Chinese Political Science Review
https://doi.org/10.1007/s41111-021-00185-2

ORIGINAL ARTICLE

# Can We Disobey in Democracy? Three Points of View

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Received: 22 September 2020 / Accepted: 21 July 2021


**Abstract**
Can we disobey in a democracy? Does not such an attitude run the risk of leading to generalized disorder? Why use illegal means of protest when democracy offers disgruntled citizens legal means of expression? There are three ways to answer these questions: a legalistic approach, a moderate approach and a radical approach. The second, defended by John Rawls and Jürgen Habermas, was so successful that it erased the other two. This article therefore proposes to restore in all its complexity and plurality the debate on the democratic legitimacy of civil disobedience. To do this, it is necessary to confront the thought of philosophers with that of the actors of disobedience, whether they are activists or political and judicial authorities.

**Keywords** Civil disobedience · Radical · Moderate · Legitimacy · Disorder

## 1 Introduction

Civil disobedience refers to political, public, collective, illegal and non-violent action. Academic contributions relating to the ethico-political foundations of civil disobedience closely follow the eddies of history. These theoretical productions—mainly articles or book chapters—gave rise to six waves, each corresponding to a specific historical event: the Nuremberg trial, the civil rights movement, the Vietnam War, the installation of missiles nuclear energy in the FRG, anti-globalization resistance to neoliberalism and mobilizations against climate change. The vast majority of these works fall within liberal political philosophy. Yet, it would be reductive to reduce the theory of civil disobedience to this dominant approach. The liberal interpretation—i.e. that of Rawls and Habermas—of civil disobedience has given rise to two different kinds of criticism. We owe to "conservative thought" for having initiated the debate concerning the democratic legitimacy of this protest practice and, even more, we owe to the "disobedient thought" of Gandhi and Howard Zinn for pointing out the inadequacies of the liberal approach.

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Published online: 31 July 2021

The liberal conception has been criticized because of the ambiguity of the relationship between liberalism and civil disobedience. An article by Fung (2005) is exemplary in this regard. Advocating the happy medium between an excessively anti-establishment approach which would make the revolution the condition for the possibility of a truly deliberative democracy and an excessively consensualist approach which addresses an absolute refusal to any non-persuasive political action, Fung seeks to make room for civil disobedience within the theories of deliberative democracy. Civil disobedience is then simultaneously presented as anti- and pro-liberal. But this apparent paradox is lifted as soon as Fung specifies that civil disobedience is opposed to the concrete reality of current liberal regimes with the objective of making these regimes converge towards the liberal ideal of a deliberative democracy. The anti-liberalism of civil disobedience is therefore only provisional and pragmatic since it aims, fundamentally, to strengthen liberalism by reducing the current gap between the norm and the reality of liberal regimes.

Does this dichotomy between practice and normative ideal satisfactorily resolve the question of the relationship between liberalism and civil disobedience? Civil disobedience would only attack neoliberal economic policies but leave intact (or even unknowingly belong to) the rich liberal philosophical tradition, today embodied by the theories of deliberative democracy and constitutionalism? Against conservative thought, upholding order and hostile to any transgression, is liberal philosophy the only way to legitimize civil disobedience? This is what liberal theorists themselves seem to claim, when they explain that civil disobedience and revolution are antithetical (for Martin Luther King, the revolution was the logical extension of civil disobedience). This article advances the idea that there is a second register of legitimation of civil disobedience. Anti-liberal in nature, this "disobedient thought"—we will call it that—draws its sources from Gandhi and Martin Luther King.

Disobedient thought offers a radical defense of civil disobedience. The specificity of disobedient thinkers is that they are also *actors*. Conversely, liberal theorists of civil disobedience are academics endowed with an almost exclusively bookish knowledge of the matter. Disobedient thinkers have the advantage of having practiced disobedience. Beyond the ideological unity of their writings, these theorists–activists share the prison experience. Thoreau, Gandhi and Martin Luther King all went through prison. Tangible elements also suggest that the passage through the dungeon favored their political radicalization. Thoreau wrote *Resistance to Civil Government* the day after his incarceration for refusal to pay tax. Gandhi discovers Thoreau's booklet during a stay in prison. And King's political radicalization crystallized during his stay in Birmingham prison, where he wrote his famous *Letter from Birmingham jail* on pieces of toilet paper.

According to disobedient thought, liberal philosophy justifies the principle of civil disobedience but condemns its use. Liberals put such severe limitations on civil disobedience that they ultimately render it impractical. And they do not hesitate to turn against it sometimes when they assert, like Rawls, that the injustice of a law is not enough to justify its disobeying (2003: 350). In short, liberals see civil disobedience as a right that the citizen must use with restraint. Conversely, disobedient thought considers, like Thoreau (1849), that disobedience is a duty in the face of any injustice, no matter how small (Delmas 2018). One cannot disobey too much, since

civil disobedience is constitutive of democracy. The cardinal virtue of the citizen is no longer obedience but responsibility. This responsibility authorizes to transgress any unjust law, because the injustice of a law only becomes reality from the moment when the subjects obey it. Disobedient thought and liberalism therefore constitute two incompatible intellectual universes.

