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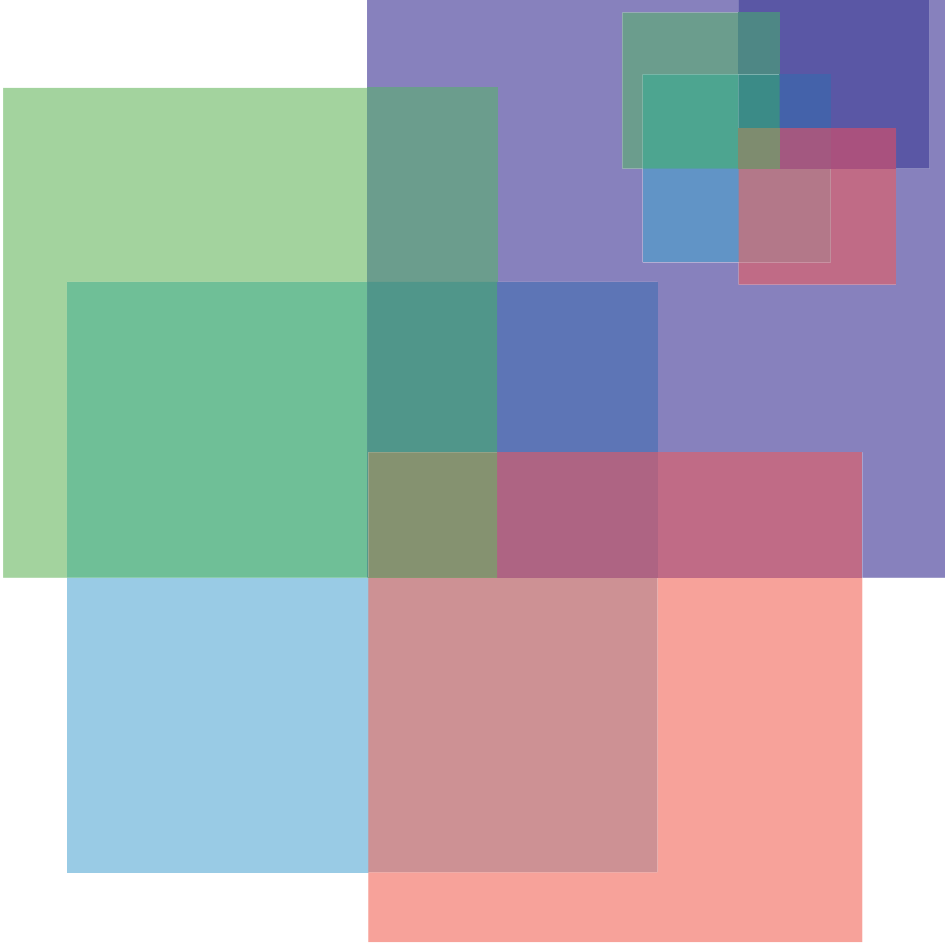

CHAPTER 10

The right to rebellion: against and inside power

*Sergio Martín Tapia Argüello**

Introduction

Power and law; law and power. Both terms appear to be inextricably linked. For a long time, a specific point of view about law has developed the idea that this relation is natural, that it is even mutually necessary. When discussing the existence of natural law in the late twenties, Hans Kelsen made a rather enlightening statement about his own considerations:

> The problem of natural law is the eternal problem of what lies behind positive law. And whoever seeks the answer will find, I fear, neither the absolute truth of metaphysics nor the absolute justice of natural law. Whoever lifts the veil without closing his eyes will confront the gaping stare of the Gorgon's naked power. (Kelsen, 1927: 54–55)[1]

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[1] *"Die Frage, die auf das Naturrecht zielt, ist die ewige Frage, was hinter dem positiven Recht steckt. Und wer die Antwort sucht, der findet, fürchte ich, nicht die absolute Wahrheit einer Metaphysik noch die absolute Gerechtigkeit eines Naturrechts. Wer den Schleier hebt und sein Auge nicht schließt, dem starrt das Gorgonenhaupt der Macht entgegen"*

