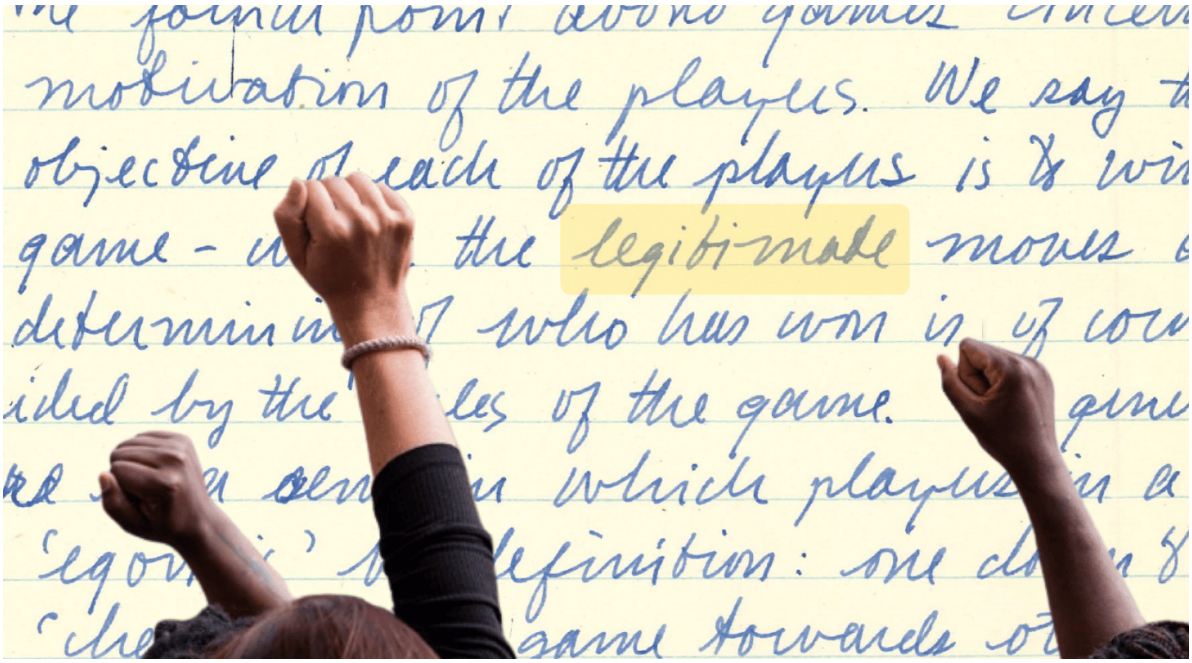
INSTITUTIONS AND FREEDOM

John Rawls and “militant resistance” as an unexplored category

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Manuscript from the John Rawls Papers (Harvard University Archives). Graphic design: Maria Oliva Campabadal (CETC).

Philosopher John Rawls spent his entire life thinking about how best to lay the foundations of a just and cooperative society. He also concentrated on the opposite extreme, pondering conceivable and justifiable exit routes in the face of severe injustices that would be difficult to repair through the institutional means available. In particular, and above all in his earlier works, Rawls meditated on two alternative responses that he considered valid in the face of difficult circumstances: “civil disobedience” and “conscientious refusal”. Only in passing did he refer to more radical modes of defiance or resistance to the law, which he grouped under the idea of “militant actions” or “militant resistance”. However, Rawls did not concern himself with exploring these forms of resistance, although he did recognise them as justified in some instances of extreme, deliberate, and structural injustice. In this essay, I will attempt to examine the concept of “militant resistance”, a category recognised and defended by Rawls, but almost wholly unexplored in his theory.

Rawls in response to unjust policies: “civil disobedience,” “conscientious refusal”, and “militant resistance”

During the decades in which Rawls developed his academic life, the public concerns that motivated his work were diverse: war, religious intolerance, extremism. Other problems, such as those related to poverty, inequality, and distributive injustice –problems that from my perspective were and continue to be prominent in Western public life– did not come to the fore in his studies.

Even in his earliest work, Rawls showed interest in studying justifiable modes of opposition to unjust policies promoted by governments. His article “Legal Obligation and the Duty of Fair Play”, for example, was written in 1964, while “The Justification of Civil Disobedience” was published in 1969. Later on, and from the outset in his “theory of justice”, Rawls referred to the “various ways” to “oppose unjust regimes, ranging from civil disobedience and militant resistance to revolution and rebellion” (Rawls 1971, 8). When studying these options, and in particular “civil disobedience”, he made it clear that he was conceptualising the issue in “nearly just…well-ordered” societies, in which there are no “serious violations of justice”. For this reason -he clarified- he decided not to deal with this mode of protest “nor with resistance and militant action”, as “tactics to transform or end an unjust and corrupt system” (Rawls 1971, 363).