Disobedient thought casts suspicion on the alleged elective affinity between liberal democracy and civil disobedience. Disobedient thought and conservative thought will therefore not be studied for themselves but come in support of a demonstration aiming to account for the ambiguous character of the relationship between liberalism and civil disobedience. Therefore, we will begin by examining the conservatives' arguments against civil disobedience. We will then study Habermas's reply to German conservatives and John Rawls' theory of justice as fairness, to show that the liberal approach proceeds to a moderate defense of disobedience. Finally, by making room for the thought of the disobedient actors themselves, we will highlight the pre-suppositions and the limits of the liberal conception of civil disobedience (Celikates 2016a, b).

The debates relating to civil disobedience were structured in two stages. In the years 1960–1970, most philosophers sought to show how civil disobedience could fit into a constitutionalist framework. At this time, everyone has in mine the US civil rights movement and the anti-Vietnam war protests. Some conservative judges and intellectuals present disobedience, even nonviolent, as moral corruption that threatens to undermine the authority of the state. To put an end to this mistrust, John Rawls will insist on what distinguishes civil disobedience from revolutionary activity. From there, while deviating from the Rawlsian approach on certain details, the vast majority of authors consider civil disobedience as a guarantee of liberal constitutional order. Bedau (1961) and Cohen (1971) insist on the necessarily non-violent dimension of disobedience. Woozley (1976) and Walzer (1967) highlight the public nature of disobedience and the willingness to accept legal punishment. Even Dworkin (1978) and Barry (1972), who address Rawls the more severe criticism, consider that we cannot think of disobedience outside the constitutional and liberal framework. The first research gap of this article is to show that there are at least two ways (conservative and disobedient) of thinking about civil disobedience without reducing it to political liberalism.

The second research gap concerns a more recent literature, published in the years 2000–2010. Contrary to the work mentioned in the previous paragraph, research devoted to civil disobedience over the past twenty years generally considers that civil disobedience carries a radicality that goes beyond political liberalism. For Young (2001) and Medearis (2005), civil disobedience makes it possible to underline the shortcomings of liberal democracy, whose formal standards of communication hinder the participation of subordinate social groups. Disobedience is therefore seen as a form of empowerment which makes possible a truly deliberative democracy. For Smith (2013), civil disobedience makes it possible to widen the circle of discussion to new entrants and to improve the quality of deliberation. For Stears (2010), civil disobedience is part of a long tradition of radical democratic activism, which owes more to trade unionists, civil rights campaigners, and members of the student New Left than to justices of the Supreme Court and to liberal philosophers.

According to Daniel Markovits, "the liberal theory of disobedience therefore cannot explain cases—for example, involving nuclear deterrence or the Vietnam War—in which political disobedience seems justified, even though the policies it opposes fall within the scope of democratic political authority" (Markovits 2004: 1948).

Speaking of civil disobedience, this research has in mind forms of action—hacktivism, bossnapping, sabotage, violation of private property, destruction of material goods—which go against the criteria of legitimacy set out by liberal philosophy. Very few of these activities fit the classical definition of civil disobedience (Delmas 2016). But, strangely, the research of liberal philosophers, such as Rawls and Habermas, is little discussed in this literature of the 2000s. Moreover, this research overestimates their own novelty, ignoring that many of their arguments had already been formulated a long time ago by Gandhi and by Zinn (1968). Thus, the second research gap of this article is therefore to produce a *radical critique* of the liberal conception of civil disobedience, which has never been developed by those who refuse the Rawlsian approach.

To sum up, in view of the existing literature, this article therefore intends to provide two innovations. It is, first of all, to question the idea of a natural affinity between political liberalism and civil disobedience. This idea is still widely shared, including by critical political thinkers, who seek to amend and expand the liberal frame, rather than breaking free from it. Second, this article sheds light on a forgotten, invisible thought: that of the actors of civil disobedience (Thoreau, Gandhi, King), whose ideas have often been obscured by liberal philosophers who have written about civil disobedience.

## 2 Conservatism versus Civil Disobedience

The conservative argument is essential because it lays the foundations for the debate. The theory of civil disobedience as a whole—conservatives, liberals and disobedient included—is a theory of the legitimacy; legitimacy being understood as what concerns "the justification of and the consenting to the difference or inequality of power between governors and governed" (Coicaud 2019a: 408, and Coicaud 2019b). It is therefore necessary to start from objections to its validity in democracy.

Before presenting these objections, let us clarify the meaning given here to the notion of "conservative thought". This thought is not to be confused here with the current meaning given to it. In the dictionaries of political philosophy, conservatism is generally assimilated to a triple critique of modernity: (1) critique of rationalism (Cartesian and Kantian) which forgets that human reason is subject to divine Providence and to the heritage of past centuries; (2) criticism of democratic egalitarianism on the grounds that society is inherently hierarchical; finally, (3) criticism of individualism in the name of an organic and united community. Conservative thought thus defined is not necessarily resistant to the use of illegal means of action; this is evidenced by the simple fact that it is such ideas (notably the belief in the sacred value of all human life) that lead some pro-life commandos to commit illegal actions aimed at preventing certain women from having abortions.

In a more prosaic manner, "conservative thought" designates, in the context of this article, a set of arguments aimed at removing all legitimacy from actions of civil disobedience. This is a fundamentally legalistic mindset. Thus defined, conservative thought interests us insofar as it highlights the objections to which liberals and disobedient people will have to respond to guarantee the democratic legitimacy of civil disobedience. Let us examine these objections.

