to be completely removed from the control of those who resisted as well as against their most basic interests. All of this describes a strong relationship between these original acts of resistance and the ones we want to examine here. What distinguishes one from the other is that the original idea of resistance applied to political authorities who were not democratic[6] and to its laws which, for that reason, were not expected to be an expression of a communal will although they were respectful of the basic interests of the community. Additionally, it related to more specific acts. Usually the change included the removal and perhaps death of the leader of the moment, depending on the catholic theologian's decision. It might also include the radical change of the system of government (as occurred, for instance, with the arrival of the American Revolution). It may be useful, then, to review some of the discussions that were generated by the traditional idea of resistance; their richness can throw light on situations such as the ones we face today, situations we usually do not instinctively know how to react to.

Above all it is important to say that by relying on the notion of resistance to authority, we are retrieving a concept that since the Middle Ages has been the principal object of all those interested in philosophical problems of politics and jurisprudence. Such reflections upon resistance took on special significance during the Reformation, the successive confrontations between Roman Catholics and protestant reformers, and above all, the ensuing possibility that religious duties were in deep tension with duties of obedience to political power (Linder, 1966: 125-6). Notably, and by dint of being consistent with their reasoning, authors coming from rigid conservative backgrounds started to tear open their own dogmas. Who, they wondered, should we obey if political authority eventually ceases to coincide with the religious authority? On the other hand, these reflections were prompted by the need to face the extraordinarily influential teachings of Saint Paul on the people's unconditional duties of obedience[7], Saint Augustine's

[6] Por el momento, tomo el concepto de democracia en su acepción más fina, vinculada con la elección periódica de autoridades, en el marco de la vigencia de ciertos derechos básicos (Dahl 1991). Cabe acotar, además, que –aunque la idea de la resistencia fue variando con el tiempo- en sus primeras presentaciones se dejaba a la misma, en una mayoría de casos, en manos de una elite, única legitimada para llevar a cabo acciones tan extremas y riesgosas.

[7] Según sostuviera San Pablo en el famoso cap. 13 de la epístola de los romanos –y que se constituyera fue durante buena parte de la Edad Media en la cita bíblica más influyente de todas- los poderes existentes derivaban de Dios, por lo cual cualquiera que osara resistirlos resistía a Dios, y se encontraba condenado a sufrir eternamente. En sus

claims that rulers should be respected as God's representatives—even if they did not fulfill their political duties properly—and particularly, as time went by, even important sectors of Lutheran doctrine, which backed the power of absolute monarchies, founding it on the people's inability to recognize God's mandates, leaving it to the authorities to decipher divine will.[8] Thus, the idea of resistance to authority grew until it arrived at a central place within constitutionalism by the end of the eighteenth century.

By the end of the eighteenth century, thanks being to Locke, resistance to authority appeared as one of the four ideas that, I think, distinguished constitutionalism in its origins. Thus, the idea of resistance tended to appear together with the concept of the unalienable character of certain basic rights; the idea that authority was legitimate as long as it rested on the consensus of the governed, and the idea that the first duty of any government was to protect the unalienable rights of the people. In such a context, it was held, the people could legitimately resist and finally overthrow the government in the event it did not give due respect to those basic rights.[9]

Remarkably, these four constitutional principles, all of them founded on the basic idea of the essential equality of all individuals, were later adopted by the two great revolutions of the eighteenth century, the American and the French revolutions. They were first picked up by Thomas Jefferson and incorporated almost unmodified into the American *Declaration of Independence*, written in 1776. Strictly after Locke, the *Declaration* stated its adherence to the following "self-evident truths":

> …[T]hat all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. -- That to secure these rights, Governments are instituted among Men, deriving their just

---

palabras, "[W]e should obey the powers that be [because] they are ordained of God and that whosoever resisteth the power resisteth the ordinance of God, and they that shall resist shall receive to themselves eternal damnation."

[8] De todos modos, es importante enfatizar que desde dentro mismo del luteranismo se fueron dando interesantes desarrollos teóricos, que lentamente ayudaron a resquebrajar las sólidas paredes de la doctrina que venían a apuntalar. Estos desarrollos se vincularon muy especialmente con los estudios llevados adelante por Philip de Hesse a comienzos del siglo xvi. Hesse reflexionó, entonces, acerca de la noción luterana conforme a la cual todos los poderes provenían de Dios, la eventualidad de que el Emperador se aliase con la mayoría católica, y la necesidad de resistir su autoridad por las armas. Otros juristas luteranos, como Martin Bucer, se preocuparon por enfatizar los deberes de los magistrados para defender la religión luterana, por lo que negaron la capacidad del Emperador para gobernar conforme a su voluntad discrecional, y en contra de las necesidades del pueblo de Dios. En casos tan graves, sostenía, no podía esperarse que los funcionarios menores permanecieran obedientes a los reclamos indebidos del soberano.

[9] Locke, en particular, desarrolló este tipo de ideas muy especialmente en reacción contra los escritos de Robert Filmer –sobre todo, *Patriarcha*- en donde el último defendía una concepción "patriarcalista" del poder. Conforme a la misma, el rey estaba justificado de ejercer su poder sin atención a la voluntad de sus súbditos, del mismo modo en que un padre ejerce el poder sobre sus hijos sin consultarles. El poder del rey, afirmaba Filmer, provenía directamente de Dios y no de algún tipo de consenso popular, por lo cual no puede ser resistido en ningún caso (Filmer 1991). En su opinión, el rey –como el padre- debía tener la capacidad de disponer aún sobre la vida de quienes estaban a su cargo (tal como se desprendía de la parábola religiosa sobre Cassius, que había arrojado a su hijo desde un acantilado). Tales poderes extremos se justificaban ante la facilidad con que las personas se dejaban arrastrar hacia comportamientos erráticos y anárquicos.

> powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The "Declaration of the Rights of Men", passed by the French National Assembly on the 26th of August, 1789, followed the previous example closely. Thus, for instance, it proclaimed the existence of "natural, imprescriptible and unalienable rights;" it asserted the basic equality and freedom of each person (art. 1); and held that the main object of all political association was to preserve the imprescriptible and natural rights of man, which are the rights to "freedom, property, security, and resistance to oppression" (art. 2).[10]

Finally, and just to highlight the importance and influence of these original approaches to the resistance to authority, it could be mentioned that many of the new constitutions born in the heat of those two revolutions asserted, in their first lines, commitments such as those mentioned above. Thus, and only to mention an especially influential case in Latin America, I would point out the *Banda Oriental* Constitution of 1813, which referred to the legitimacy of the right of resistance if the government were unable to secure the general welfare and fundamental rights founding it on the principle of equality and freedom, and on natural rights.[11] Similarly, I could cite the Constitution of *Apatzingán*, passed in Mexico in 1814 by a group of revolutionaries headed by the priest José María Morelos, which referred to the "undeniable popular right" to "establish... alter, modify, or completely abolish the government, whenever that was necessary for the people's happiness" (art. 14).