If we follow his line of thought, there is nothing but power behind the law. It is not any kind of power but one that petrifies those who try to look straight at it; an aggressive, even unmerciful power that does not have any relation to human beings and becomes external and strange to the social relations beneath and inside it.[2]

This *authoritarian*[3] way of understanding law is not as it presents itself: a neutral approach to the characteristics of every single normative system in the history of the world; it is not even a proper description of that kind of systems in the past (or in other realities) that we can call, using a metaphor, "law".[4] In modern western societies, the legal normative system has been reduced to an *external, heteronomous and authoritarian*[5] set of orders:

> State law, on the other hand, is legislated in his name by his political superiors, now called his representatives. The three forms of subjection to God, rulers and inner self become condensed in the modern 'nomophilia' (love of the law): I become free — a subject — by being subjected to a law legislated (by me or) in my name. This is modernity's law. (Douzinas, 2007: 91)

It is not a coincidence that Human Rights have arisen in this era. They must be understood as part of the reductive process of the modern western political and legal reality (Villey, 1976). The notion of *rights* in a modern sense was unknown both in the classic Mediterranean civilizations (Campbell, 2006: 5–10) and in every historical context before the reduction of the idea of *social power*

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[2] This could be a good example of how legal positivism (like other positivist approaches to reality) just creates new forms of metaphysical entities to replace the old ones. Cf. e.g. the works of Alf Ross (2006) and the concept of *quasi positivism*.

[3] I prefer to use the word authoritarian and not *imperative* as it recognizes itself because I want to emphasize its intent to naturalize the idea of an external authority that gives *orders* as a requirement to obtain *order.*

[4] "*It is obvious that any society, however elementary it may be, must have a set of rules, which can also be called 'law' (...) In this way, however, we use only one kind of analogue assimilation, that lets us understand a strange idea in a familiar way*" (*Schiavonne*, 2009: 15).

[5] Cf. Grossi (2003).

and the emergence of political concepts of (formal) equality, universalism and individuality.[6]

Through the present chapter, I want to demonstrate that despite the traditional approaches, the ideas of social power and Human Rights as well as their mutual interactions are an important part of the signification process that allows to present a reductive idea of power and legitimate a specific form of authoritarian social relationship. As I will demonstrate, this does not mean abandoning the idea of rights, even in their legal form, but to understand the limitations and dangers that their use involves.

1 Some reflections on the right to rebellion

The first step to study the relation between the concepts of power, law and human rights from a critical perspective, is to get within the borders of its connections and see how they can be problematized from there. By doing this properly, we will be able to understand that the division between them is just an ideological form (Holloway 1980: 11–12).

As I will try to explain in the next pages, there is no better option for this than the right to rebellion. It is a classical theme in the study of law and politics and we can easily find many examples of its relevance. Both characteristics allow me to use a well-known example in the Mexican context but at the same time, that makes senses in other realities:

> The right to rebellion is sacred, because its exercise is essential to break the obstacles that oppose to the right to live. Rebellion, screams the butterfly when breaking the cocoon that incarcerated it; rebellion, screams the bud when tearing apart the strong crust that stand in its way; rebellion, screams the seed in the furrow when cracking the earth to get the sunlight; rebellion, screams the little human when

[6] Cf. Douzinas (2007), Correas (2007a).

> leaving the maternal body; rebellion, screams the people when rising up to crush tyrants and exploiters.
> Rebellion is life: submission is death. Are there rebels among the people? Life is ensured, and ensured is also art, science and the industry. From Prometheus to Kropotkin, rebels have made humanity go beyond.
> Supreme right of the supreme moment is rebellion. (Flores Magón, 1910: n.p.)[7]

The first topic that emerges from the text is the possibility of a right to rebel. This is not a trivial concern, because at the moment we can find many examples of legislative proposals and legal interpretations that try to constrain even the more institutional and embryonic forms of rebellion, as the right to demonstrate (CDHDF, 2013), to protest (Correas, 2011) or to civil disobedience (Rawls, 1978; Dworkin 1993).

