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Kant and Civil Disobedience

Rok Svetlič

Clearly one of the origins of Western philosophy is the cognition that we can speak about the same phenomenon in many different ways. The ambivalence of each situation is perfectly mirrored in the Sophist philosophical school that taught the skill to speak about any matter in a convincing way. The answer to the state of complete disorientation is the emergence of classical antique philosophy, starting with Plato's idealism. The ambivalence of discussion is therefore not abolished, although the dividing line between real and false manners of speaking about phenomena is created. It seems that controversialism in relation to the world is an anthropological constant.

And this is why law has always been an essential component of all communities. One of the definitions of law – which is probably too narrow, but without doubt true – states that law is an instrument for resolving conflicts. The mere fact of the existence of legal order implies that the judgements contained within the legal order shall not always coincide with the judgements of all individuals. The philosophy of law does not pay much attention to this discrepancy since it is part of the notion of law as such. With one exception: when the discrepancy between the legal order and the values of an individual becomes extreme and when it affects the most vital values, then some authors introduce the possibility of civil disobedience. Probably the best known case of such resistance is described in Sophocles' *Antigone*.

This article is dedicated to a discussion of civil disobedience in the New Age, namely from T. Hobbes to I. Kant. We shall observe the following fact: the more the emphasis is put on the meaning of natural law (or justice) for the constitution of community, the higher is the interest in civil disobedience. This pattern is broken by I. Kant who categorically rejects the permissibility of disrespecting

the law, regardless of its content. By persisting on the validity of law also in cases which contain the most unjust provisions, Kant approaches the maxim of legal positivism that strictly divides the content of law from its validity. We will see that this oddness is not the hidden positivistic core of Kant's doctrine of natural law, but a necessary consequence of the development of thinking of New Age subjectivity. In the project of critical philosophy, the latter cannot be perceived as the naive creator of existence and human co-existence. The reasons for this are articulated in greater detail by Kant in the philosophy of history.

I. Justice and the Constitution of Sociality – from T. Hobbes to J. Locke

T. Hobbes (1588–1679) is an important figure in the New Age because he introduces a completely new understanding of the law and the state. He introduces the traditional perception of human natural sociality (*zoon politikon*) which is known from Aristotle's tradition. Henceforth, human sociality has been created *ex nihilo* based on a social contract, namely, based on the decision of man. If we look at this matter from a current standpoint, Hobbes' philosophical concept contains a unique contradiction. It starts with a 'democratic' component that only concerns the origin of law and the state: free expression of the will of each individual is a necessary condition for concluding a social contract. However, according to Hobbes, absolutism is the only appropriate form of government. Absolutism attributes the individual a completely passive national status since the individual does not even have the right to judge what is right or what is wrong. The rights of individuals are actually concessions which can be or cannot be awarded, modified or taken away by the sovereign. Instead of the traditional reference to justice, the foundation of the notion of law now is authority: *Non veritas sed auctoritas facit legem* (authority and not truth makes law).

The necessity of the absolutistic order is advocated by thesis that this is the only way to retain the stability of the social structure. If citizens were to have rights and consequently legal subjectivity in relation to the sovereign, an issue would arise, namely how to resolve a possible conflict among them: *"...there is in this case, no Judge to decide the controversie: it returns therefore to the*

Sword again; and every man recovereth the right of Protecting himselfe by his own strength, contrary to the designe they had in the Institution".¹ Therefore, the transition from the natural into the civil state should occur as an unconditional dedication of citizens to the absolutist.

This convulsiveness in thinking, which is in contradiction with the founding idea of Hobbes' philosophy, namely with the free consent of the individual, can be understood through the historical context. *Leviathan* was issued in 1651, only three years after the Peace of Westphalia, which ended the bloody thirty-year war. The first and only task of the theory of law and the state is to establish peace! All other issues related to co-existence become silent.