In a clearly undemocratic regime where human rights, individual freedoms and the equality of citizens are systematically violated, it seems accepted that civil disobedience is legitimate, and even necessary.

The question is much more complicated when it concerns the legitimacy of civil disobedience in a democracy. Can citizens disobey the law, even though it resulted from the decision of the legitimately elected Parliament, on the sole ground that it seems unfair to them? The philosopher Christian Mellon wonders about the undemocratic character of civil disobedience: "when laws are passed by an elected majority without fraud and without intimidation, when policies are defined by a government emanating from universal suffrage, can we admit that citizens—even with the most respectable ethical motives—organize illegal actions to change the laws and policies they condemn?" (1998: 17). What is more, the American judge Fortas (1968) raises essential questions, discussed at length in an article by the philosopher Bedau (1991: 49–67): Can one disobey the law when, in democracy, other means of struggle and expression are available? Why act illegally when legal avenues of dispute are made available to citizens? And, is not it risky to let every citizen freely assess the validity of the law? If everyone behaves according to their wishes, would not this quickly create disorder throughout society? And will it not be enough for an individual or a group to judge a law contrary to their interests for them to claim the right to opt out? Finally, can you ever be sure that the law you are breaking is really unfair? The preceding questions reveal three concerns about civil disobedience: anti-democratism, illegalism, anomie.

First, civil disobedience violates democratic procedure by violating the principle of majority. Democracy is based on the demand for obedience to the law on the part of every citizen, even when the policies implemented do not suit them (Neal 2001: 204). This duty to obey derives from majority rule between equal political subjects. Even citizens who have spoken out against the law or against the winning candidate must submit to it as long as the democratic procedure has been respected. To refuse this obedience amounts to asking for an individual power of veto which is incompatible with the recognition of each one as a political subject equal to his peers. Therefore, disobedience seems unjustifiable in democratic terms.

In addition, by their act, disobedience breaks the social contract which binds them to other members of society. In fact, each individual choosing to reside in the national territory tacitly consents to benefit from the rights guaranteed by the State and to fulfill his duties towards the community. To disobey is to break this pact. Conservatives, therefore, demand not only that the perpetrator of an act of civil disobedience be criminally sanctioned, but also that he accepts his sentence and plead guilty, even if he considers himself morally or constitutionally innocent (Power 1970: 40). This acceptance of the penalty does not excuse the act, but constitutes a

central proof of the good faith of the disobedient and of his absence of revolutionary or criminal intention.

From a conservative standpoint, civil disobedience does not only contradict democracy in a procedural sense, it also undermines the condition of possibility of democracy, namely the existence of laws. By weakening the power of political authorities and discrediting existing legislation, disobedience risks driving society into chaos. We know, since Aristotle, that without laws, no social life is possible and, *a fortiori*, no democracy. The conservative argument mobilized here is part of the slippery slope strategy: "What will happen if everyone acts like this?" In fact, civil disobedience does not withstand the Kantian test of universalization. The idea is deployed in two descriptive and normative versions. The descriptive version argues that disobedient actions will be imitated by others, thus promoting the risk of anarchy. The normative version points out that if civil disobedience is justified for one group in particular, then it is for all others, thus paving the way for anarchy.

But the conservative argument par excellence is summed up in Goethe's famous phrase: "I like an injustice better than a disorder". In other words, the conviction of an innocent person would be preferable to questioning the authorities. Consequently, even if we recognize the injustice of a law, we would have to submit to it. The implicit assumption is that disorder would allow greater injustice to occur. However, the Goethian argument poses two problems. First, it supposes that injustice and disorder maintain an exclusionary relationship, which is far from always being the case. Sometimes, for example, with the police repression of a peaceful demonstration, disorder and injustice go hand in hand. Moreover, Goethe's formula is based on a pejorative presupposition against disorder, which would necessarily be bad and dangerous.

Indian philosopher Vinit Haksar offers a more nuanced version of the "Goethian" argument. Starting from the postulate that all civil disobedience is "erroneous" because it is dangerous for democratic institutions, he nevertheless distinguishes, based on two Indian examples, a disobedience whose error would be "reasonable" (it would then be necessary to tolerate) and a disobedience whose error would be "fanatic" (democrats should not show any indulgence towards this second form) (Haksar 2003: 408–419). This internal distinction between a perilous and a reasonable form of civil disobedience echoes another distinction, established by Moreall (1976: 35–44), between coercive disobedience (putting pressure on the adversary) and persuasive disobedience (aiming to change the mentality of the opponent). With these two authors comes into play the difficult question of the definition of violence, perceived or real, and its link to civil disobedience. The insistence on the violent nature of this type of action is at the heart of government strategies to "criminalize" disobedience.

It is not surprising that the two arguments of anti-democracy and anarchy are manifested above all, more than among conservative academics, in the discourse of political authorities. Power is in fact directly targeted, if not threatened, by acts of civil disobedience. So he reacts to this form of protest with a strategy of criminalization. In 1969, Hannah Arendt already denounced "the inclination of the government […] to treat the protesters as common criminals" (1970: 54). By deliberately equating "disobedient" with "delinquents" and more recently with "terrorists",

governments seek to discredit civil disobedience in the eyes of public opinion. It then becomes possible to repress civil disobedience. These attacks gained some vigor during the civil rights movement era. They aroused reactions, especially among liberal philosophers.