We can talk of rebellion as the attempt, whether "peaceful" or not,[8] to bring back through concrete demands and actions some of the principles that are assumed to have been abandoned and that constitute a substantial part of the relationship between the state and its citizens. Rebellion does not try to attack the "constituted order" as a whole, so it could be appeased with the satisfaction of its specific claims (Pasquino, 1998: 1121). In this sense, it differs from

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[7] "*El derecho de rebelión es sagrado porque su ejercicio es indispensable para romper los obstáculos que se oponen al derecho de vivir. Rebeldía, grita la mariposa, al romper el capullo que la aprisiona; rebeldía, grita la yema al desgarrar la recia corteza que cierra el paso; rebeldía, grita el grano en el surco al agrietar la tierra para recibir los rayos del sol; rebeldía, grita el tierno ser humano al desgarrar las entrañas maternas; rebeldía, grita el pueblo cuando se pone de pie para aplastar a tiranos y explotadores.*
La rebeldía es la vida: la sumisión es la muerte. ¿Hay rebeldes en un pueblo? La vida está asegurada y asegurados están también el arte y la ciencia y la industria. Desde Prometeo hasta Kropotkin, los rebeldes han hecho avanzar a la humanidad.
Supremo derecho de los instantes supremos es la rebeldía."

[8] This does not mean at all that I understand the possibility of a "nonviolent" rebellion because when confronting a power, even without physical violence, it is a form of foundational violence. Cf. Benjamin (2015).

revolution as it remains within the limits of the "big dichotomy" (Bobbio, 2008) of legality/illegality (Lukács, 2009).

Although there are concrete demands in a rebellion, it is easy to understand the difficulties that could exist to satisfy them. First, there is a difference between the concepts "concrete" or "specific" and *explicit;* a requirement can be misunderstood due to linguistic, cultural or even volitional issues. Second, a claim made by those rebelling may attack some of the basic principles of the *status quo* that would become impossible to fulfil without deep transformations taking place, transformations beyond the possibilities (or desires) of the institutional action. Third, the answer given by the authorities may be considered inadequate, incomplete or superseded by new conditions.

As we can see, rebellion makes a moment of crisis visible and, due to its characteristics, it can easily be transformed into the beginning of a *systemic crisis* (Portantiero, 1999) if not treated properly. If even the smallest threat of violence involves a foundational danger (Benjamin, 2015), the first question must be if rebellion could be, under certain circumstances, considered as a *right.*

1.1 The possibilities of the existence of the right to rebellion

We must start by asking if it is possible to talk about a *right to rebellion,* or if due to its characteristics, rebellion must always be external to the idea of *rights.* As is the case in all kinds of discussion about the relation between meanings and reality, the differences could be seen as the result of diverse *methodological perspectives*, equally valid in different contexts. Against this intention to reduce the epistemological and conceptual issues to an extreme relativistic point of view, I would like to point out that "*the election of the method is neither casual nor arbitrary, but different methods have not an identical core*" (Adorno, 2008: 113–114). So, even though

I do not embrace the objectivistic idea of the "true" answer, that does not mean I do not believe my approach is right or that I will not defend it.[9]

If we look at the history of the idea of rebellion, we can see that there is solid evidence that, in the past, the right to rebellion was something broadly accepted. We can find justifications for it in the work of Saint Thomas, who, even though he believed that all kind of breach of the duty to obey was evil in itself, he understood that in some cases it could be a necessary evil:

> Finally we must look at what we would do if the King became a tyrant, as it could happen, and without any doubt, if the tyranny is not excessive, it is better to tolerate it for a while than to rise against the tyrant, getting into dangers that are more serious that the tyranny itself (…) If the tyranny is so extreme that it is unbearable, some have argued that it is a virtuous act for brave men to run the risk of death in order to kill a tyrant and liberate the community (…) this would be more of a threat in terms of losing Kings, than a remedy against the Tyrants: that is why we must act against their cruelty through public authority and not just on particular presumptions. First, if the right to choose a King came from the people, they could take away his power and depose him if he used his royal power abusively, and you cannot say that the people acted against the duty of obedience and loyalty when overthrowing the Tyrant, even if they had pledged an eternal oath to him, because he deserves it if he does not act like a King, so that the people can comply with what they have committed. (Aquinas, 1786: 15–17)[10]

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[9] Contrariwise any common sense in this case, those ideas are not mutually incompatible. Cf. Chiassoni (2011: 150).

[10] *"Finalmente se debe cuidar, de lo que se haría, si el Rey se convirtiese en tirano, como puede suceder, y sin duda, que si la tiranía no es excesiva, que es más útil tolerarla remisa por algún tiempo, que levantándose contra el tirano, meterse en varios peligros, que son más graves que la misma tiranía* (…) *Más si fuese intolerable el exceso de la tiranía, a algunos les pareció, que tocaba al poder de los varones fuertes, el dar la muerte al Tirano y ofrecerse por la libertad del pueblo al peligro de la muerte* […] *así más se le seguiría de esto al pueblo peligro de perder los Reyes, que remedio, para liberarse de los Tiranos: por lo cual parece, que más se debe proceder contra la crueldad de ellos por autoridad pública, que por presunción particular. Lo primero, si de derecho pertenece al pueblo el elegir Rey, puede justamente deponer, el que habrá instituido y refrenar su potestad, si usa mal y tiránicamente del poderío Real, Ni se puede decir que el tal pueblo procede contra la fidelidad debida, deponiendo al Tirano, ahunque* (sic) *se le*

In his text we can find the construction of a normative vision about the right to rebellion, namely the idea of the right-duty bilateralism which creates a quasi-contractual relation, the external third-part that deems the decision made by others legitimate, the construction of a non-personal legitimacy of its existence and the differentiation between two apparently equal activities based on these characteristics. Similar ideas can also be found in the writings of the *Compañía de Jesús* (Society of Jesus) against Protestantism and in those books and pamphlets which were used as theoretical and political support of the so-called bourgeois revolutions.[11]

With this in mind, it is not hard to find the reasons of its inclusion in the documents that are considered the most important outcomes of these revolutions related to human rights: the Virginia Declaration of Rights (section 3)[12] and the Declaration of the Rights of Man and of the Citizen (article 2).[13] Even more, we can easily understand why in particular situations and contexts, some could see the rebellion not only as a *right,* but as a *duty;* the French Constitutional Act of June 24 of 1793 (Art. 35) established, in consonance with the thinking of one of its most important redactors,[14]

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hubiera sujetado para siempre, porque él lo mereció, en el gobierno del pueblo no procediendo fielmente, como el oficio de Rey lo pide, para que los súbditos cumplan con lo que prometieron"

[11] E.g. Locke (2006: 221-243).

[12] "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety and is most effectually secured against the danger of maladministration. And that, when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal" Cf. Soberanes (2009: 205-207).

[13] "The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression" Cf. Jellinek (2003: 197-199).

[14] Maximilien Robespierre, whose ideas could be seen in the Project of Declaration of the Rights of Man and the Citizen, presented in the National Convention on April 24, 1793 and in the speech "On the duty of insurrection (I say that if people do not rise as one, freedom is doomed)" pronounced in the Society of the Friends of the Freedom and the Equality on May 29 of that same year (cf. Robespierre, 2005a, 2005b).

that "when the government violates the rights of the people, the insurrection is, for all the people and for every part of the people, the most sacred right and the most imperative of its duties" (Ferrer Muñoz and Luna Carrasco, 1996: 195).