S. Pufendorf (1632–1694), one or two generations younger than Hobbes, is an interesting author since he takes a substantially more profound closure from the same premises. He establishes that safety is not possible without sociality: "*The conclusion is: in order to be safe, it is necessary for him to be sociable*".² This is why he evolves an extensive doctrine on duties that analyse human sociality, where he mostly relates to the positive duty of mutual help: "*everybody should be useful to others, as far as he conveniently can*".³

However, Pufendorf does not introduce institutes that would enable the affected person to pursue their interests in conflict with the sovereign. Yet the input of the moment of justice in the system of the constitution of sociality presents a step forward, which implies the question of how to act when an extreme discrepancy arises between the state's decisions and an individual's judgements. Pufendorf recognises the right to civil disobedience: "*Citizens ought to obey the civil laws, so far as they are not openly repugnant to divine⁴ law, not as if by fear of punishment alone, but by an internal obligation which is established by nature law itself, since its precepts include the behest to obey legitimate rules*".⁵

This testifies to the originating change of the view of sociality, which is very clearly articulated in Locke's political philosophy.

¹ Thomas Hobbes: *Leviathan*, Penguin Books, Penguin Classics 1985, p. 230

² Samuel Pufendorf: *On the Duty of Man and Citizen According to Natural Law*, Cambridge University Press 1991, p. 35

³ See above, p. 64

⁴ This is not a theological reference. God is understood as the cause of natural law, which is already integrated into human nature.

⁵ See above, p. 156

The key difference is: Hobbes and Pufendorf focus on what man *does not have* – peace and safety; Locke instead focuses on what man inalienably *has* – rights. Locke (1632–1704), on this side of critical philosophy, initiates a healthy and rational premise that man simply has numerous rights, e.g. the right to equal treatment: “*there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another, without subordination or subjection...*”.⁶

This pre-recognition of rights impacts the concept of social contract: ‘peace’ can no longer be the only answer of the theory of law and the state. Locke sets numerous arguments against absolute power, the most interesting being the one that contradicts the arbitrariness of the conduct of authorities: “*For it (legislative, note by R.S.) being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of Nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another*”.⁷

This argument refers to the basic principle of civil law, namely *nemo plus iuris in alium transferre potest quam ipse habet* (no one can transfer a greater right than he himself has) and is the foundation for all derived methods of obtaining rights. This principle is the legal articulation of the maxim *ex nihilo nihil fit*. An individual cannot sell another individual a thing that he does not own. A man in the natural state does not have the right to destroy himself or another person. Because everything the authority is originates from the parties to the social contract, the one who executes power can in no case have the right to harm the citizens. There is no doubt that the authority can be replaced in case the contract is violated. This is also confirmed by the historical context, namely the essay *Two Treatises of Government*, which is an *ex post* legitimization of the so-called famous revolution of 1688.

⁶ John Locke: *Two Treatises of Government*, Cambridge University Press 2005, II., §4

⁷ See above, II., §135

II: Kant and the Obscurities Regarding Civil Disobedience

Up to this point we were able to observe the pattern mentioned in the introduction. The greater the interest of the philosophy of law and the state in the issue of justice, the greater the thought based on jus naturalism, the greater is the interest in civil disobedience. This doctrine is radically revoked by I. Kant (1724–1804) since he fanatically and radically excludes the right to disrespect legal provisions: *“Resistance on the part of the people to the supreme legislative power of the state is in no case legitimate”*.⁸ In order to avoid misunderstanding, we have to emphasise that Kant was an extremely jus naturalist thinker. His *Rechtslehre* (RL) presents a glorious bow to law, based on purely practical reason. He sarcastically writes on positive law (which he calls empiric law): *“In this search, his empirical laws may, indeed, furnish him with excellent guidance; but a merely empirical system that is void of rational principles is, like the wooden head in the fable of Phaedrus, fine enough in appearance, but unfortunately it wants brain”*.⁹

All that counts in legal philosophy is the foundation of a priori legal institutes that apply on the basis of practical necessity. There is no doubt that man has a range of a priori rights already in his natural state. The entry into a civil state, the establishment of a state does not convey new rights, it only changes their character: they change from provisory to peremptory.