First Foundations of the Right of Resistance: When is it Justified to Resist?

What has been examined so far helps us to clearly state that the idea of resistance to authority has been, since its origin, a key notion to constitutionalism—one that was not seen as an enemy to it, but as an integral component of the right of each community to self-government.

---

[10] The representatives of the French people, organized as a National Assembly, believing that the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties; in order that the acts of the legislative power, as well as those of the executive power, may be compared at any moment with the objects and purposes of all political institutions and may thus be more respected, and, lastly, in order that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all. Therefore the National Assembly recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and of the citizen: Articles:
1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.
2. The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression….

[11] Decía la Constitución: "Porque los hombres nacen libres e iguales y gozan de ciertos derechos naturales, esenciales e inalienables –entre ellos, el derecho de gozar y defender su vida y su libertad, el derecho de adquirir, poseer y proteger su propiedad y, finalmente, el derecho de demandar y obtener seguridad y felicidad- es deber [del gobierno] el de asegurar estos derechos…y si no pudiese alcanzar estos grandes objetivos, el pueblo tiene el derecho de alterar el Gobierno, adoptando todas las medidas necesarias para asegurar su seguridad, prosperidad y felicidad."

Taking this into account, I will now focus on the examination of how much those original reflections can shed light on some of the problems we face today when we deal with (what I have so far called) constitutional resistance. To this purpose, I will pay attention to three old questions which appeared along with the original idea of resistance to authority. First, what reasons can justify such actions? Second, what is the authority that can judge the legitimacy or "appropriateness" of those actions? And finally, how should juridical authorities react when facing such serious behavior? I will start, then, with the first point, which refers to the foundations of the right of resistance.

One of the most important lines of thought on the justifications for resistance to authority comes from what we could call the *juridical current of natural law [corriente jurídica iusnaturalista]*. This theory has its origins in St. Thomas' writings and the school founded upon them, particularly the religious men from the "Dominican" order, such as Domingo de Soto and Francisco Vitoria; or from the "Jesuit" order, such as Francisco Suárez and Luis de Molina. Despite the differences that distinguish some from others, all these theologians rallied around an especially important and, at that time, divisive nucleus of ideas. These Thomistic theologians were especially worried about countering some of the Lutheran intellectual ideas then in vogue. Particularly, they reacted against the idea that people were fundamentally unable to recognize God's will, and therefore needed to be disciplined and led by those who could. Such thought, essentially perfectionist, was contradicted by the Counterreformation Thomists, who held that it was thoroughly mistaken, since it did not acknowledge that *all individuals were equally able* to recognize and understand divine law. Following St. Thomas, they held that all *rights were natural*, resulting from God's law and not from God's grace.[12] In the Catholic theologians' opinion, the fact that the community, once constituted, delegated its sovereignty to a supreme authority, did not imply that it lost its most basic natural rights.

It was by exploring the implications of those root assumptions of egalitarianism that the Hispanic Thomists came to justify pioneering forms of resistance to oppression that included tyrannicide. Even though those reactions had to be reserved for very extreme circumstances, and although they made marked efforts to assert the people's duty of obedience, they could not find a way of denying the fact that, "even if the commonwealth has given away its authority, it nevertheless keeps its natural right to defend itself" (Vitoria 1991: 200). This was because, in the last analysis, as Vitoria pointed out, he who committed a sin, even if he were a properly constituted authority, was as guilty as any one of his subordinates.

Worried about setting clear limits to the right of resistance, the natural law theorists focused intensely on the circumstances that could justify resistance. Thus, Francisco Suárez, like many of his brothers, distinguished between tyrants of legitimate origin and usurpers, and outlined different ways to react against them. For example, Suárez believed that tyrannicide was justified, even if performed by any individual acting out of personal motives, in the case of the tyrant-usurper but not in that of the originally legitimate tyrant. In this last case, the decision was in the hands of "inferior magistrates" and it depended on a prior justifying process to demonstrate, among other things, the "public and manifest" character of the tyranny, the

[12] La diferencia era sustantiva ya que, conforme a los luteranos, quienes sostenían la última posición, el derecho sólo podía ser ordenado por un goberante guíado por Dios, y no por los restantes miembros de la comunidad.

nonexistence of alternatives to tyrannicide, the absence of any pact between the community and the tyrant (in which case it should be respected), the tacit consensus of the community, or the certainty that greater evils would not ensue once the tyrant was dead (Suárez 1944: 712-3). The natural law principle according to which "force may be met with force," and the necessity of preserving the State, were the ultimate justifications for this kind of action (Hamilton 1963; Copleston 1963). At the bottom of both claims was the assumption, also remarkable for that time, that "the state, as a whole, is superior to the king, for the state, when it granted him his power, is held to have granted it upon these conditions: that he should govern in accord with the public weal, and not tyrannically; and that, if he did not govern thus, he might be deposed from that position of power" (Suárez 1944: 855).

Spanish theologians opened a field of study that even influenced some of their intellectual enemies in the Calvinist school. Remarkably, some of these Calvinist theorists —members of the Huguenot minority in particular—found exceptional support for their reflections on the limits of political power in the Thomists' work (Skinner 1978).[13] Afterwards, the cautious reflections of the Thomists began to flower into other more radical arguments. Pierre Viret of Switzerland, a personal friend of Calvin and considerably influential in France, for instance, held that resistance to power was justified for religious reasons as much as for social and economic injustices committed against the people on the part of the ruler (Linder 1966). The most radical positions, however, were doubtless those which arose from Scottish Calvinism.

The group of Scottish Calvinists found foundation for their defense of resistance to power in a potentially more powerful tradition than natural law theory, which had its origins in Jean Gerson's writings, and in later developments by the "bribists" John Mair and Jacques Almain. This tradition justified extreme actions not by natural law, but by *religious duty*: resistance, in effect, was not a right but a duty which involved all the members of the community and which had to be carried out because it was a reflection of God's Will (Skinner 1978; Rueger 1964). Heirs to this tradition, individuals such as John Ponet, justified the resistance anytime the sovereign betrayed his country; or committed any kind of abuse of his position (abuses which included, for example, having sexual intercourse with another man's wife). For Christopher Goodman, resistance was justified in all cases in which God's Laws were implicated, and which included those situations in which rulers became the oppressors of their people. Rulers—held Goodman—had not been placed in their position to act according to their judgment, but to act in

