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The Right to Resistance to Injustice

1. THE EXPERIMENT OF STANLEY MILGRAM

It is interesting to review the experiment carried out by Stanley Milgram at Yale, illustrating the limits of obedience to authority, and how these limits failed under National Socialism. [1]

The experiment in question consisted of the following. Through adverts in a paper and direct mailing, more than one thousand volunteers were recruited to take part in it. Once chosen, the candidate was called to an elegant «laboratory» at Yale where he met two other people: the «experimentor» and the «victim», in fact an actor passing off as another volunteer. The experimentor then explained the purpose of the test: to study the effect of fear of punishment in the learning and teaching process. Having explained this, the actor –the «victim»– took the part of the «student» and the other person, in reality the true subject of the experiment, the part of the «teacher». The student was tied within an «electric chair» and an electrode attached to his wrist. The teacher was placed in another room, before a device designed to release electric charges of varying intensity, from 15 to 450 volts, scaled in a series of 7 different grades: mild charge, moderate charge, strong charge, very strong charge, intense charge, very intense charge, and critical charge. Next, the one playing the teacher was instructed that he must apply an electric shock to the student every time he committed a mistake in answering a test he was set, the charge being progressively greater with each new mistake until it reached 450 volts, when the experiment would be over.

During the first shocks –which, obviously, the actor was not really suffering– he showed no sign of complaint, but, from 120 volts up, the «victim» screamed at the experimentor who was positioned next to the teacher, in the other room. The actor/victim let out increasingly more and more violent yells and

[1] See on this and related subjects, María José Falcón y Tella: *La desobediencia civil* (Preface by Fernando Garrido Falla), Marcial Pons, Madrid, 2000. There is an English translation by Peter Muckley, of the first Part: *Civil Disobedience* (Preface by Martti Koskenniemi), Martinus Nijhoff, Boston-Leiden, 2004. And of the second Part: *A History of Civil Disobedience,* Editions Diversités, Geneva, 2004. See also, from the same author, *Legal Validity and Civil Disobedience,* Indian Institute of Comparative Law, Bikaner (India), 2000.

complaints, even begging him to end the experiment. The real interest resided in testing the capacity of subjects to continue administering shocks, under the external pressure provided by a person invested with authority, the «experimentor». If the subject producing the electric shocks refused to continue, the experiment was at an end.

Before obtaining results, the investigating team carried out a survey among a group of psychiatrists, students, and middle-class adults to try to establish the type of behavior which might be expected in such an experiment. In each case, the predictions coincided in that only a small group of subjects –no more than 1 or 2%–, designated pathological, would be capable of reaching the end. What was astounding was to discover that, in the real test results, a large number of subjects taking part –some 62.5%– were able to administer right up to the ultimate shock, the pressure of the «experimentor», demanding for the sake of science that the experiment continue to the end, being sufficient to ensure obedience.

The investigating team devised different variants of the same experiment to see if results would be the same. Thus, at first, they tried to find out if the physical proximity of the «victim» and his personal reactions –complaints, screams, gestures– had any effect upon the behaviour of the one administering the shocks. To this end, together with the base test of the experiment, another was devised wherein the complaints of the victim were eliminated, where, with each shock application, there was only silence. Thirdly, the same base experiment was repeated, but with the victim placed at a short distance from, and in the same room as the teacher. The results of these new experiments showed that «the degree of proximity to, or distance from, the victim, together with direct physical contact with him, were the true deciding factors influencing the behaviour of the subjects».

The results of the experiment did not rest there. An attempt was made to apply them to the historical experience of National Socialism and the concentration camps of Germany during the Second World War in order to help explain how massive obedience was possible when faced with conditions so barbaric and so reprehensible. The explanation for such events would seem to be the lack of critical awareness we show when faced with authority. This prevents us from consciously and voluntarily reacting to it by disobeying it –as we should when it is unjust– rather than deferring to it as we do. Milgram, however, did not restrict himself to an analysis of the past, but affirmed that the social structures upon which Fascism was based have not only not disappeared, but rather that they have been up-dated and their effectiveness increased. Hence, the excercise of free will, as much intellectual as practical, would be extremely healthy.