## 3 John Rawls, Praise of a Moderate Civil Disobedience

The work of John Rawls was the occasion for the renewal of a discipline then in decline, that of political philosophy. His *Theory of Justice*, published in 1971, kicked off an important debate which that very quickly concerned all American academic circles. The work aims to rethink a classic question of political philosophy, that of *political obligation*.

Starting from the observation that any society produces inevitable antagonisms, Rawls tries to find fair rules of organization of social life to which everyone could adhere and thus submit. In the original position, the participants choose, behind a veil of ignorance, the following two principles, called to govern a just society in which everyone recognizes their natural duty to obey the laws:

- the principle of equal liberty: each individual has an equal claim to a fully adequate scheme of basic rights and liberties, which scheme is compatible with the same scheme for all;
- the difference principle: social and economic inequalities are to satisfy two conditions: (1) they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and (2) they are to be to the greatest benefit of the least advantaged members of society.

### 3.1 The Duty to Comply with an Unjust Law and the Majority Rule

It is in this general theoretical framework that Rawls tackles the question of civil disobedience and the two problems which shed light on it: that of obedience to unjust laws and that of submission to the government of the majority.

A social organization whose political institutions are founded on the principles of equal freedom and difference constitutes a society which conforms to the idea of justice as fairness. As a result, explains Rawls in the sixth chapter of the *Theory of Justice*, its members are subject to a set of obligations. The most important of these is the "natural duty" to support and strengthen the institutions of said society. If the social structure is fair—as much as possible given the context—everyone has a duty to respect decisions taken according to due democratic procedures.

To restore Rawls' thought, it is appropriate to reason like him into a "well-ordered" and "nearly just society" (2003: 363). The first problem concerns obedience to unjust laws. The American philosopher admits, like the classic jusnaturalists, that what the law demands and what justice demands are very different things. These two types of standards should not be confused. But by virtue of our obligation to support a globally just system, we must accept, in such a

system, to obey unjust laws. Moreover, says Rawls, "given human beings as they are" (2003: 468), this duty will come into play on many occasions. But this duty is not absolute, since it only concerns laws not exceeding "a certain minimum degree" of injustice (2003: 442). The principle of proportionality here provides benchmarks for achieving what Rawls calls a "well-balanced position".

The second problem is strongly linked to the previous one. It touches on a fundamental aspect of the democratic system: the majority rule. Rawls believes that majority rule is the best way to establish legislation that is both fair and effective. However, it would be wrong to say that the majority is always right. As Rawls underlines during his debate with Habermas, democracy also has a substantial dimension (Habermas 1995; Rawls 1995). So that it is always possible that the will of the majority infringes the constitutional constraints and the rights of the minority. In this case, the first principle of justice is violated. The possibility is then open to the responsible citizen to enforce justice by directly resorting to an action of civil disobedience. Violations of the second principle of justice are more difficult to observe because they often involve economic and social programs. Rawls therefore advises leaving it to the regular democratic institutions to settle these questions.

Relying on Emersonian perfectionism, Stanley Cavell objected to Rawls for the exclusionary and discriminatory nature of the discussion of principles of justice (1988). Like Rawls, Cavell sees democracy from the voice of the citizens who are supposed to take part in it. But Cavell points out that there is an essential difference between the conversation aimed at defining the principles of justice in the original position and the conversations held daily by real individuals about the degree of justice of their institutions. Because, in the first case, can defend their claim only those to whom their consent has been requested—who participate in the conversation of justice. Furthermore, the discussion on the ethics of discussion ignores, in the eyes of perfectionists, the tragic and always problematic nature of the political agreement. Taking part in the justice discussion does not mean, as Rawls seems to think, that I have given my consent once and for all, definitively. My consent is always conditional and nothing prevents an individual from withdrawing it when the dissonance between his voice and that of his representatives in the government seems unbearable to him. This is exemplified by Thoreau's refusal to pay his taxes to the slave and warmongering government of Massachusetts. Perfectionist philosophy is thus based on a radical individualism (the Emersionnian idea of self-reliance) allowing it to reproach Rawlsian philosophy for its incapacity to assume until the end the consequences of its individualist premise. As Cavell reminds us, there are no preliminary limits to the acceptable claims of individuals. There are no, in other words, "good manners" to claim. This political perfectionism has the advantage of fully assuming that a government is legitimate only on condition that everyone finds its voice in it. However, it is not certain that the radical individualism that underlies moral perfectionism is a solid foundation for a political community. If the consent of the individual is revisable at every moment, the possibility of forming a society is threatened.

### 3.2 Define and Justify Civil Disobedience: the Duty to Uphold Just Institutions

Rawls defines civil disobedience as "a public, nonviolent, conscientious yet political contrary to law usually done with the aim of bringing about a change in the law or policies of the government. By acting in this way, one addresses the sense of justice of the majority of the community and declares that on one's considered opinion the principles of social cooperation among free and equal men are not being respected" (Rawls 2003: 320). It is therefore an act (a factual situation which affects the law, but it is not a right), which is illegal (by omission of a compulsory act or by commission of a prohibited act), public (because it manifests itself in the public space and aims to challenge public opinion), political (insofar as it pursues innovative ends and calls for a common conception of justice), non-violent (Rawls does not define), collective and motivated by ethical principles. But these seven elements of definition are in reality as many conditions of validity: if an act of civil disobedience does not fulfill these conditions, it is for Rawls illegitimate. The definition of civil disobedience is more of a limitation than an assertion of the right to disobey.