1.2 The right to rebellion as a subjective right

If we can agree that the idea of a "right to rebellion" is not a contradiction and can be understood as a possibility in a political system that does not mean that we must accept, for the same reasons, the existence of a *subjective right to rebellion*. The second issue that arises for our reflection about the possible relations between the idea of "right" and "rebellion" forces us to make a distinction: not every *right* is (or could be understood as) a *subjective right*.

In a broad sense, we talk about a subjective right when there is a *formal recognition* about certain claims for a *centralized normative order* that provides someone (in the case of *human rights,* the promise is "everyone") with *a formal mechanism to enforce it* (cf. Parcero 2012). In western societies, there are two reductions applied to this idea. The first is that as far as the state law presents itself as the only centralized normative order possible (Douzinas, 2007), or maybe, in some soft versions of the legal monism, the only one legitimate enough to do this (Mutua, 2001), there is an assimilation between subjective and legal rights. The second, which derives from the above, says that since only legal rights have formal recognition and enforceability, they are the only rights in a proper sense, because other kinds of "rights" are nothing but isolated, illegitimate or impossible demands.[15]

[15] Nino (2007) offers a rather convincing explanation about this. The word we use in Latin-based or "Romance" languages to talk about rights (*derechos, dirittos, droits, direitos*) is necessary linked to the law (*Derecho, Diritto, Droit, Direito*).

The existence of a subjective right to rebellion could be a theoretical problem only if there is a monistic reduction[16] in the sense that the "state reduction" of the law works in modern western societies. If we accept the existence of legal pluralism, it is easy to understand that some systems could present some sort of conditions that, in other normative systems could be understood as a rebellion. Nevertheless, it would be a problem only if one of the multiple normative systems that concurs tries to present itself as the "only valid system".[17] The question: Can a normative system provide the right to rebel against another system? Confuses the idea of the legal (or normative) pluralism with the coexistence of diverse legal (or normative) "systems" that have a common supra-system that would be, in a formal sense, the real normative system that makes the existence of the rules in the other systems possible. As we can see in the classic response by Hans Kelsen regarding the existence of legal pluralism between international law and the states norms, it is a common mistake:

> The idea that the state law and international law are two different legal orders, independently reciprocal in their own validity, finds its justification in the existence of unsolvable conflicts between them. A more detailed research proves that in the so-called normative conflict between the norms of international law and the norms of the state's law there is nothing that could be named like that, because the legal sentences could be described without any logical contradiction. (Kelsen, 2009: 332)[18]

[16] This means, if there is a reduction that says a community can only have one normative-legal system.

[17] We can see really good examples of this in how the "bourgeois" legal system presented itself in the beginning of the capitalist accumulation process. Cf. Tigar and Levi (1986), especially chapter 2 and 5.

[18] "*La concepción de que el derecho estatal y el derecho internacional son dos órdenes jurídicos entre sí distintos, independientes recíprocamente en su validez, encuentra justificación en lo esencial en la existencia de conflictos insolubles entre ambos. Una investigación más detallada muestra, sin embargo, que lo que se considera un conflicto entre normas del dere-*

If the rules of two "different normative systems" could be subsumed in one, then there is no such thing as normative pluralism between them, and, as argued by Kelsen, the legal monism is "inevitable" (for that system) because both would represent two different parts of the same normative order. But if we are talking about normative pluralism and not only about different (and even hierarchically organized) norms in a system with the same *rule of recognition* (Hart, 1997), the existence of normative contradictions is impossible, because there is no common rule that could mediate between them. If there is an apparent contradiction between the norms of two different normative systems in a pluralistic space, we must understand it as the result of a factual situation of the observer, a contingency that emerges from the desire of those who try to see both of them as different parts of the same thing.[19]

When we have a monistic view of the legal system like the "state law as the only kind of law" reduction, there has to be a way of solving all possible contradictions. In this case, the problem of the normative contradiction would be a matter of *substantive* (and that means political) or *formal*/logical validity of the norms.