[13] El teórico hugonote Beza, en su momento, también aceptó una distinción similar a la expuesta, entre tiranos con legitimidad de origen, y tiranos usurpadores. Como aquellos, Beza sostuvo que la justificación del tiranicidio en manos de cualquier individuo, actuando privadamente, sólo se daba frente a los últimos, que por su propia condición no podían reclamar ningún derecho a ejercer el poder que de hecho pretendían ejercer. Frente a los tiranos con legitimidad de origen (tiranos en el ejercicio del poder), el derecho de resistencia quedaba reducido a circunstancias excepcionales, que los individuos privados no se encontraban en condiciones de alegar como justificatorias de sus pretendidas acciones. Los magistrados principales, sin embargo, tenían la obligación de llevar adelante tal resistencia, en honor del pueblo para con quien el tirano era desleal, y en el caso de que el rey rompiera la promesa que había hecho a su pueblo, y pasara a gobernar tiránicamente. De modo similar, para Philippe Mornay, el tiranicidio también era aceptable sólo en circunstancias muy extremas, luego de una decisión de los "magistrados inferiores" –ya que no del pueblo en su conjunto. Aquellas autoridades podían ejercer tal derecho, cuando comprobaran que los gobernantes habían violado el contrato celebrado con su pueblo (un contrato orientado a asegurar la protección y defensa de los últimos), y roto así su promesa de sostener la ley de Dios (Skinner 1978: 325).

benefit of their subjects. That is why, he concluded, when rulers violated their duties they became equal to any other citizen, and could be resisted by any of their peers. In a similar sense, Georges Buchanan held that the power that the people had yielded at one time could be retaken at any other: to do so was not to go against the institution of the king, but against the person that coincidentally filled that position at the moment.[14]

These were the antecedents with which Locke was familiar, at the advent of modernity, when he identified the conditions that, in his opinion, could make it inevitable (and finally legitimate) to resist the authority. Locke spoke then of "a long train of abuses," an idea that was later directly incorporated into the American *Declaration of Independence*, related to the tyrannical and capricious use of power. More specifically, Locke referred to the situation in which it was evident that the government promised one thing and did the opposite, the fact that it used chicanery to elude the law, the fact that it used its unique powers against the welfare of its people, the fact that inferior officials cooperated in those actions, and the fact that arbitrary actions followed one after another (Locke 1988: 405, sect. 210).[15] In such cases, he assumed– and these are the final lines of his *Second Treatise on Government*– "[T]he People have a Right to act as Supreme, and continue the Legislative in themselves, or erect a new Form, or under the old form place in the new hands, as they think good" (Locke 1988: 428).

Closely following Locke's reasoning, Thomas Jefferson saw to it that a detailed list of grievances were added, which, in his opinion—and later, in the opinion of those who signed the *Declaration of Independence*—transformed the performance of the British government into an irreparable grievance that justified resistance to authority. The document referred to offenses such as not having approved (or having prevented the approval of) laws necessary for general welfare, to having offended the representative bodies, having obstructed the performance of justice, having fostered dependency in the judiciary, having created a multitude of unnecessary positions, having privileged military power over civil power, having set taxes without the consent of the people, and having deprived the people of the benefits of a jury.

The People as the "Last Court of Appeal."

---

[14] Al argumentar de ese modo, Buchanan parecía retomar, notablemente, una argumentación avanzada mucho antes por Gerson, quien había procurado defender lo actuado por el Movimiento Concilliar, al deponer al Papa Juan XXIII: había sostenido, entonces, la distinción entre la institución papal y la persona que coyunturalmente ocupaba el lugar del Papa, para afirmar la defensa permanente de la primera, aún a costa del sacrificio de la segunda. (Rueger 1940)

[15] De todos modos, para Locke, el recurso a la resistencia se justificaba, ante todo, por el hecho de que el gobernante abandonaba el uso de la razón y el recurso a la ley, para reemplazar éstas por el uso de la violencia, que era su contracara (Dunn 1969: 179). Y dado que la violencia era el medio utilizado por las bestias para dirimir sus conflictos, al adoptar este camino el gobernante se auto-reducía el status de las bestias, y merecía el mismo trato que aquellas: de allí que todo individuo quede en su derecho de actuar frente a tal enemigo como se actúa frente a las bestias. En una situación tal, los gobernantes eran responsables del retorno a una situación que Locke denomina "estado de guerra," y que viene a ser opuesta al estado de naturaleza o al de una sociedad legítimamente constituida. El estado de guerra resulta, entonces, del indebido uso de la fuerza. Y no hay peor situación imaginable que la de un gobernante que se convierte en responsable de retrotraer a la sociedad a este estado, dado que la sociedad ha depositado en él su confianza (*trust*), y a delegado en él la tarea de asegurar la preservación de la paz. El uso continuado de la fuerza resulta entonces, finalmente, el hecho principal que justifica que cada individuo, por sí mismo, decida cómo es que debe reaccionarse.

In the event we come to an agreement on the justifications for resistance, there emerges the question about which institution/s and/ or individual/s are going to be in charge of their ultimate application. It is clear that even if a detailed list of justifications for resistance has been agreed upon, important differences are expected to appear at the moment of determining if we are or aren't confronting such a situation (i.e., has or hasn't the government harmed the general welfare with the measures it has just taken? Is it necessary that the ruling authority violate all the justifications on the list we have imagined, or only some of them? Or is it enough to have violated only the most important ones?). Moreover, it is necessary to determine the seriousness or intensity of the violation/s at stake (i.e., it may be that the government has actually harmed the general welfare with its decisions, but there may be no reason to think those measures are serious enough to justify an uprising against the government). Ultimately, these considerations call for the definition of an interpretative organ able to clarify the situation we face.

For a long time, concentrating the final interpretative authority in a body of "inferior magistrates" solved such a problem. For example, for Suárez, as for the majority of the Thomist theologians, the possibility of resisting the tyrannical behavior of a ruler of legitimate origin was subject to acting in "conformity with the public and general councils of its communities and magnates" (Hamilton 1963: 61-3; Copleston 1963: 220-22). Domingo de Soto set even stricter consultative barriers. For their part, Calvinists such as Philippe Mornay also considered it necessary to avoid the possibility that someone would confront authority on his own initiative. Such an attitude, he assumed, was offensive to religion, since nobody could claim for himself the clarity of judgment and discernment uniquely attributable to God. Because of that, he made the possibility of legitimate resistance rest on a previous process of serene reflection on the part of the "inferior magistrates". Similarly, John Mair also connected the overthrow of the sovereign with a duty of prudence that he left in the hands of the highest spheres of society: without their careful deliberation, there was the risk that such a serious decision was the result of the mere passions of the few. Although remarkable in the context where they appear, distinctions such as the ones cited registered significant tensions, in the sense that they did not fit well with the people's basic beliefs regarding freedom, from which some of them—typically the Spanish Thomists—departed.