Indeed, contemporary, post-industrial societies, with their increase in population and technology, also increase the loss of autonomy and the critical sense. This makes of them a likely breeding ground for the exercise of authoritarian power:

> «Modern technology, placing within the reach of man means of aggression and destruction which may be used at a certain remove from the victim, without the necessity of seeing him nor of suffering from the influence of his reactions, has created a distancing effect which tends to weaken human inhibitory mechanisms in the exercise of aggression and violence.»

Thus, man converts all into a thing. Subjects are reduced to the mere condition of agents. We might define the «agentic state» as that in which the individual ceases to see himself as responsible for his own actions and is considered a mere instrument through which others achieve their desires, as a simple link in the chain of command.

Hence, subject behavior becomes compelled by the pressure of authority. This is due to the fact that every child from birth up is strongly socialized in the principle of obedience, in school, in the family or during military service, or even in the company in which he finds his first job. On the other hand, one should note the greater propensity to disobedience as the level of education increases, in turn, being greater among doctors, lawyers and teachers than among technicians and engineers, also, it is greater amongst protestants and jews than amongst catholics. To this, according to Milgram, we should add one other factor: the decisive influence of the industrial capitalist system. Another important variable to take into account when considering uncritical obedience turns out to be group influence. Thus, as responsibility is shared, it seems to become diluted. Today's societies have formulated the disjunction between encouraging the critical sense of conscious and voluntary dis/obedience, or educating submissive and obedient beings functioning as mere automata.

Along the same lines of studying inhibition mechanisms and disobedience to the law, one finds the analysis of Erich Fromm. This thinker points out that it is not that all disobedience must be a virtue and all obedience a vice. Such a vision ignores the dialectic relation between obedience and disobedience. An act of obedience to one principle is necessarily an act of disobedience to the opposed principle, and vice versa. The classic example is that of Antigone who, while disobeying state laws was obeying the laws of Humanity, and also the other way round. To obey and to disobey are always disjunctive. If a man can only obey and not disobey, he is a slave; if he can only disobey and not obey, he is a rebel.

In turn, Fromm distinguishes between «heteronomous» obedience to an institution or to a power external to the subject, which implies submission and abdication of one's own autonomy, and «autonomous» obedience to one's own convictions, as an act not now of submission but rather of affirmation of oneself, of which beliefs form an integral part. This distinction must be fleshed out with more precision regarding the concepts of conscience and authority.

The word «conscience» is endowed with two modalities: the «authoritarian» conscience, which is the internal voice of an authority we must obey, which Freud meant by the «Super-Ego», like the commands and prohibitions of the father accepted by the child; and, the «humane» conscience, that is, the voice present in every human being and independent of external sanctions or

rewards, based on the sentiment every man has of what is humane and what inhumane, of what is beneficial to life and of what goes against life. The authoritarian conscience –the *Super-Ego*– presupposes obedience to a power outside ourselves, although this power has been internalized. In resistance to injustice, we would be dealing with taking notice of the so-called «humanitarian» conscience, the individual's own conscience, as against the «authoritarian» conscience imposed by the State.

Again, two possible meanings are given to authority: «irrational» and «rational» authority. An example of rational authority is that which obtains between a student and her teacher; irrational authority, for its part, would be that existing between a slave and his master. While the interests of the teacher and the student, in the best of cases, lead in the same direction, and the teacher is happy if the student is successful, the student's success being the teacher's own, the interests of slave and master are antagonistic, in such a way that what is beneficial for the one is detrimental to the other, and the master desires to exploit the slave, the more, the better. The first –rational authority– is based on reason; the second –irrational authority– on force or suggestion, since nobody in principle would let himself be exploited if he were free to prevent it. Resistance to injustice arises precisely as a protest when rational authority turns into irrational authority, acquiescence into brute force.