In the previous section I presented a group of historical examples of the acceptance of the idea of the right to rebellion. If we look at them, we can see they refer to the *general idea* of a right to rebellion, and not to the legal approach of this. They present themselves as political statements or natural claims that can be easily fulfilled, and just one of them is contained in a legal text,

cho internacional y las normas de un derecho estatal, no constituye un conflicto normativo, dado que la situación puede ser descrita en enunciados jurídicos que de ninguna manera se contradicen lógicamente."

[19] In some cases, it could be the authorities of one of the normative systems trying to build a monistic self-based system that could subsume the others. It is the case of the traditional "legal pluralism" as understood by the Constitution of Mexico (cf. Correas, 2007b). In others, it could be a part of the community that tries to subsume a common rule to another particular rule of a different system (e.g. Cooper, 2004). Both cases show a false normative pluralism claim that hides the power struggle involved.

requirement *sine qua non* of the state reduction to understand the formal recognition of the subjective rights.

For some people the fact that the French Constitution contains the phrase "right to rebellion" could be irrefutable evidence of the existence of a subjective right. To accept that answer, however, we must put away the internal limitations of the rights and the law and make a common confusion between the idea of "strong permission"[20] and an expression in the law about something. We must understand that there is a difference between the legal text and the existence of a legal norm (Guastini, 2011: 81–82). In some cases, the legal text contains some elements that do not have any legal significance:

> Naturally, we cannot deny that the legislator can make an action — an action based on the *Gründnorm* — that in a subjective sense could be a norm that constrains certain human conduct without making another action […] that creates a coactive action if the first occurs […] In that case, the norm that constitutes its "subjective sense", cannot be interpreted as a legal norm, but it must be seen as legally irrelevant. (Kelsen, 2009: 65)[21]

Not everything written in a law, as Kelsen understands it, is a legal norm, even if it is presented with a normative guise. In some cases, these are just descriptive issues, ethical evaluations or even moral norms without the coactive power of the rule of law.

In this case, we can see how the allegedly "subjective right to rebellion" presented in the French Constitution is a factual

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[20] That is the base of the subjective law in every normative system. Cf. Alchourrón and Bulygin (1971).

[21] "*Naturalmente que no puede negarse que el legislador puede llevar a cabo un acto —entendiéndose que lo hace mediante un procedimiento conforme con la norma fundante- cuyo sentido subjetivo sea una norma que obliga a una determinada conducta humana sin que se lleve a cabo otro acto […] que estatuya un acto coactivo para el caso de darse la conducta contraria […] La norma que constituye su sentido subjetivo no puede ser interpretada como una norma jurídica sino que tendrá que ser vista como jurídicamente irrelevante*."

description and an evaluation about what the people *must do* (in moral sense) in some circumstances. The statement lacks the juridical constraint of the legal norms and of the enforceability that comes with a formal legal mechanism to protect their demands, the *facultas exigendi* (Tamayo, 2011: 110–111) of the subjective rights.

The fact that all the examples we use in the text cannot be understood as subjective rights does not mean there are no possibilities of a subjective right to rebellion. The existence of a normative system that allows a rebellion against itself as an explicit permission and the possibility of the people to legally require an authority's intervention to prevent others (authorities or citizens) from constraining that same permission is still possible. Could a normative system create a valid norm which allows that that same normative system not be obeyed? If we look at the difference between the normative monism and pluralism, we can understand that the only possible answer for this question is a clear "no", both in a logical and political way. A strong permission to disobey a normative system is the beginning of a new order:

> From this maxim it follows that law sees violence in the hands of individuals as a danger undermining the legal system. As a danger nullifying legal ends and the legal executive? Certainly not; for then violence as such would not be condemned, but only that directed to illegal ends. It will be argued that a system of legal ends cannot be maintained if natural ends are anywhere still pursued violently. In the first place, however, this is a mere dogma. To counter it one might perhaps consider the surprising possibility that the law's interest in a monopoly of violence vis-a-vis individuals is not explained by the intention of preserving legal ends but, rather, by that of preserving the law itself; that violence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law. (Benjamin, 2015: n.p.)