Partly because of that, this intellectual position started to change toward the end of the sixteenth century, and was exemplified in works such as George Buchanan's. Buchanan radically claimed that if a person "from amongst the lowest and meanest of men" decides "to revenge the pride and insolence of a tyrant" by simply taking upon himself the right to kill him, such actions are often "judged to have been done quite rightly," and such men are commonly left unmolested with "no question ever being made against the killers" (Skinner 1978: 3444). In a similar tone, the Jesuit theologian Juan de Mariana held the possibility of opposing a tyrant violently. He held then that, "anyone who is inclined to heed the prayers of the people may attempt to destroy [a tyrant, and] can hardly be said to have acted wrongly in making such an attempt to serve as an instrument of justice." Tyrannicide was a right that, "can be exercised by any private person whatsoever (*cuicumque privato)* who may wish to come to the aid of the commonwealth" (ibid.: 346).

This slow "popularization" of the right of resistance would arrive at its culminating moment in the works of Locke and Jefferson. At last, no other conclusion seemed reasonable, especially once it was assumed that all people were born free and equal – in other words, that there were no families, religious authorities or public officials inherently able to recognize that which common mortals could not see. Thus, for the English philosopher, the decisions about resistance against the government could not rest but in the hand of the citizens themselves: no one other than they deserved to determine the serious of the conflicts facing them. The majority itself must have the right decide its collective fate, just as each individual does so in regards to private matters. As Seliger's interpretation of Locke holds:

> By their conscience or feeling, the people are called upon to decide whether there exists a serious threat to their lives, liberties, and fortunes. To be able to decide on this evidently presupposes neither knowledge of nor a direct judgment upon the right and reasonable way to secure life, liberty, and fortune. It means to know and judge when and whether one's security and dignity are excessively endangered by the rulers. One need not be capable of knowing specifically what is ultimately right in order to be able to judge, according to generally accepted standards of right and wrong, what is unbearable and to declare this to be wrong [As Locke asked,] "Are the people to be blamed if they have the sense of rational creatures and can think of things not otherwise than as they find and feel them?" (Seliger 1991: 601).

The conclusion, then, was that in extreme cases there was no other court of appeal than that of their peers', the people, who, in turn, did not have before them any other court of appeal than God's judgment (Dunn 1969: 180).[16]

Jefferson's idea of the right of resistance was basically similar to the one just examined.[17] As Edward Carrington wrote in his letter of January 16, 1787, the people were the "only censor

---

[16] Importa señalar, además, que para Locke, los poderes de la ciudadanía eran amplios, e incluían la posibilidad de elegir el nuevo régimen de gobierno entre una variedad de regímenes posibles.

[17] Este reconocimiento del derecho del pueblo a constituirse en último tribunal de la legitimidad de los levantamientos, no implicaba –ni para Locke, ni para Jefferson- una actitud simplista o irresponsable frente a tal tipo de situaciones. Ninguno de los dos pretendía alentar la producción de hechos de esa naturaleza, a los que consideraban obviamente preocupantes. Según insistían, por lo demás, la práctica política de sus respectivos países, tanto como la experiencia comparada, demostraban que el pueblo sólo se decidía a "ponerse de pie" en contadas ocasiones, y enfrentado a situaciones muy extremas. Según Locke, el pueblo iba a tender a sumarse a iniciativas tan extremas como la de derrocar al gobierno sólo en situaciones muy límite, previsiblemente excepcional. Por lo demás, asumía, si el gobierno se encontraba efectivamente comprometido con el bien del pueblo y la preservación de las leyes, luego, resultaba inconcebible que el mismo fuera incapaz de hacer que los gobernados reconocieran tales esfuerzos (Locke 1988: 405, sect. 209). Algo similar es lo que surge de la "Declaración de la Independencia" norteamericana. Allí se expresa que, por razones de prudencia, puede convenir no cambiar aquellos gobiernos establecidos desde hace mucho tiempo, y en razón de causas meramente circunstanciales. Y además, la "Declaración" se ocupa de precisar de qué modo la historia de la humanidad demuestra que la ciudadanía está dispuesta a tolerar y sufrir lo que sea necesario, antes de levantarse y abolir el gobierno existente. Ocurre, sin embargo –y así concluye la "Declaración"- que hay ocasiones en donde la resistencia resulta un derecho y un deber, en razón del nivel de abusos sufridos.

of their government": nobody else but them could determine whether the conditions to trigger legitimate resistance existed or not.[18]

The Law Confronting Resistance.

The idea of resisting authority places us, no doubt, at the very limits of constitutionalism. The gravity of this situation is recognized when we admit that the community appears to be the ultimate arbiter regarding the need and legitimacy of resistance against power. One must wonder, then, what is the attitude the government should have—or, more interestingly, its most honest officials should have—when facing such a situation. Let's take into account that each institutional organization recognizes its own "ultimate arbiters" in resolving weighty conflicts, the judicial power typically being the one in charge of such a task. How should these officials react, then, taking into account that they are, at the same time, part of the power structure being challenged? Should they seek to preserve that structure from the challenges it is exposed to? Should they, on the contrary, be open to criticisms which threaten to deprive them of their own authority?

Within the traditions we have reviewed, the analysis of civil resistance tended to adopt extreme forms; either it was evaluated as an illegitimate uprising, upon which it was necessary to impose extreme measures, or it was assessed as a legitimate uprising that, therefore, demanded fervent support. Without any doubt, the mere fact that the "people" succeeded in their action to resist was for many a sign of its validity; triumphant action became legitimate action. The