We have to remember that the theory of justice as fairness applies to the case of a "nearly just society, and this implies that it has some form of democratic government, although serious injustices may nevertheless exist" (Rawls 2003: 335). Therefore, it concerns the "role and the appropriateness of civil disobedience to legitimately established democratic authority" (Rawls 2003: 319). This theory does not apply to other forms of government or to other forms of dissent and resistance.

The question of the justification of civil disobedience comes down to a question of conflict of duties: when does the duty to obey the laws of the majority cease to be an obligation vis-à-vis the right to defend one's freedoms and the duty to fight against injustice? The formulation of the question teaches us that civil disobedience, to be justified, must appeal to a common conception of justice, which is to say to the principles of justice previously adopted by all. Justification must in no case invoke the principles of personal morality or religious doctrine. It must be based on group interests, not those of an individual. When it considers that the conditions for free cooperation have been violated, the disobedient minority appeals to the majority and its sense of justice.

Rawls attaches three other conditions of legitimacy to civil disobedience. First, the legal means to remedy a situation must have proved ineffective. In other words, civil disobedience should only be used as a last resort. But this necessary condition is not sufficient. Rawls points out that the multiplication of acts of civil disobedience leads to considerable disorders that risk harming the functioning of a just constitution. Accordingly, oppressed minorities must practice disobedience with caution and restraint and, if possible, cooperate to limit the overall level of protest.

Rawls thus explicitly defines three conditions of validity. However, without presenting them as such, he adds two more. First, civil disobedience must take place "within the bounds of fidelity to law" (Rawls 2003: 323). Unlike the militant, the insurgent or the revolutionary, the disobedient does not oppose the entire system but only a particular law. Its action is motivated by the desire to establish or restore the rule of law. By breaking the law in a public and non-violent manner, he proves that he remains loyal to it. And if it is necessary to choose, the disobedient will rather

sacrifice himself than risk destabilizing society. Second, still from a perspective of loyalty to the rule of law, Rawls demands that disobedient people assume the legal consequences of their act. This is to prove to the public that the gesture was authentic and well thought out. It is also a way of emphasizing the individual responsibility of each citizen. This requirement of submission to legal sanction is thus proclaimed by mutual agreement between the liberals and the conservatives. We will see in the conclusion of this article that it was strongly rejected by disobedient thought.

When these five conditions are met (call for a common conception of justice, use as a last resort, restraint in practice, fidelity to the law and acceptance of the penalty), it becomes possible to exercise civil disobedience. What role does it play then? What is its function within a democratic regime and an almost just society? It may be illegal by definition, but according to Rawls it is a means "to uphold and to further just institutions" (Rawls 2003: 257). To do this, it must be used little and wisely. As long as the five conditions are met, it presents no threat of anarchy. On the contrary, it allows democracy to better arm itself against its own dysfunctions.

But Rawls is not the only thinker to embed civil disobedience in a theory of the rule of law, deliberative democracy and constitutionalism. Dworkin (1985: 104–119), Bobbio (1999: 199–213) and Jürgen Habermas proceed in the same way. In the absence of any major difference in the argumentative structure of these four authors (in connection, of course, with the only problem of disobedience), it is not necessary to return to each of them to grasp the essential characteristics of the liberal theory of civil disobedience. However, the reflection of the theoretician of "communicative action" deserves our attention.

## 4 Jürgen Habermas, Civil Disobedience *in* and *for* the Rule of Law

Habermas is in the right line of Rawls since he also thinks of civil disobedience within (1) the already existing social structure and (2) a nearly just society (Audard 2002, 95–132). For the American philosopher, disobedience is legitimate when it appeals to the common sense of justice. The German philosopher, for its part, demands that it appeal to the principles of the Constitution. In both cases, this amounts to excluding the possibility of an infringement motivated by special interests. All disobedience is not acceptable. According to the German philosopher, disobedience is only civil if it comes from civil society. Consequently, the rich cannot evade the laws organizing redistribution and large companies cannot circumvent measures aimed at protecting the environment, "insofar as capitalist economic actors have been excluded from civil society in advance" (Lemasson 2008: 60). Finally, Habermas and Rawls both speak out against legal positivism and legitimize civil disobedience by violating fundamental rights and calling into question values shared by all citizens.

However, there are differences. The former philosopher of the Frankfurt school presents a more detailed and less abstract reflection than that of Rawls. Habermas nourishes his normative developments by taking positions on concrete cases, such as that of the German antimilitarists of the 1980s, and he denounces the strategy of power, of the "brat media" and of reactionary jurists who seek to criminalize the

action of engaged citizens. Civil disobedience is presented by professors of public law as a subversive element aimed at establishing the dictatorship of an elite of leftists. It is to respond to these neoconservative attacks that Habermas engages in a controversial reflection on this theme.

Habermas' thesis is this one: civil disobedience, as long as it falls within the framework of the rule of law, constitutes a factor of progress for this same rule of law. Rawls and many liberals subscribe to this thesis, which directly opposes the conservative ideas presented above. However, Habermas's interest lies in having explicitly developed a critique of this conservatism, which he calls "German Hobbism" and whose theoretical foundations he traced back to Thomas Hobbes and Carl Schmitt (1985: 100).