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Be that as it may, Rawls’ work would gradually begin to explore other forms of greater injustice and, consequently, other forms of response. In these approaches, the philosopher would recognise, yet at the same time set aside, move towards and, yet separate himself from the analysis of cases of major targeted, permanent or structural injustices and the justifiable ways of responding to them. Of particular interest to us here is that Rawls was suggesting, through these considerations, that he had in mind some more vehement or direct ways to confront severe and structural social injustices such as “resistance” or ” militant action”.

More specifically, and intending to clarify his definition of civil disobedience, in a carefully crafted paragraph, Rawls presented and gave various details about the way in which he understood this “militant resistance” that he would not deal with directly. This long, but ultimately concise paragraph (spread between pages 367 and 368) would be the only place Rawls would elaborate, albeit briefly, on this category that would remain unexplored within his theory. Rawls maintained that:

> Civil disobedience has been defined so that it falls between legal

> protest, on the one side, and conscientious refusal and the various forms of resistance on the other. In this range of possibilities, it stands for that form of dissent at the boundary of fidelity to law. Civil disobedience, so understood, is clearly distinct from militant action and obstruction; it is far removed from organised forcible resistance.
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> Rawls 1971, 367

Having "situated" such forms of protest, Rawls went on to describe, for the first time, how he conceived the action of "militants", to whom he alluded to once again if only to distinguish them from "disobedient civilians". He stated:

> The militant, for example, is much more deeply opposed to the existing political system. He does not accept it as one that is nearly just or reasonably so; he believes either that it departs widely from its professed principles or that it pursues a mistaken conception of justice altogether. While his action is conscious on its own terms, he does not appeal to the sense of justice of the majority (or of those having effective political power), since he thinks that their sense of justice is erroneous, or else without effect. Instead, he seeks by well-framed militant acts of disruption and resistance, and the like, to attack the prevalent view of justice or to force a movement in the desired direction.
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> Rawls 1971, 367

We now have a clearer understanding of the way in which Rawls understood "militant action", and therefore also of the deep-seated and generalised rejection that the "militant" expresses towards the predominant political system and the principles that order it. For this very reason –Rawls underlined– the "militant" does not show "fidelity to the law", nor the disposition (unlike the "disobedient civilian" and "conscientious refuser") to abide by the rulings and sanctions the system has defined to deal with those who perpetrate serious breaches of its rules. Hence, Rawls adds:

> the militant may try to evade the penalty, since he is not prepared to accept the legal consequences of his violation of the law: this would not only be to play into the hands of forces that he believes

> cannot be trusted, but also to express a recognition of the legitimacy of the constitution to which he is opposed. In this sense, militant action 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 so unjust or else to depart so widely from its own professed ideals that one must try to prepare the way for radical or even revolutionary change. And this is to be done by trying to arouse the public to an awareness of the fundamental reforms that need to be made.
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> Rawls 1971, 368

> According to Rawls, militant action implies a generalised rejection towards the predominant political system and its principles

And this is where the deliberations and detail that Rawls offers on “militant resistance” basically come to an end. However, before concluding this brief detour around the issue, the author of *A Theory of Justice* did not shy away from introducing a fundamental suggestion, by way of conclusion, in regard to the possible justification for such acts of resistance. Rawls stressed, then, that “in certain circumstances, militant action and other types of resistance are surely justified”. Unfortunately, he immediately added that he would not consider such cases since his aim was to “define a concept of civil disobedience and understand its role in a nearly just constitutional regime”.

When resistance is “surely justified”

In his book on the “theory of justice”, Rawls abandons his contemplations on the details of “militant action” at a somewhat premature stage. Therefore, in the following paragraphs, I will try to “complete” his deliberations on the subject in order to clarify and polish the issue. Whenever possible, in pursuit of this reconstructive task, I will try to base my deliberations on the suggestions, “clues”, and clarifications offered by Rawls himself.

Locke: “trust” in citizens and “responsibility” of authorities

John Locke appears as one of the most cited authors throughout Rawls’ work, particularly in his first and most important texts, more firmly anchored in a “contractualist” conception. As I understand it, Locke –and in particular for us, the Locke who wrote about the “right of

resistance"– plays a fundamental role in understanding Rawls' approach to the subject.

A first and essential point of agreement between Locke and Rawls (and the influence of the first over the second), in terms of challenges to the government, has to do with what I would call a "principle of trust" in the citizenship, which I would relate to the concept of "priority of responsibility" aimed at the authorities. In his day, Locke, who was far from being a revolutionary philosopher, developed a well thought out theory on the subject based on these principles. For him, history had indisputably demonstrated that respect and relative passivity towards governments was always preferable for citizens –hence his position on "tacit consensus"–. However –Locke added– in the same way the citizenship's "silence" or acquiescence towards governments should be respected, so too should governments take very seriously anything that citizens express or intend to express in those occasional, almost rare incidences when they choose to "stand up" to the authorities.