[18] Sin embargo, es necesario contrastar la actitud de autores como los citados con la defendida por el filósofo alemán Immanuel Kant frente al derecho de rebelión. En el que es, posiblemente, el mejor texto escrito sobre el tema, H. Reiss llama la atención sobre la dificultad de conciliar el núcleo de la filosofía kantiana -a la que Marx denominara la "teoría alemana de la revolución francesa-" con las explícitas invectivas de Kant contra el derecho de resistencia (Reiss 1956). A diferencia de Locke (o Jefferson), Kant veía un problema serio en el hecho de que el pueblo fuera juez en su propio caso, cuando de lo que se trataba era de su derecho a rebelarse frente al poder. Para Kant, el juez en tales situaciones debía ser una tercera, e inhallable, autoridad. Por lo tanto, y por contradecir el deber de obediencia al gobierno, Kant se oponía al principio del derecho de rebelión. En su *Principles of Politics* sostenía al respecto: "All resistance against the supreme legislative power, every kind of instigation to bring the discontent of the subject into active form, every kind of rising which becomes a rebellion constitute the highest and most punishable crime in the commonwealth for they destroy its very foundations." La dureza de estos términos debe equilibrarse, de todos modos, con las alegaciones que hace –por ejemplo, en su *Doctrine of Law*- en favor de formas de "resistencia negativa" a la autoridad ejecutiva (como la que podría darse en el parlamento. Schwarz 1964); con algunas esporádicas referencias a la legitimidad de tal derecho (i.e. "[the people] cannot rebel except in the cases which cannot at all come forward in a civil union, e.g., the enforcement of a religion, compulsio to unnatural sins, assassination, etc., etc." Citado en Beck 1971: 412); o su admisión de que, si la rebelión se produce y tiene éxito, no se justifican tampoco las acciones para revertirla (ver Laursen 1986: 597). Como señala Nicholson (Nicholson 1971: 226): "Kant's argument is that revolution is a priori wrong because it contradicts law, not because it actually produces lawlessness, which of course it may not." En este sentido también, cabe notarlo, la concepción kantiana terminaba amparando revoluciones exitosas como las de 1688, 1776 o 1789, a la vez que condenaba posibles revoluciones futuras destinadas a restaurar el viejo orden (Beck 1971 examina y critica esta visión, señalando que la posición de Kant, en verdad, debe entenderse a la luz de su concepción teleológica, evolutiva, de la historia. Otra postura sobre el tema en Nicholson 1971). De allí que cueste no reconocer en Kant los fundamentos para formas significativas de resistencia (aún activas, Reiss 1956), a pesar de sus abiertas críticas a tal derecho. Tiene sentido, también, contrastar los argumentos de Kant en contra de que el propio pueblo sea el último juez en lo concerniente al derecho de resistencia, con los ofrecidos por John Rawls (directamente tributario de la tradición kantiana), en su análisis de la desobediencia civil (ver más adelante).

extreme approach above mentioned could thereby be translated into the following: the successful uprising must be applauded, the failed one, punished. Even for Kant, as we said, the triumph of resistance turned it into an action that must be respected.

According to Locke's analysis, it was conceivable that some "turbulent spirit," eager to change the order of things, would become involved in a violent action against the government. But, as he foresaw, such cases tended to result in the adventurer's "ruin and perdition." It happened that if the unrest did not become general and the majority did not perceive the poor performance of the government, the people, "who are more disposed to suffer, than right themselves by Resistance," would not join him in the uprising (Locke 1988: 417-8, sec. 230). Locke proposed the adoption of the most severe penalties, as many of his predecessors had done, for the opportunist who attempted to overthrow a legitimate government.

In comparison to arguments such as the one quoted, Jefferson's was distinguished by a more detailed analysis of the actions of resistance against the government. In particular, he took care to examine the case of failed but totally or partially legitimate uprisings by clearly separating the legitimacy of the uprisings from their result (successful or not). Similarly, and against many of his predecessors, Jefferson was interested in showing the value that even non-legitimate uprisings could have. In effect, the Virginian parted from the premise that uprisings were on the one hand unfortunate because of the costs they carried, but at the same time necessary because they kept the government within its boundaries and citizens involved in the decisions of matters pertaining to them. In this sense, he described uprisings as a "medicine necessary for the sound health of the republic."[19]

Jefferson affirmed that these uprisings could occasionally be founded on hardly acceptable reasons. But even so, he added, the reaction of the government must be measured: severe punishment was a real mistake, since it implied "suppressing the only safeguard of public liberty" (Jefferson 1999: 153). The basis of a good government was, according to him, the people's opinion, so "the very first object should be to keep that right." A severe reaction on the part of the State could bring about the gradual isolation of the community in their own private matters as they perceived the government's decision to not accept radical questioning to its

[19] Como dijera Jefferson (en carta a James Madison del 30 de enero de 1787, en torno al levantamiento en armas de Daniel Shays, que tanto horrorizara a Madison), este tipo de levantamientos ocasiones debían ser bienvenidos, más que recibidos como acontecimientos inaceptables. En su opinión: "Societies exist under three forms (of government) sufficiently distinguishable. 1. Without government, as among our Indians. 2. Under governments wherein the will of every one has a just influence, as in the case of England in a slight degree, and in our states in a great one. 3. Under governments of force: as is the case in all other monarchies and in most of the other republics. To have an idea of the curse of existence under these last, they must be seen. It is a government of wolves over sheep. It is a problem, not clear in my mind, that the 1st. condition is not the best. But I believe it to be inconsistent with any degree of population. The second state has a great deal of good in it. The mass of mankind under that enjoys a precious degree of liberty and happiness. It has it's (sic) evils too: the principal of which is the turbulence to which it is subject. But weigh this against the oppressions of monarchy, and it becomes nothing. *Malo periculosam, libertatem quam quietam servitutem*. Even this evil is productive of good. It prevents the degeneracy of government, and nourishes a general attention to public affairs. I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical. Unsuccessful rebellions indeed generally establish the encroachments on the rights of the people which have produced them. An observation of this truth should render honest republican governors so mild in their punishment of rebellions, so as not to discourage them too much. It is a medecine necessary for the sound health of government" (Jefferson 1999: 108).

policies. Against such a result, Jefferson understood that this kind of involvement of citizens in public affairs should be welcomed, even when mistaken. These apparent threats, in fact, helped to consolidate the basis of republicanism by contributing to the common enterprise of having good institutions.[20]

Jefferson's argument in favor of the restriction of the use of the coercive state apparatus against those who resisted authority was then based on the public significance of such acts. This was due to the value of having good active citizens (and therefore the importance of not discouraging that activism by means of penalties), the need of keeping the government under permanent criticism, and the need to have public officials accept the most thorough responsibility to its citizens.[21]

Present Life of a Close Relative: the Right to Civil Disobedience.

No doubt, reflections like these have helped us think more contemporaneously about close relatives to the right of resistance such as civil disobedience. In effect, current political and juridical philosophy has had recourse to those antecedents in considering acts of disobedience (for example, against the Vietnam war and the persistent application of racial discrimination policies). Thus, central authors of political philosophy like John Rawls and juridical philosophers such as Ronald Dworkin have analyzed civil disobedience along lines of argumentation almost identical to the ones that appeared centuries ago regarding the right of resistance. I would like to explore some parallels between those original reflections on the right of resistance and these contemporaneous reflections on civil disobedience in order to better understand how different authors have studied a theme that takes us to the margins of constitutionalism.

A first important parallel between the original treatment of the right of resistance and the one given to the right to disobedience in the present has to do with who is the "ultimate arbiter" evaluating the validity of popular action. Typically, Rawls seems to rely directly on Locke's and Jefferson's original suggestions to refer to the people as the "last court of appeal". For Rawls, too, it is obvious that there is no alternative authority to the people themselves for determining

---

[20] "I am persuaded myself that the good sense of the people will always be found to be the best army. They may be led astray for a moment, but will soon correct themselves. The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, & to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers & be capable of reading them" (Jefferson 1999: 153-4).