Fromm asks: Why is man so prone to obedience and so averse to disobedience? The answer to this question resides in the fact that obedience creates a feeling of security and protection in the one obeying. Obedience makes us at one with the power which we obey and therefore lets us share in its omnipotence. It allows us to feel that we are not mistaken, since the power decides for us, and as if we are not alone, because it watches over us. To disobey, it is necessary to have the courage to be able to withstand being alone and to withstand the possiblity of being wrong. Courage, however, is not all. It is also essential to have developed enough as a person, to have cut the umbilical cord with the mother, and with paternal authority. It also requires that we be free. Freedom is as much an effect as a presupposition of disobedience. If we fear freedom, we do not dare naysay the established power. However, there is a still further reason why to say no is so difficult. This is because, throughout the entire history of humanity, obedience has been identified with virtue, and disobedience with sin. The reason for such identification is simple: only thus can a minority in power force obedience upon the majority. Given that there are goods enough to only satisfy the few, it is essential that the rest of us mortals give our consent and submit, and such submission is stronger and more lasting if, instead of being based on pure force, it is the result of some type of consent.

Faced with this gregarious obedience, resistance to injustice proposes a critical attitude, governed by two mottos: you should dare to know –*sapere aude*– and you should dare to doubt all –*omnibus est dubitandum*–. Man in society has lost the ability to disobey. Probably, he is not even capable of knowing that he is

obeying. At the present historical juncture, to a large extent, the future of Mankind depends upon the capacity to doubt, to criticize, and to disobey injustice.

2. RESISTANCE TO INJUSTICE. LEVELS OF RESISTANCE

Another phenomenon which has been historically related to disobedience is resistance. There are diverse grades of resistance, going from lesser to greater intensity, from non-resistance to the right to resist, passing through passive and active resistance. In what follows, we separately analyze each of these types of resistance.

2.1 Non-Resistance

Non-resistance literally means «not to be against», to not oppose, but, at the same time, to not yield. Non-resistance is united in a Christian cultural context, in the context of the scriptural «turn the other cheek» and in the Sermon on the Mount's «resist not him that is evil». According to this philosophy, the only means of overcoming evil is to let it extinguish itself without opposing active resistance to it, since resistance only creates further evil and adds fuel to the blaze, whereas, when evil encounters no opposition nor obstacle, but only patient endurance, it is faced with an adversary superior to its own powers.

Non-resistance, in the Christian context, does not constitute a value in itself, but is rather a method by which to retain spiritual integrity when confronted by not only the physical, but, above all, the moral danger connected with the act of resistance's wicked potential. Christian martyrs of the 1st century were a prime example of non-resistance. Other famous non-resistance representatives are Tolstoi, the anarchist, Adam Ballou, within New England society, and William Lloyd Garrison, the abolitionist and reformer.

Civil disobedience only shares its non-violent character with non-resistance. Both may be distinguished by their respective motives: faith, in the case of non-resistance, and political, in the widest sense, in the case of civil disobedience; by the different methods they employ, passivity, in the former, and active conduct and publicity, in the latter; by their distinct goals, individual salvation and redemption from evil, with non-resistance, and affirmation of justice against an unjust law, with civil disobedience.

2.2 Passive Resistance

The second sort of historical resistance is passive resistance. The relationship between this and non-resistance is a very distant one. The former is, more than a means of preserving spiritual integrity itself, a means of defending

rights, which gives pride of place to the idea of justice. Still greater is the difference on the practical level. Cosi holds that «if non-resistance, on the basis of the imperative not resist evil, in practice takes the second step in the direction desired by the oppressor, passive resistance refuses even to take the first».