Rebellion is maybe the only kind of right that cannot be constrained like this. A right to rebellion that exists in a juridical way as an explicit permission with a formal mechanism of protection, creates its own limits in a negative form: the rebellion could only exist beyond the authorized actions. This is not valid only in the case of the revolutionary moment that can evolve from the rebellion, but in every way it is manifested: in protests, civil disobedience, strikes or even in the small daily struggles that every one of us faces within the repressive process of power.

If the normative system recognizes the "right to rebellion" when rebel activities take place between 10:00 a.m. and 03:00 p.m., if the rules try to limit actions in certain places, if strikes are only recognized if workers follow an administrative procedure, if a demonstration is considered illegal if people wear masks, if some words are forbidden in demonstrations,[22] the right to rebellion is placed in the interstices of the things that the normative system allows.

The characteristics of the right to rebellion allow us to see one of the most important contradictions in the idea of "rights" as a way of protection against the normative system. If the only option to influence a normative system is being part of it and if everything that is part of it cannot be used against that system in particular, how can we try to protect ourselves from that same system, not to mention to *change* or to *transform* it, by using rights? (Correas and Del Gesso, 2003) The answer could be in the way that rights and their relation with power is understood in traditional theories (Tapia, 2015).

[22] All the mentioned limitations are actual prohibitions or obligations in the Mexican positive law.

2 Rights, law and power

We can see the relation between a specific way of understanding power and the construction of the bourgeois law project. Social power is presented as a partial and incomplete form that requires an authoritarian division in society between the ones that rule and the rest that must obey. It does not matter if this division is presented as the result of a democratic process, like the idea of *representation* (Douzinas, 2007: 91) because it is the principles and not only the forms that make it possible. In that sense, the heteronomy, the "casuistic abstraction" of the rule or even the idea of some sort of universal obligation are in line with an authoritarian project (Grossi, 2008a).

One of the most important parts of this separation lies in an incomplete form of understanding power. For this approach, there is a necessary separation between "power" in a generic sense and the construction of a social power. This separation creates the idea of *necessity* of the ruler to engage in social transformation. In this essay I will take the example of *instrumentalism* to demonstrate this incomplete form of understanding power and the relation between it and the law, the state and rights.

2.1 The instrumental point of view regarding rights and the law

In some political and legal philosophy and practices you can find the idea that the law and rights (not only legal but even moral rights) could be *used* as an *object* for someone. It does not matter if you are talking about conservative or progressive approaches, right or left oriented policies and politics, democratic or authoritarian preferences, this idea is widespread. In "The revolutionary function of the law and the state", P. I. Stučka gives us a clear example: "The law is a system (or order) of social relationships that corresponds to the interests of the dominant class and is safeguarded by the

organized force of that class" (Stučka, 1969: 34).[23] For him, the law and the state are a sort of "tool" that can be and is actually used by the dominant class in a society in order to organize the economic, social, cultural and political forms developed in that particular society.

For this author, in a class structured society there will always be class interests in the creation process of the law, so the way in which society is organized will coincide exactly with those interests. The author further argues that since we live in a society in which the bourgeoisie is the dominant class, the state and the law will have all the characteristics that this same class wants. If there is a radical change in the power structures of society, as could be the case with a revolution, and if another class (e.g. the workers) takes control of the state apparatus, they could still use the law and the state itself to transform reality. In such a context, all the bourgeois characteristics of the state and the law in the former stage will disappear in the new one because they are not inherent to the state or the law in itself, but to the way they are used in the bourgeois society. Consequently, the law and the state are no more than an empty canvas (waiting) to be filled for the new dominant class.

Starting from an instrumental approach to reality, it is easy to believe into the vast potential of rights in accomplishing a deep social transformation.[24] Human rights, in particular, turn out to be the perfect instrument to use against the reminiscences of the former society with all the legitimacy and the support of the state law (even if they are unacknowledged as *subjective* rights, it could be the precise moment to achieve its recognition).