[21] En el análisis de Rawls en torno a la desobediencia civil, encontramos apreciaciones similares. Así, cuando sostiene que la desobediencia "is one of the stabilizing devices of a constitutional system;" cuando mantiene que junto con "free and regular elections and an independent judiciary empowered to interpret the constitution…civil disobedience used with due restrain and sound judgement helps to maintain and strengthen just institutions; y cuando afirma que la desobediencia civil resulta una parte integral de una "theory of free government" (Rawls 1971: 383, 385).

the legitimacy of the disobedience in question –a judgment that would have horrified Kant. Similarly, and against what many of his contemporaries and predecessors would believe, Rawls argues that there are no reasons to fear the consequences of this recognition of the people. In his opinion:

> [The] final court of appeal is not the court, nor the executive, nor the legislature, but the electorate as a whole. The civilly disobedient appeal is in a special way to this body. There is no danger of anarchy so long as there is a sufficient working agreement in citizens' conceptions of justice and the conditions for resorting to civil disobedience are respected. That men can achieve such an understanding and honor these limits when the basic political liberties are maintained is an assumption implicit in a democratic polity (Rawls 1971: 390).

Rawls' position clearly derives from assumptions shared by many of his predecessors: the principle of the basic equality of people, the worry that some members of the community might not be treated as equals,[22] the trust that citizens always deserve because of those egalitarian assumptions,[23] and the certainty that, not having obvious answers to the justifiability of civil disobedience, the only thing left to us is to reason, individually or collectively--even at the risk of making mistakes.[24]

Another parallel between the current approaches to the right to disobedience and the original visions of resistance can be found in Rawls' and Dworkin's discussions on how the law should react to such extreme actions. For Dworkin, for instance, one cannot simplify the complexity of such situations by saying that if the law is valid and a crime was committed, it must be punished, but if the law is not valid, then there was no crime and nobody should be punished. This reasoning, Dworkin tells us, hides the crucial fact that the validity of law can be

---

[22] Defendiendo las razones por las cuales la desobediencia civil resultaría reconocida en la posición original, Rawls sostiene que "As the contract doctrine emphasizes, the principles of justice are the principles of willing cooperation among equals. To deny justice to another is either to refuse to recognize him as an equal…or to manifest a willingness to exploit the contingencies of natural fortune and happenstance for our own advantage. In either case deliberate injustice invites submission or resistance" (Rawls 1971: 384).

[23] "The absence of a final authority to decide, and so of an official interpretation that all must accept, does not lead to confusion, but is rather a condition of theoretical advance. Equals accepting and applying reasonable principles need have no established superior. To the question, who is to decide? The answer is: all are to decide, everyone taking counsel with himself, and with reasonableness, comity, and good fortune, it often works out well enough" (Rawls 1971: 390). Rawls resiste, por lo demás, la idea de que este análisis represente un acercamiento ingenuo frente a problemas como el de la desobediencia civil. Algunos pueden sostener –nos dice Rawls- que dicho estudio es irrealista, dado que supone que la mayoría tiene un sentido de justicia, cuando en realidad lo que mueve a los hombres son "various interests, the desires for power, prestige, wealth, and the like," y cuando sus razonamientos no son más que "occasional pieces calculated to advance certain interests." Rawls reconoce la fuerza de estas críticas, pero agrega que "the essential question is the relative strength of the tendencies that oppose the sense of justice and whether the latter is ever strong enough so that it can be invoked to some significant effect" (Rawls 1971: 386).

[24] "If [one] comes to the conclusion after due consideration that civil disobedience is justified and conducts himself accordingly, he acts conscientiously. And though he may be mistaken, he has not done as he pleased. The theory of political duty and obligation enables us to draw these distinctions. There are parallels with the common understandings and conclusions reached in the sciences. Here, too, everyone is autonomous yet responsible. We are to assess theories and hypotheses in the light of the evidence by publicly recognized principles" (Rawls 1971: 389).

dubious, that public officials can reasonably conclude that the law is valid, while the dissenters can hold the contrary while also appealing to good arguments (Dworkin 1977: 207-8; 215, 1985: 105-6).[25] When that happens, that is, when "a plausible case can be made on both sides," then it cannot be said that the citizen that follows his or her own judgment behaves improperly (Dworkin 1977: 215).

Does Dworkin, then, mean that he who has committed a violation of the law should not be sanctioned? Do authorities not have the duty to apply the law each time it is violated? According to Dworkin, to think in those terms implies getting involved in an act of "moral blindness," where the differences between a situation where one acts according to his own judgment against a dubious law, and a situation where one knowingly and intentionally commits a crime for his or her own interest are glossed over (Dworkin 1977: 216). That is so because it is not true that, even from our strict viewpoint of law, we are always ready to be inflexible in the application of it. We know of penal discretion, which can be practiced before a diversity of crimes for very different reasons (Dworkin, 1985: 114). And we know of the existence of violations of the law that our law does not punish, because they are balanced by justifying reasons (for example, hunger as a legitimate defense for theft).

Finally, it is convenient to point out how the argument about the uncertainty of law, framed by such authors as Dworkin, simply strengthens considerations like Jefferson's made centuries ago. Given the respect for differences that we owe each other, we cannot simply assume that the prevailing law is valid. This is so not only because of a general, principled rejection of dogmatism (and ideological positivism), but also because of the conviction that, given our habitual errors, we need to test the law, and therefore be especially open to critics (even radical ones) against it. Because of reasons of this kind, the actions of the most critical deserve to be welcomed, as Jefferson held, because they force us to reconsider the sense and value of our laws. As Dworkin says:

> [If] our practice were that whenever a law is doubtful…one must act as if it were valid, then the chief vehicle we have for challenging the law on moral grounds would be lost, and over time the law we obeyed would certainly become less fair and just, and the liberty of our citizens would certainly be diminished (Dworkin 1977: 212).

Constitutional Resistance as the Last Resort.

The right to (or duty of) resistance, a prominent aspect of the foundational nucleus of constitutionalism, began to diminish in importance as time went by until it completely lost the privileged position it had formerly held. The reason that seems to explain such a loss is the gradual consolidation of the constitutional democracies that gave definite shape and firmness to prolix rules to permit the punishment and reward of public officials and allow for the legal possibility, at least, of a drastic change of regime via a constitutional reform (Baumgold 1993).

[25] En este sentido, sostiene Dworkin, "[c]ivil disobedience is a feature of our political experience, not because some people are virtuous and other wicked, or because some have a monopoly of wisdom and others of ignorance. But because we disagree, sometimes profoundly, in the way independent people with a lively sense of justice will disagree, about very serious issues of political morality and strategy" (Dworkin 1985: 105-6).