Habermas notes that the conservatives are concerned exclusively with order, to the detriment of justice. Haunted by the specter of anarchy, they hold any form of domination legitimate as long as it effectively ensures internal peace. Their fascination with legal peace makes them forget the demand for legitimation of force, the monopoly of which is appropriated by the State.

According to Habermas, this conservative approach poses two problems. First, by evacuating questions of validity and legitimacy, German Hobbism stifles all possibility of civic life. Second, Hobbism implicitly considers that the foundation of a political order lies in that order itself. However, Habermas argues, internal legitimacy is not enough. The legal order must be justified by principles that are external to it. The constitution must then be in accordance with these principles. In the absence of one of these two conditions, obedience to the laws cannot be required (1985: 102). The way is then opened to legitimate civil disobedience. In addition, Habermas argues that the rationality of the norms resulting from the deliberation process does not automatically guarantee their validity. "A strong concept of procedural rationality locates the properties constitutive of a decision's validity not only in the logicosemantic dimension of constructing arguments and connecting statements but also in the pragmatic dimension of the justification process itself" (Habermas 1996: 226).

Moreover, by taking into account only the concern for legal peace, the conservatives adopt an erroneous vision of what constitutes the essence of the rule of law. The latter is based not on one but on two constitutive principles: the guarantee of internal peace and the requirement that the citizens recognize the order of the State as legitimate. These two ideas come into tension when approaching the question of obedience to the law. From the first—the only one that Hobbes takes into account—it follows that one demands to obey the laws *unconditionally*. From the second—it follows on the contrary that it is necessary to obey *knowingly*.

Democracy must therefore seize civil disobedience as a "chance" from which it can "draw some positive" (Habermas 1985: 104). Civil disobedience makes it possible to test the "maturity" (1985: 99) of the rule of law by evaluating its capacity to reconcile the two aforementioned contradictory requirements: the preservation of social peace and the production of legitimacy of the system. Thus, a democratic constitution tolerates disobedience "under the proviso, of course, that the 'disobedient' citizens plausibly justify their resistance by citing constitutional principles and express it by nonviolent, i.e., symbolic means" (Habermas

2004: 9). By tolerating disobedience thus conditioned, the rule of law demonstrates its flexibility and capacity for adaptation. It protects democracy by guaranteeing a reflective return to its own normativity. This is why, according to White and Farr (2012), Habermas's paradigm of communicative action is less hostile to dissensus than many commentators have said. However, if dissidents are to be given room for maneuver, it must be balanced and put under tension with the symmetrical concern of preserving the stability of democratic institutions. To prevent a generalized or unjustified spread of illegal practices, Habermas makes civil disobedience conditional on respect for the principle of last resort. The disobedient can only come into action after having unsuccessfully exhausted all formal possibilities of revision (Habermas, 2015).

In addition, civil disobedience constitutes a guarantee of the social bond. It makes it possible to "hold together" the community. Habermas' conception is a marked departure from that of Hannah Arendt (1970). The latter makes disobedience a legitimate breach of a social contract which can always be revised. However, with Habermas, far from breaking a social contract, the gesture of civil disobedience reaffirms it. By recognizing the legitimacy of civil disobedience, the State acts of tolerance vis-à-vis dissidents. But this tolerance is not free. It is based on the bet that "these persons (who could in the final analysis transpire to be enemies of the constitution) nevertheless have the opportunity contrary to their image to prove themselves to actually be the true patriotic champions of a constitution that is dynamically understood as an ongoing project-the project to exhaust and implement basic rights in changing historical contexts" (Habermas, 2004: 9). Habermas thus makes possible a new debate on the interpretation of the constitutional order. Civil disobedience is therefore only an extension of the virtuous logic of communicative action.

That being said, Habermas associates disobedience with a set of conditions of validity similar to those already mentioned by Rawls: respect for the legal order as a whole, willingness to assume the judicial consequences of his act, use as a last resort and legitimation of the act based on the Constitution. Thus liberal states and regimes must be challenged in the name of their own principles, because the tension is purely internal between the ideals they proclaim and the reality of the systems of power. As Thomassen has shown (Thomassen 2007: 211), for Habermas, the liberal normative ideal constitutes the unsurpassable political horizon, so that civil disobedience cannot oppose it.

The normativism of the Habermassian theory of civil disobedience is at the same time its strength and its weakness. For Habermas, critical political thought must be dialectically linked to a sociological account of injustices and conflicts in social life. Despite this laudable declaration of intent, Habermas's theory does not conform to this requirement. His normative political theory and that of Rawls have been severely criticized for the inadequacy of their sociological claims. Loïc Mc Nay writes that their theories are based on "an untenable abstraction vis-à-vis sociological reality" (2008: 87). Moreover, civil disobedience highlights the difficulty inherent in any normative political theory. If this theory is confined to must-be, it risks being valid only for a society of angels. If, on the other hand, it claims to describe the "real" functioning of society without taking social science research seriously, it risks projecting the normative onto the descriptive and delivering a biased analysis

of the social. Thus, a "good" theory of democracy and civil disobedience must be closely coupled with a theory of injustice and domination.