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[23] *"El derecho es un sistema (u ordenamiento) de relaciones sociales correspondiente a los intereses de la clase dominante y tutelado por la fuerza organizada de esta clase".*

[24] Cf. Dworkin (1992: 15-17).

2.1.1 The objectification of law, state and rights

In the course of the instrumentalisation process, there are at least two different but certainly related problems. The first is the objectification of the social relationships of what we call "state" and "law". As one of the most famous critiques of Stučka's work probes, the law is not "a thing", not in the way an object is, nor even like a mental construction separated from the human being, but a special form of social relation that occurs in modern western societies (Pashukanis, 1976). This idea, equally important in the study of the "state" (Abrams, 1988), helps us to understand that the separation of both concepts (law and state) is just a methodological issue and not a "real" and factual thing, as the instrumentalisation wishes (Poulantzas, 1969). As such, the objectification is not a neutral thing, but an attempt to hide the reality of social relationships behind a mask, like the Gorgon's mythical veil in Kelsen's idea. It is the beginning of an ideology.[25]

To achieve this goal, however, instrumentalisation requires a clear strategy. Objectification needs to present itself as a neutral process, so it is accompanied by the "naturalistic fallacy" (Moore, 1903: ch. 1 § 10). The existence of the state and the law (as an object but maybe even as a special form of social relationships) in a particular society is presented as "neutral", as if the concept or idea of neutrality actually existed in the essence of both law and state (and if is necessary to present the neutralization process as something independent of the "object", it is showed as an advantage, a "methodological resource" which is, at the same time, the best option). Despite this idea, the neutrality of social relationships is not a possibility in a society based on class struggles, not because of the unidirectional interests of a "dominant class"[26] as the instru-

[25] As both "false conscience" and a "way to understand reality" (Eagleton, 2005).

[26] In the case I used to illustrate the problems of the instrumentalisation there is a third problem: the idea of *class* as a closed and essentialist concept. For a more accurate con-

mentalisation presents, but due to the inner contradictions of the society itself (Marx, 1994).

2.1.2 The reduction of the idea of "power"

The second and most important problem of instrumentalism is the reduction of the idea of social power that it involves. If we embrace the instrumentalist point of view regarding the construction of reality, power is a unilateral and unbeatable force to which everything is allowed.

This kind of omnipotence is impossible when conceptualizing power as a relational situation, but it is perceivable if power is understood as an object that one could actually "have". Against that idea, we need to remember that power is a social relationship (Stoppino, 2011: 1191) and, in this sense, cannot be unilateral:

> In the beginning of power relationships, there is no binary and global opposition between dominators and dominated, reflecting as a general matrix in dual "up" and "down" positions that transform into certain groups, more and more restricted to the bottom of the social body. (Foucault, 2009: 114)

This idea is crucial because we can see the potential to transform the society in it. If social power is a relational situation that cannot be unbeatable and unidirectional, that means that at the same time every power relation creates a resistance against it (Foucault, 2008: 171).

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cept of *class*, Cf. Gunn (2004).

Conclusions

In a society in which power is reduced to domination, the law cannot be anything more than a set of authoritarian rules which are externally imposed. This argument can be used in every normative system that implies the centralization of the decision process regarding the content of its rules. It is through this process that a division between those who command and those who must obey is created. One of the most important problems of human rights is the fact that they need this division to exist.

In fact, even if this authoritarian power presents itself as an exception, we have to acknowledge that *"the tradition of the oppressed teaches us that the 'emergency situation' in which we live is the rule"* (Benjamin, 1940). And in this sense, that oppression and violence are the eternal companions of the hierarchical and unequal division of society.

Despite the common sense about it, this does not mean there is no way of escaping domination. If the state of emergency is an ongoing process, we need to understand the constant emergence of anti and counter-powers within power relations (Dussel, 2006: 98). That is the most important reason of the impossibility of a right to rebellion: in a hierarchical and unequal society, rebellion is growing everywhere and cannot be constrained.

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