With regard to civil disobedience, it seems that Kant draws back to the level of Hobbes. Resistance is not permissible in any case, not even in the case of the worst tyranny: *“It is the duty of the people to bear any abuse of the supreme power, even then though it should be considered to be unbearable”*.¹⁰ Even more, the mere discussion on the origin of authority is not permissible and should be strictly sanctioned. How is it possible that the institute of civil disobedience, regarding which *“From Bodin (1530-1594), Joh. Althusius (1557-1638), Gotius, Locke and Pufendorf to Mendelssohn theorists of the New Age give an affirmative answer”*,¹¹ is not present within Kant. In spite of recognising the rights of people, he claims *“Hence it*

⁸ Immanuel Kant: *The Metaphysics of Morals*, Cambridge University Press, Cambridge 2008, 320

⁹ See above, p. 230

¹⁰ See above, p. 320

¹¹ Otfried Höffe: *Immanuel Kant*, Beck'sche Reihe Denker, München 2007, p. 237

follows, that the supreme power in the state has only rights, and no (compulsory) duties towards the subject".¹² Independently from various approaches to these problems, some of them are quite futuristic. In contradiction to other critical authors who replace pragmatic and principled arguments, it is quite clear that Kant's reasons are not "*pragmatic but principled*".¹³ We therefore have to abandon the search for an answer through the historical context of his thought and, similarly as in Hobbes, e.g. in the bloody massacres of the French Revolution, see the reasons for rejecting revolution.

For the sake of truth, the prohibition of resistance should not be equalled with the complete passivity of citizens, which was claimed by Hobbes. The undisputable fact claimed by Kant is that they can "appeal" (*Gravamina*)¹⁴ and that they can freely write about the situation in the country (the so-called "Freedom of the Pen"). Therefore, B. Ludwig¹⁵ suggests that three types of opposing authority should be indicated: the resistance of peoples, the resistance of the individual, and the right to appeal. The latter is not disputable. Ludwig also claims that the right of the individual to resist is also not disputable – of course, in the name of morals. Man is not only a legal being; he is also a moral being. If an individual according to his/her internal forum believes that a certain act is unacceptable, then the individual has to resist regardless of the consequences. The fundamental provision of moral necessity is the type of the sense of obligation, which does not need to be referred to a spatial-temporal experience. This is why there is a possibility of colliding with the world, which can paradigmatically be seen in the case of Antigone. According to the abovementioned division, the prohibition of resistance should be explained as follows: "*Kant's rejection of peoples' right to resist is no longer nothing more than an establishment that you do not resist against the state as a member of the community in the name of law, but you can decline your obedience merely as an individual in the name of your own conscience*".¹⁶

¹² Immanuel Kant: The Metaphysics of Morals, Cambridge University Press, Cambridge 2008, 319

¹³ Otfried Höffe: Immanuel Kant, Beck'sche Reihe Denker, München 2007, p. 238

¹⁴ Immanuel Kant: The Metaphysics of Morals, Cambridge University Press, Cambridge 2008, 319

¹⁵ See: Bernd Ludwig: Kommentar zum Staatsrecht (II.) par. 51-52; Allgemeine Anmerkung A; Anhang; Beschluss, in: Otfried Höffe: Metaphysische Anfangsgründe der Rechtslehre, Akademie Verlag, Berlin 1999, p. 189

¹⁶ See above, p. 191

The prohibition of resistance should refer solely to the right of the nation to resist. Reading paragraph 52 questions such an explanation. The text shows the distinction of two types of contradiction that would emerge in case such an institute were to be integrated into the legal system. To continue: the nation that would resist already assumes the existence of a state. T. Pinkard¹⁷ also notes that the legal state is possible only by subordinating individuals to legislative general will, which enables the nation to become a nation. Kant says *“For as the people, in order to be able to adjudicate with a title of right regarding the supreme power in the state, must be regarded as already united under one common legislative will, it cannot judge otherwise than as the present supreme head of the state (summus imperans) wills”*.¹⁸

By resisting, it would only oppose itself as a nation. Ludwig similarly claims that *“only through representation (...), namely through a commander, the crowds become a nation, namely the carrier of one type of political will”*.¹⁹