However, Habermas' normativism is also the strength of his theory. A whole section of critical thought remains trapped in the myth of the extinction of politics. The Marxist forecast of the advent of communism gave birth to the image of a society transparent to itself. Marxist prophecy announced the imminent transition from the government of men to the administration of things. From this utopia of a reconciled society it generally follows that within such a society civil disobedience no longer has the right to exist. Rawls and Habermas rightly reject this totalitarian fantasy of the disappearance of the conflict. For them, even in a utopian society—a "nearly fair" or "nearly democratic" society—civil disobedience remains legitimate and beneficial to political life.

## 5 Radical Civil Disobedience and Risk of Anarchy

Liberal academics generally oppose the discourse of governments and of the conservative fringe of intellectuals. Civil disobedience therefore appears to be a liberal concept. Concern for the individual, mistrust of the State and the common reference to natural law explain this apparent membership. But there is a gap between the constitutionalist-liberal justification of civil disobedience and the discourse of the actors. A detour through the disobedient thought of Gandhi, Martin Luther King and Howard Zinn reveals the limits of the liberal conception of civil disobedience.

### 5.1 Radical and Moderate Civil Disobedience

The first and main criticism is addressed to the operation of domestication that liberalism makes civil disobedience undergo. By asserting that disobedience is by definition respectful of the principles of the rule of law, that is to say moderate, the liberals are committing a double historical and philosophical negation. At the historical level, such a minimalist definition of civil disobedience results in excluding from this category a set of phenomena which nevertheless belong to it and which claim this notion: occupation of empty housing, repossession of agricultural land and more generally any illegal and non-violent action which would not only aim at the modification of a law but the overthrow of the liberal political order. At the philosophical level, the liberal definition is based on the illusion that only the invocation of human rights or the Constitution would be capable of justifying the violation of the principle of majority, thus closing off any possibility of thinking about democracy beyond of its liberal and representative form. Disobedient thought does not reproduce the error of liberal thought, which would consist in naively reversing the proposition and affirming that all civil disobedience is radical. In a more nuanced way, Gandhi (2007) and Martin Luther King (1964) have highlighted the existence of two forms of civil disobedience, one moderate and the other radical, one reformist and the other revolutionary (Scheuerman 2020; Aitchison 2018).

In their article on "The production of dominant ideology", Luc Boltanski and Pierre Bourdieu recall that the thinkers who recognize "conservative thought only in its reactionary form, the very one that conservatism is the first to fight against, are late of a war" (Boltanski and Bourdieu 1976: 42). Gandhi would approve of this rapprochement of liberalism with conservatism since he builds his thought on a frontal opposition to economic, political and philosophical liberalism (Pantham 1983: 165–188).

But is not equating liberalism with conservatism an excessive judgment, since Rawls and Habermas have both legitimized the use of civil disobedience in democracy? No, answer the disobedient thinkers. Because Rawls is very ambiguous on the issue of civil disobedience. He seems to approve of the principle, but in reality, Rawl attaches such a series of conditions to civil disobedience that it almost comes to the point of emptying it of all practical significance. The same goes for Habermas, who actually praises a limited resistance, so limited that it ultimately comes to be legitimate only in a small number of cases. Rawls and Habermas justify the principle of civil disobedience but they block its use. Disobedience is theoretically possible, but politically undesirable.

For Thoreau and Gandhi, the injustice of a law demands that it be disobeyed. Rawls asserts on the contrary that "the injustice of a law is not, in general, a sufficient reason for not adhering to it" (2003: 308). Moreover, while Martin Luther King and Howard Zinn insist on the existence of an insurrectional dimension of "civility", Rawls attributes to this term a perfectly opposite meaning. According to him, the "natural duty of civility" comes down to accepting the shortcomings of democratic institutions. Note, moreover, that the injunction to obey unjust laws constitutes a foundation of the Rawlsian theory of civil disobedience. The author reformulates this injunction on numerous occasions.

Paragraph 57 of the *Theory of Justice* is titled "The Justification of Civil Disobedience". The reader will expect to find in it a defense of civil disobedience. On the contrary, Rawls draws up a long list of restrictive conditions. Instead of providing "good reasons to disobey", Rawls elaborates a whole series of conditions limiting the cases in which civil disobedience will be deemed legitimate. We presented earlier Rawls as the defender of civil disobedience against conservative attacks. But, in view of what has just been said, it is important to understand that in the eyes of Gandhi's disciples, Rawls is less distant from conservative thought than it seems. Behind a clear defense of civil disobedience, Rawls' thought tends, by indirect and subtle means, to restrict its use as much as possible. This liberal mistrust of disobedient practice is not surprising because, once the emphasis is placed on the virtuous normative dynamics of contemporary democratic states, it makes sense that civil disobedience can only exist at the margins.

### 5.2 The Fear of Disorder

Besides the concealment of radical manifestations of civil disobedience, the disobedient criticism of the liberal approach has as a second stake the question of disorder. Rawls makes it clear that he sets conditions of validity for civil

disobedience to prevent it from dragging society into disorder. In Gandhi's eyes, this fear is unfounded in the sense that civil disobedience cannot be held responsible for the possible disturbances which ensue.