Of course, the fact that the stabilization of constitutional democracies *explains* the right of resistance's fall from grace does not help us with the separate task of assessing whether the displacement of that right is *justified* or not. By reflecting on that, what can be said is that even the most optimistic expectations for the performance of constitutional democracies do not cover all the ground that the right of resistance intended to cover. It is true, however, that today we have alternative and less expensive means of carrying out some of the tasks that that lost right performed. Let me therefore refer to those tasks first.

On the one hand, it is clear that the right of resistance originally worked as the only important mechanism to make the authorities in power responsible, to reproach them for their abuses, and to prevent future excesses. According to authors like John Locke, for instance, the right of resistance was the only instrument the people could count on to ensure their rulers' responsibility. Resistance was seen, then, as the opposite of the ordinary positioning of the people with respect to the government, which consisted in a mix of passivity and *tacit consensus* (Seliger 1991: 603). From this perspective, it is clear that the coming of periodic elections explains and justifies the undermining of an important function and justification for the right of resistance. In such cases, what would be the sense of using physical force to overthrow or eliminate the abusive ruler when it was possible to displace him by the force of votes?

Something similar can be said of constitutional reform mechanisms. Each community has the right to radically review the merits of the system of government through the processes by which it is organized. Historically, this function also seemed to be exclusively connected to such extreme rights as the right of resistance. Once again, it is reasonable to ask what the sense would be in resorting to a violent mobilization of the population to achieve an end that can be achieved much less dramatically through a civilized constitutional assembly.

Despite what has been said, it also seems clear that neither transparent elections nor constitutional reforms can completely occupy the space that the idea of resistance has filled in the past. In contexts of *legal alienation*, the recourse to law to reinvigorate the present rulers or to modify the constitutional basis of the government is simply nonsensical. In these cases, the law is a central obstacle that hinders the possibility of self-government, not one of the conditions that make it possible. In such situations, in fact, periodic elections are not likely to be a proper vehicle to advance significant changes. The alternative of an election of new political personnel does not clearly translate into the possibility of promoting a change in the enforced laws that violate the basic interests of the majority of community members. The same applies to constitutional reform; if that reform is left in the hands of those institutions and individuals who are themselves the motivation for such reform, little can be expected from it. Why should those most willing to resist serious change commit an act of self-sacrifice, especially if they would be its first victims? In these cases, any appeal to the prevailing law as an instrument of change is either too optimistic or too naive.[26]

[26] En tales casos, resultaría cínico no ponerse a reflexionar sobre los límites del derecho, para exigirle a los disidentes, en cambio, que con el fin de ejercer sus protestas recorran una y otra vez los mismos medios institucionales que encuentran una y otra vez cerrados. También lo sería, por lo demás, exigirle a aquellos que recurran a las formas conocidas y tradicionales de protesta, que son justamente las que el poder público ignora. Por lo demás, en situaciones de alienación no sólo resulta esperable que los críticos padezcan de dificultivas expresivas, y carezcan de recursos que les faciliten la tarea de tornar visibles sus quejas, juntar adhesiones para sus reclamos, o

Of course nobody rules out the possibility that good lawyers find good means of "taking advantage" of some "loopholes" left open by the law, that good politicians promote decent initiatives able to commence a slow reform process, that honest judges be fair in the middle of a sea of corruption, that a decent president occasionally change course, that, in view of the uncertainties intrinsic to these situations, the most diverse ways be tried to change that situation (some, more hostile against the authorities, others, involving some recourse to or negotiation with them). It is probable that, in practice, some events as the ones mentioned have occurred, and it is probable that there are good arguments to "block" or morally condemn those actions. This point is a different one, and it has to do with the acknowledgement that the law, an instrument ideally created by the community for its benefit, can start to deny, rather than give life to, such possibility. It is in such situations, when the state uses its force to maintain a fundamentally unfair institutional arrangement, that certain actions of resistance may appear to be justified; to what extent that is so will, of course, depend on the amount of existing "legal alienation". As Rawls held in one of the few references he makes to the idea of resistance to authority, faced with such critical situations, it becomes possible to justify the right of resistance: "For 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 1971: 391). The right of resistance appears then as the *last possible resort* for citizens confronting legal alienation.[27]

---

coordinar sus acciones con otros individuos y grupos que padecen similares problemas. Lo que es peor, en tales casos, previsiblemente, el poder público va a tender a utilizar los medios legales a su alcance –tanto su capacidad económica como, muy especialmente, su capacidad coercitiva- en contra de aquellos que cuestionan su autoridad. Hechos tales como la *criminalización de la protesta social* resultan, en tal sentido, distintivos de situaciones de alienación legal. Tendemos a encontrarnos aquí, entonces, con que los disidentes no sólo quedan con pocas posibilidades de generar demandas institucionalmente exitosas sino que, por lo demás, resulte esperable que las instituciones terminen siendo empleadas directamente en su contra. De allí la sensatez de criterios como los sostenidos por el juez Brennan –uno de los jueces más notables de los que pasaron por la Corte Suprema norteamericana- cuando afirmara que un buen juez debía tomar especialmente en cuenta que "los métodos convencionales de petición pueden ser, como suelen serlo, inaccesibles para grupos muy amplios de ciudadanos. Aquellos que no controlan la televisión o la radio, aquellos que no tienen la capacidad económica para [expresar sus ideas] a través de los periódicos o hacer circular elaborados panfletos, pueden llegar a tener un acceso muy limitado a los funcionarios publicos." En "Adderley v. Florida," 385 U.S. 39 (1966), voto disidente. En este sentido, también, consultar casos como "Schenck v. Pro-Choice Network," 117 S. Ct. 855 (1997); "Madsen v. Women's Health Ctr. Inc., 512 U.S. 753 (1994), y el comentario de los mismos en Fiss (1997).

[27] Por supuesto, en nuestra aproximación a dicho derecho no podemos retomar simplemente los criterios y argumentos que eran apropiados siglos atrás. En dicho entonces, la autoridad pública se encontraba concentrada en una persona o pequeño núcleo de personas, la sociedad tendía a organizarse jerárquicamente, y por ello mismo, la resistencia tendía a adoptar formas peculiares: un solo, dramático acto –típicamente, el tiranicidio- podía dar cuenta, y a la vez resolver de algún modo la raíz del problema en cuestión. Dicho acto podía ser más difícil de concretar, pero era uno, era especialmente visible, y por ello mismo las consecuencias que le seguían podían ser también más transparentes. En cambio, en la actualidad el poder se encuentra, ya que no democratizado, descentralizado al menos en múltiples sectores e intereses, por lo que no es concebible la situación de un único acto milagroso, resolutorio. Del mismo modo, y por la ya apuntada dispersión del poder, es esperable que existan múltiples iniciativas descentralizadas de resistencia a la autoridad, ninguna de las cuales, posiblemente, pueda tener nunca un resultado tan contundente y visible como el que pudo haber tenido un tiranicidio. En este sentido, también resulta esperable que sean mucho más numerosas las iniciativas no exitosas de resistencia a la autoridad –y así, muchas más las oportunidades en que deba evaluarse la legitimidad o ilegitimidad de las mismas. Más todavía, estas crecientes complejidades tornan menos reconocible el grado de consenso o disenso social respecto de las múltiples y dispersas iniciativas anti-gubernamentales y anti-jurídicas.