It is interesting to note, in this regard, Rawls' full agreement with Locke on the matter. Rawls, like Locke and following Locke, seemed to affirm those convictions of trust in the citizenry, and the responsibility of the authorities in charge. He wrote, for example, and to that effect (referring, once again, to "civil disobedience"):

> if justified civil disobedience seems to threaten civic concord, the responsibility falls not on those who protest, but on those whose abuse of authority and power justifies such opposition. 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.
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> Rawls 1971, 391

> Rawls spoke of resistance as a right to which individuals could resort as a way of dealing with grave injustices

Like Locke, Rawls made it clear that he spoke of resistance as a right to which individuals could resort as a way of dealing with grave injustices; by the same token, he stressed that, for him, in these situations, the responsibility of the authorities in office should be presumed.

Substantive and procedural conditions for resistance

The link between Rawls' thought and the Lockean tradition can also help us better understand the conditions that –according to this line of thought– must be met to be able to speak of justified forms of resistance.

As I understand it, Locke was thinking of *substantive and procedural conditions* that could spark certain forms of resistance to authority. The substantive conditions had to do with what he called "a long train of abuses", an idea that would be taken up years later by Thomas Jefferson to be incorporated into the North American "Declaration of Independence". In *procedural* terms, government failures became manifest and wholly unacceptable when incumbent authorities failed to meet their fundamental commitments.

Similarly, John Rawls seemed to be of the opinion that robust forms of resistance to authority were sparked by substantive and procedural considerations. His first reference to substantive conditions of resistance appears in his early article on "civil disobedience", where he maintained, for example, that "the persistent and deliberate violation of basic liberties over a prolonged period of time cuts the ties of community and invites either submission or forceful resistance" (Rawls 1999b, 182).

His references to procedural conditions also appear at various points in his work. In particular, they are expressed in his allusions to the "deliberate" rather than random or unfortunate nature of certain serious violations of rights; and, above all, in his allusion to the effective impossibility of resorting to existing constitutional mechanisms to put an end to the violations in question. In Rawls' words:

> Whether the law should be obeyed or not depends, if one wants to emphasise the notion of justice, on such matters as 1) the justice of the constitution and the real opportunity it allows for reversal; 2) the depth of the injustice of the enacted law; 3) whether the enactment is actually a matter of calculated intent by the majority and warns of future such acts; and 4) whether the political sociology of the situation is such as to allow of hope that the law may be repealed.
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> Rawls 1999b, 126

The limits of resistance: “natural duties”, “fair play”, calculation and inconvenience

Depending on the circumstances, levels of justice, and the structural and permanent nature (or otherwise) of such inequities, resistance to the government may become necessary, and therefore be justified. Nonetheless, it should be understood that for Rawls, any act of resistance, from the forms of “civil disobedience” and “conscientious refusal” he examined to other more radical responses, are subject to certain limitations.

A common limitation to be considered in these cases has to do with what Rawls called “natural duties”. Rawls alluded to these duties in some detail. He dedicated a special section to them and illustrated them, classifying them as positive and negative “natural duties” through examples such as the following: “to help another, when another is in need or is under threat, and to the extent that such help does not entail excessive risk or loss for oneself; the duty not to harm or hurt another; and the duty not to cause unnecessary suffering” (Rawls, 1971, 122).

> For Rawls, any act of resistance, from the forms of “civil disobedience” and “conscientious refusal” to other more radical responses, are subject to certain limitations, such as natural duties

Similarly, although more explicitly and directly, Rawls alluded to other limitations on protest and disobeying the law in his article “Legal Obligation and the Duty of Fair Play”. In this article, the Harvard professor listed some facts that had to be considered to determine the course and radicality of action to follow. These facts to consider could motivate the participants to “continue to obey the law, at least for a time”. Rawls then referred, for example, to i) acts (of disobedience, for instance) that “do not improve the justice situation of their descendants”; or ii) situations that involve “hurting and causing harm to innocent people who do not belong to the unjust majority”.

The “electorate as a whole” as the “ultimate court”

In his reflections on “civil disobedience”, Rawls raised the critical question of who should be the “final arbiter”, who should have the “final say” when weighing up the justification for such actions of resistance to the authority? And his answer on the matter was entirely consistent with the argument above, in terms of how John Locke and his theory on the right of resistance influenced Rawls’ writings on the subject. In this regard, Rawls pointed out:

> Although the Court has the final say in settling any particular case,

> it is not immune from powerful political influence that may change its reading of the law land. The Court presents its point of view by reason and argument; its conception of the Constitution must, if it is to endure, persuade men of its soundness. In any case, the final court of appeal is not the Court, or Congress, or the President, but the electorate as a whole.
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> Rawls 1999b, 188

That is to say, according to Locke, and also for Rawls, the last court of appeal when faced with these difficult questions should not be the Supreme Court or any court of that kind (which would probably not be "immune to powerful political influence that may change its reading of the law"), but nor should it be the Congress or President in question. The "final say" on these problematic and dramatic cases of resistance to authority and disobeying the law should lie elsewhere, on the shoulders of another subject. Rawls, without hesitation, took the view that, in such extreme cases, the "final say" should come from the "electorate as a whole". Thus, he demonstrated, as Locke had done, his trust in the citizenship as both actor in and judge of its most delicate and essential of acts: deciding when to resist or not, to what degree, in what way, and by what means.

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