It could be argued, based on Weber's theory of perverse effects, that disobedient activists, by trying to improve the order of things, risk precipitating its ruin. This is not the case, Gandhi answers. Civil disobedience only consolidates democratic gains. Gandhi's political opponents blamed non-cooperation for exciting the masses and leading to violence. It is true that his campaigns of public agitation have on several occasions led to bloody riots (Runkle 1976). However, Gandhi explains that it is not the non-cooperation which constituted a danger here for democracy. Indeed, civil disobedience only revealed the latent violence that already existed within colonial society. "The fact that civil disobedience turns into violent disobedience is not, I regret to admit, an improbable situation. But I know she would not be the cause. The violence is already there which corrodes the political world. Civil disobedience will only be a process of purification and perhaps bring to the surface what is buried in this world" (Gandhi 2007: 346). The injustices prior to the *satyagraha* campaign are the real cause of the riots. Gandhi can thus affirm that "civil disobedience never leads to anarchy" (2007: 269).

One could also argue, as the American judge Francis Ford (of the Federal Court of Boston) did, that from civil disobedience to criminality there is only one step which the disobedient will soon take. However, this intuition is belied by sociological studies (National Commission on the Causes and the Prevention of Violence 1969). Hannah Arendt, commenting on these studies, concludes that the evidence which might show that acts of civil disobedience tend to lead to criminality "is not insufficient but simply non-existent" (1970: 74). Howard Zinn adds that disobeying the law in the context of social struggles does not lead those who have practiced civil disobedience to break the law for other reasons. He supports his point by referring to the conclusions of a study published in the *International Journal of Social Psychiatry.* This study, involving three hundred young African Americans who practiced civil disobedience, found "practically no manifestation of delinquent or anti-social behavior, no more than school dropout or pregnancies outside marriage". In conclusion, the authors state that, "in any case, there is a lack of evidence to assert that civil disobedience inevitably leads to less respect for the law or that it induces an inclination for criminal behaviour" (Zinn 1968: 213).

The issue of disorder constitutes the crux of the divergence between the liberal and disobedient conceptions of civil disobedience. From a liberal perspective, disorder is only provisionally accepted to the extent that it ultimately allows stabilization of just institutions. Disobedient thought, on the contrary, does not fear the disorders that accompany civil disobedience, because it sees in these disorders a step towards more justice and freedom. While liberals tolerate civil disobedience under strict conditions, Thoreau, Gandhi and all of disobedient thought erect it as a building block of democracy.

## 6 Conclusion: the Practical Scope of the Debate

The liberal approach conditions the legitimacy of civil disobedience by respecting the principle of last resort, by accepting the penalty and by an absolute rejection of any form of violence. However, the idea that civil disobedience is only legitimate if it takes place after the proven failure of all legal means of protest can be disputed. The denial of justice is sometimes so blatant that one cannot imagine the minority embarking on a long legal journey before expressing its refusal to obey. The gravity of the situation makes civil disobedience the only effective and rapid means of resolving a problem. Moreover, the legal remedies being almost inexhaustible, a legitimate civil disobedience is almost impossible to concretize in reality.

Finally, there are emergencies, such as climate change, which mean that civil disobedience cannot wait until they have exhausted all legal avenues. Current democratic polities face a governance dilemma, in the sense that the imperative of deliberation can prevent government to respond to the political and ecological demands of the people in a timely and effective manner. Regarding this dilemma, a direct action of citizens, such as civil disobedience, can constitute a kind of solution. Conservative and liberal approaches give a subordinate place to the direct action of the governed because, according to them, democracy resides first and foremost in the action of elected officials. In contrast, the radical approach proposed by Gandhi and Martin Luther King places the center of gravity of democracy on the side of ordinary citizens.

The principle of accepting legal sanction has also been criticized by disobedient thought (Brownlee 2012), in the person of Howard Zinn, for whom this condition is both incoherent and ineffective. To submit to the sanction betrays the original spirit of civil disobedience. If it is sometimes necessary to accept prison out of pragmatism (to arouse the indignation of public opinion in the face of the imprisonment of an innocent person), there is no ethical–political obligation to submit to the sanction. Such an acceptance would be inconsistent since, according to Zinn, when the law broken is clearly unjust or unconstitutional, the sanction is as unjust as the law infringed, so that the acceptance of the sentence is a moral and legal lie (Zinn 1968: 197). Moral inconsistency is compounded by strategic ineffectiveness since acceptance of the sanction encourages the State to maintain the law. It also risks sending an ambiguous message to public opinion by making them believe, wrongly, that submission to the sanction is considered morally justified.

Finally, it should be remembered that, from a liberal perspective, activists must refuse in advance and absolutely to practice any form of violence. Considering this condition of legitimacy of civil disobedience as excessive, Gandhi refused for his part to make non-violence an “absolute doctrine”. Thus he asserted that “if it was absolutely necessary to make a choice between cowardice and violence, I would recommend violence” (1990: 182). In this way, he opened up the possibility of a distinction between physical violence applied to people and that applied to their objects. Can we really qualify as “violent” attacks on objects and private

property? Disobedient thought offers no obvious answer here. From Gandhi to Howard Zinn via Martin Luther King, opinions differ. But disobedient thought has the merit of raising the problem, unlike liberal philosophy which disqualifies from the start any form of physical violence, including that applied to objects.

**Declarations**

**Conflict of Interest** On behalf of all authors, the corresponding author states that there is no conflict of interest.

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