However, it seems that the inclusion of the right to civil disobedience, regardless of whom it refers to (the individual or the nation), would present one more contradiction in the legal system. The element of the sense of obligation would also fall out: law itself would claim its validity regardless of the opinions of all addressees (which is implied by the notion of law itself) and at the same time it would permit that the addressee could declare law as invalid: *“And the reason is that any resistance of the highest legislative authority can never but be contrary to the law, and must even be regarded as tending to destroy the whole legal constitution. In order to be entitled to offer such resistance, a public law would be required to permit it. But the supreme legislation would by such a law cease to be supreme, and the people as subjects would be made sovereign over that to which they are subject; which is a contradiction”*.²⁰

The explanation determined above which softens the impression of radicalism is questioned. It seemed that the predicament with

¹⁷ Terry Pinkard, in: Otfried Höffe (urednik): *Metaphysische Anfangsgründe der Rechtlehre*, Akademie Verlag, Berlin 1999, p. 168

¹⁸ Immanuel Kant: *The Metaphysics of Morals*, Cambridge University Press, Cambridge 2008, 318

¹⁹ Bernd Ludwig: *Kommentar zum Staatsrecht (II.)* par. 51-52; Allgemeine Anmerkung A; Anhang; Beschluss, v: Otfried Höffe (urednik): *Metaphysische Anfangsgründe der Rechtlehre*, Akademie Verlag, Berlin 1999, p. 191

²⁰ Immanuel Kant: *The Metaphysics of Morals*, Cambridge University Press, Cambridge 2008, 320

Kant's fanatical rejection of civil disobedience – which can be found in the middle of the most complete jus naturalist concept of the New Age – would be explained by distinguishing between the individual and the nation. The notion of law would enable the right to resist only to the nation mostly due to moral reservations, the individual, however, would be excluded from this. Yet we have seen that disobedience can in no case become a part of the law. It is also not clear why, according to the explanation mentioned above, the law would not consist of such an institute that would limit the right to resist only to the individual.

The situation becomes complicated since Kant's system of law a priori *implicitly* gives the right to resist to the nation as well as to the individual. To the latter he awards the right in another systemic location of the text, where he discusses penal law. Despite the inexorable dedication to penalising, Kant also introduces the possibility that someone should take the right in his/her own hands and take the life of someone else without being punished.²¹ Secondly, Kant also implicitly recognises the right to resist to the nation as a whole, since the RL consists of the prohibition or restoration besides the prohibition of revolution:

*“Further, when on the success of a revolution a new constitution has been founded, the unlawfulness of its beginning and of its institution cannot release the subjects from the obligation of adapting themselves, as good citizens, to the new order of things; and they are not entitled to refuse honourably to obey the authority that has thus attained the power in the state. A dethroned monarch, who has survived such a revolution, is not to be called to account on the ground of his former administration”.*²²

²¹ In order to understand how awkward this possibility is within Kantian penal law, we should describe the following metaphor. Picture an island, where the community will be dissolved on the following day. Each member will go his/her own way around the world. Therefore, all relations which had emerged in the past will become irrelevant and can be forgotten. With one exception: all death-row convicts must be hanged. Although, we will not meet again, this ought to be done: “This ought to be done in order that every one may realise the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice” (333). Despite the diligent commitment to punishment that does not permit even a fragment of pragmatism, Kant anticipates a situation where punishment should be abandoned. The reason is the same as in cases of civil disobedience according to other authors: a major discrepancy between natural and valid law. Kant mentions a case when a soldier in a fight caused by an allegation of cowardice kills another soldier. Kant argues: the offended soldier did not have the opportunity to clear his name of shame with the aid of legal remedies, therefore, he was still in his natural state in this sense. Therefore, he did not commit a murder (*homicidium dolosum*), but merely a homicide (*homicidium*). If the court were to convict such a perpetrator, it would annul the meaning of (military) honour, to which he is entitled – today, we would call this according to ‘natural law’.