Of course, there arise then the already mentioned crucial and difficult questions about whether or not we are in a situation of legal alienation, the gravity of the situation, how to recognize or "gauge" these difficulties, and what type of reactions are justified in opposing it. In this sense, an examination of the considerations generated by constitutionalist theory before analogous situations can orient us. Such an investigation can be important in order to start reasoning on the subject individually and collectively, assuming that such serious problems can appear, and that, as many of the authors examined held, in the hour these problems confront us, there is no ultimate arbiter beyond us.

Of course such an answer is especially uncomfortable. On the one hand, it is likely that in the gravest situations, those where legal alienation is pervasive, the conditions for individual and collective deliberation will be the least likely to appear, given the lack of adequate collective forums and the extent to which money and political power can interfere with transparent public communication. On the other hand, the question of "how to respond," especially when confronting the state, is very problematic: can one "propose" that the state change when that state is supposed to be fundamentally corrupt? Nevertheless it is this framework and no other that we must operate in. We know, at the very least, that authors like Locke and Jefferson, reflecting on the resistance to authority like many of our contemporaries reflecting on civil disobedience, recognized the possibility of these radical difficulties, and gave thought albeit tentative answers on how to react in such cases. Of course, radical problems come with radical paradoxes and radical difficulties to be confronted. But the fact is we must face them; we have neither alternatives, nor better theories that those accumulated through the centuries.

Ackerman, B. (1991), *We the People: Foundations*. Cambridge: Harvard University Press.
Baumgold, D. (1993), "Pacifying Politics. Resistance, Violence, and Accountability in Seventeenth Century Contract Theory," *Political Theory*, vol. 21, n. 1, 6-27.
Beck, L. (1971), "Kant and the Right of Revolution," *Journal of the History of Ideas*, vol. 32, n. 3, 311-422.
Bedau, H. (1961), "On Civil Desobedience," *Journal of Philosophy*, vol. 58, 653-665.
Cohen, M. (1972), "Liberalism and Disobedience," *Philosophy and Public Affairs*, vol. 1, n. 3, 283.-314.
Copleston, F. (1963), *A History of Philosophy. The Revival of Platonism to Suárez*, New York: Image Books.
Dunn, J. (1969), *The Political Thought of John Locke*, Cambridge: Cambridge University Press.
Dworkin, R. (1977), *Taking Rights Seriously*, Londres: Duckworth.
Dworkin, R. (1985), *A Matter of Principle*, Cambridge: Harvard University Press.
Filmer, R. (1991), *Patriarcha and Other Writings*, Cambridge: Cambridge University Press.
Fiss, O. (1997), "The Unruly Character of Politics," 29 *McGeorge Law Review* 1-16.
Gargarella, R. (2000), *The Scepter of Reason*, Dordretch: Kluver.
Geismann, G. (1971), "The Democratic Legal Order and Politics," *Ethics*, vol. 81, n. 4, 314-325.
Hamilton, B. (1963), *Political Thought in Sixteent-Century Spain*, Oxford: Clarendon Press.
Jefferson, T. (1984), *Writings*, New York: Literary Classics.
Jefferson, T. (1999), *Political Writings*, Cambridge: Cambridge University Press.
Knox, J. (1994), *On Rebellion*, Cambridge: Cambridge University Press.
Laursen, J. (1986), "The Subversive Kant," *Political Theory***,** vol. 14, n. 4, Noviembre, 586-603.
Linder, R. (1966), "Pierre Viret and the Sixteenth-Century French Protestant Revolutionary Tradition," *The Journal of Modern History*, vol. xxxviii, n. 2, 125-37.
Locke, J. (1988), *Two Treatises of Government*, Cambridge: Cambridge University Press.
Marx, K. (2000), *Selected Writings*, selected by D. McLellan, Oxford: Oxford University Press.
Nicholson, P. (1971), "Kant on the Duty Never to Resiste the Sovereign," *Ethics* 81, n.2, 214-230.
Nino, C. (1987), *Introducción al análisis del derecho* Buenos Aires: Astrea.
Nino, C. (1991), *The Ethics of Human Rights*, Oxford: Oxford University Press.
Nino, C. (1992), *Fundamentos de derecho constitucional*, Buenos Aires: Astrea.
Representation, Cambridge: Cambridge University Press.
Rawls, J. (1971), *A Theory of Justice*, Cambridge: Harvard University Press.
Rawls, J. (2001), *Collected Papers*, Cambridge: Harvard University Press.
Reiss, H. (1956), "Kant and the Right of Rebellion," *Journal of the History of Ideas*, vol. 17, n. 2, 179-92.
Rueger, Z. (1964), "Gerson, the Conciliar Movement and the Right of Resistance," *Journal of the History of Ideas*, vol. 25, n. 4, 467-486.
Schwarz, W. (1964), "The Right of Resistance," *Ethics*, vol. 74, n.2, 126-34.
Seliger, M. (1991), "Locke's Theory of Revolutionary Action," in R. Aschcraft ed., *John Locke. Critical Assesments*, vol. 3, New York: Routledge, 598-621.
Shoenberger, C. (1979), "Luther and the Justifiability of Resistance to Legitimate Authority," *Journal of the History of Ideas*, vol. 40, n. 1, Enero-Marzo, 3-20.
Skinner, Q. (1978), *The Foundations of Modern Political Thought*, vol. 2, Cambridge: Cambridge University Press.

Skinner, Q.; van Gelderen, M. (2002), eds., *Republicanism: Volume 1, Republicanism and Constitutionalism in Early Modern Europe : A Shared European Heritage*, Cambridge: Cambridge University Press.
Suárez, F. (1944), *Selections from Three Works*, Oxford: Clarendon Press.
Vitoria, F. (1991), *Political Writings*, Cambridge: Cambridge University Press.
Walzer,, M. (1966), *The Revolution of the Saints*, London.
Walzer, M. (1967), "The Obligation to Disobey," *Ethics*, vol. 77, n.3, 163-175.
Wilson, K. (1989), "Inventing Revolution: 1688 and Eighteenth-Century Popular Politics," *Journal of British Studies* 20, Octubre, 349-386.
Wooton, D. (1990), "From Rebellion to Revolution: the crisis of the winter of 1642/3 and the origins of civil war radicalism," *English Historical Review*, vol. 105, n. 416, 654-669.