²² Immanuel Kant: *The Metaphysics of Morals*, Cambridge University Press, Cambridge 2008, 323

If the revolution succeeds, the new authority is legally binding – although this provision is a contradictory element of the legal system. The law therefore sends a message: you can violate the law, if you are strong enough to succeed. The legal system cannot judge on the power that can actually enforce respect in the form of a new national order. Most certainly, the law must prohibit the illegal use of power; otherwise, it stops being an obligatory system. But when revolution happens, the law should simply acknowledge it. Is this a farewell from justice as the foundation of law? Has an equal sign been introduced between power and justice?

III. Kant and the Concept of Creativity of the Subject

Law cannot judge the revolutionary power in its court. However, it is judged on another level, namely the level of the philosophy of history. The dimension of jus naturalism and justice is reintegrated into the concept of law. Kant does not integrate his concept of the philosophy of history in RL, which would cause extraordinary standpoints regarding civil disobedience, which are symbolised by the simultaneous prohibition of revolution and restoration, to become understandable. Therefore, we have to look at his philosophy of history, which he presents in several short essays. Two can be pointed out, namely the *Idea for universal history from a cosmopolitan point of view* (1784) and *Perpetual Peace* (1795). In the absence of this reference it is impossible to explain the paradox that no understanding of civil disobedience, which is quite self-evident for other authors, can be found in the most glorious compliment to the natural law of the New Age. We will see that this is a necessity for the development of philosophy, which cannot affirm the simple creativist premise of early contractualism at the stage of entering its critical period.

The resistance against tyrannical authority considered as the creation of a more just world is legitimised within the idea of expedience (third *Critique*) and not within the necessity of the practical mind (second *Critique*).

In the introductory part of the *Idea*, Kant describes the main predicament in finding the principle that would explain the course of history – including all resistance against authority. Man is a rational, yet sensibility-affected being. Man exists between pure

nature and pure reason. If man were only a rational person, then the course of history could be determined based on the second *Critique*. If man were merely a mechanical being, then his history would be explained by the first *Critique*. Thus, the only possibility remains to seek our answer on the level of the third Critique which sets a comprehension of the expedient course, but only on the level of our cognitive abilities. Kant determines: “*Since men in their endeavours behave, on the whole, not just instinctively, like the brutes, nor yet like rational citizens of the world according to some agreed-on plan, no history of man conceived according to a plan seems to be possible, as it might be possible to have such a history of bees or beavers. One cannot suppress certain indignation when one sees men’s actions on the great world-stage and finds, beside the wisdom that appears here and there among individuals, everything in the large woven together from folly, childish vanity, even from childish malice and destructiveness. In the end, one does not know what to think of the human race, so conceited in its gifts. Since the philosopher cannot presuppose any [conscious] individual purpose among men in their great drama, there is no other expedient for him except to try to see if he can discover a natural purpose in this idiotic course of things human. In keeping with this purpose, it might be possible to have a history with a definite natural plan for creatures who have no plan of their own*”.²³

Kant understands it is necessary to abandon the naive idea originating from the Enlightenment, namely that man creates history as some kind of a fabricate. This idea emerged as a consequence of breaking the religious view of the course of history, which considered history as the manifestation of the hidden prudence of God: if history is not created by God, then it is created by the hands of man. At first glance, this is true; however, a more detailed view of the problem, illustrated by the abovementioned quote, warns that history is not a simple product of man. A provocative question emerges, namely, whether the image of man – as a reasonable being, affected by sensibility – can actually be the basis from which we can deduct the exceptional complexity and reliability of everyday relations among humans. How is it that millions of people come to their workplaces every

²³ Immanuel Kant: Idea for universal history from a cosmopolitan point of view, in: R. C. Scharf, V. Dusek (ed.): *Philosophy of Technology*, Blackwell, Oxford 200, p. 38

day, although it is not hard to predict that if it was up to their own judgement they would rather stay at home. And these people perform numerous tasks that they would not perform only based on their own motivation scheme etc. Based on this, Kant is certain that only the notion of 'man' cannot present the basis for deducting the complexity of the world as we see it. And there is even a smaller possibility to deduct the laws that enable history to progress.

Even if it seems a paradox, creating a more just order cannot (only) be the work of man.²⁴ It is obvious that we need to assume one more instance that cohabits with us and focuses us on order and progress. Kant calls it the expedience of nature, which made man sociable and unsociable at the same time: "*The means employed by Nature to bring about the development of all the capacities of men is their antagonism in society, so far as this is, in the end, the cause of a lawful order among men. By 'antagonism' I mean the unsocial sociability of men, i.e., their propensity to enter into society, bound together with a mutual opposition which constantly threatens to break up the society.*"²⁵ If people were more sociable, then they would not live like cattle, which has been grazing grass without progress and without conflicts for thousands of years. If they were merely unsociable, they would grow as lonely trees that idly surrender to dwarfish growth in the clear field. Unsociable sociability, however, is summarised by the metaphor of the forest: condensed cohabitation and the continuing process of attempting to beat the other is what lures growth from trees, and invokes strong trunks, because only growth towards the light enables a tree to survive.

Unsociable sociability leads us to conflicts which we are forced to resolve by applying (just) law. At the same time, this is a mechanism that ensures increasing the presence of just mutual relations in the world. The Kantian vision of this process is the

²⁴ Similar doubt is provided by the problem of the hierarchy of control that necessarily leads to regression: "The difficulty which the mere thought of this problem puts before our eyes is this. Man is an animal which, if it lives among others of its kind, requires a master. For he certainly abuses his freedom with respect to other men, and although as, a reasonable being he wishes to have a law which limits the freedom of all, his selfish animal impulses tempt him, where possible, to exempt himself from them. He thus requires a master, who will break his will and force him to obey a will that is universally valid, under which each can be free. But whence does he get this master? Only from the human race. But then the master is himself an animal, and needs a master". (Immanuel Kant: Idea for universal history from a cosmopolitan point of view, in: R. C. Scharf, V. Dusek (ed.): *Philosophy of Technology*, Blackwell, Oxford 200, p. 41)

²⁵ See above, pp. 39-40

regulative idea of perpetual peace: when at the end, all relations among people and states will be regulated by applying reasonable law, all conditions for war shall be abolished on a systemic level. This is also the element of RL, which in the chapter on cosmopolitan law includes the imperative "*There shall be no war*",²⁶ although its realisation does not depend on the practical mind but on the expedience of nature.

The key element for our purpose determines that man is not the one who leads history to a better level, but it is the mechanism which willingly or unwillingly directs us in the exactly determined direction: "*Individuals and even whole peoples think little on this. Each, according to his own inclination, follows his own purpose, often in opposition to others; yet each individual and people, as if following some guiding thread, go toward a natural but to each of them unknown goal; all work toward furthering it, even if they would set little store by it if they did know it*".²⁷

This is why civil disobedience in RL is at the same time forbidden and recognised. It is forbidden because it would dismiss the nature of law, which lies in the obligatory sense of its rules. At the same time, the Kantian prohibition of civil disobedience does not bring a moral contradiction between the unjust order and the just vision of the individual, who is ready to realise it by (passive or active) resistance. Because *intentional* acts of the individual are completely irrelevant for justice on the level of the community's cohabitation. When a step forward is made in the justice of a certain order, this will happen independently of the direct will of individuals – just like the French Revolution, which Kant observed with great inclination. In the period of unjust order, man is left with hope, provided by the vision of perpetual peace; or with resistance that is demanded by a sufficiently loud command of the internal moral forum, like in Antigone. In this case, the individual takes over the tragic consequences that do not speak about the rejection of the sovereign, but about the destiny of the (not yet) reasonable cohabitation of people. The real tragic meaning, however, is that according to Kant such sacrifice in no case contributes to a more just future.

²⁶ Immanuel Kant: The Metaphysics of Morals, Cambridge University Press, Cambridge 2008, 354

²⁷ Immanuel Kant: Idea for universal history from a cosmopolitan point of view, in: R. C. Scharf, V. Dusek (ed.): Philosophy of Technology, Blackwell, Oxford 200, p. 38