A clear instance of passive resistance was the Indian Liberation Movement, in its attempt to gain independence from the British Empire. Nevertheless, «Gandhi, after a certain point, considered that the title of passive resistance was not adequate to describe the movement he was leading. In England, the expression 'passive resistance' had two connotations Gandhi did not want associated with the Indian movement: the first considered 'passive resistance' a weapon of the weak; the second, that passive resistants did not renounce violence out of principle, but rather because they were in no position to conquer by force».

Passive resistance's characteristic means are non-cooperation and omission; the strike and the boycott, so long as it does not degenerate into sabotage. Passivity of means, however, does not coincide with passivity of either will or the emotions. Adam Ballou, who influenced Tolstoi and, through him, Gandhi, tried to fuse non-resistance and passive resistance together, building up the concept of «moral resistance».

While conscientious objection might often constitute a form of passive resistance, the same cannot be said of civil disobedience, given the passivity predicable of the former but not of civil disobedience. Whereas he who resists passively has only resistance itself as a goal, making the will of the opponent ineffective, the civil disobedient looks further afield, to change, to a metamorphosis of the situation against which he is opposed. Another difference between the two phenomena is that, whilst the number of civil disobedients is small, in passive resistance, contrariwise, it may be, and frequently is, very large, just think of Gandhi's massive campaigns in India.

2.3 Active Resistance

The main characteristic distinguishing passive from active resistance, or non-violent, direct action is precisely its «active» nature. Whereas passive resistance is basically omissive and abstentionist, active resistance is commissive and interventionist. Where the former attempts to retreat from the problem area, the latter takes the initiative and heads straight for the centre of the conflict. Further, as noted by Passerin D'Entrèves, and also at odds with passive resistance, active resistance proclaims the use of violence, exercised individually or collectively, organized, almost taking a revolutionary form.

2.4 The Right to Resist

The right to resist (*Widerstandrecht, ius resistendi,* or *diritto di resistenza*) merits a mention apart. It is historically speaking the most important form of resistance. As regards its historical configuration, the theory of resistance has antecedents in Medieval and Renaissance theory. For the Scholastics, as *ius resistendi*, it had theological connotations and parallelled the birth of the idea of subjective right in the works of William of Ockham. Apparently, it was unknown to the Ancient Greeks and Romans, for whom all that existed was *libertas*, a condition opposed to «servitude» or slavery, which was not, however, a subjective right from which one might derive some faculty of resistance when confronted by power. For the Scholastics, *ius resistendi* was a right to protection from power –a *ius contra potestatem* in their terminology– exercisable when such power departed from divine or natural law –from the *ratio vel voluntas Dei*– either because the origin of the power was illegitimate –*ilegitimitas ab origine*– because the said power had been acquired without just title, or because there was illegitimacy in its exercise –*ilegitimitas in exercitio*– since such power was used in some arbitrary manner.

A second step in the creation of the right to resist, now already within the modern period, is represented by Liberal Philosophy, in the 18th century, where the right to resist appears consecrated when faced with Absolute Monarchy. It questioned the idea of the supreme sovereignty of the monarch, and it questioned external power. Resistance revealed itself then as already a natural right, not a doctrine, positivized in the *Declaration of Independence of the Good State of Virginia* of 1776 and in the French *Rights of Man and of Citizens* of 1789.

In the 20th century, the right to resist may be found recognized in the *Universal Declaration of Human Rights* of 1948, accepted by the United Nations General Assembly.

A third stage in the evolution of the right to resist may be made out in the Western constitutionalist doctrine of our own times. After the Second World War, with the rejection of Nazism the old right to resist suffered a rebirth. Thus, it appeared in the Hessen Land Constitution of 1946 and in the Bonn Basic Law of 1949. In the latter, it was presented in very wide terms, which might lead one to believe that we are dealing with a right of «all against all», even if, in context, it is to be understood as limited to actions against the State and not to those against individuals or social groups. The right to resist is also found in the Preamble to the current French Constitution of 1958. Some scholars of the subject consider that the right to resist is likewise discernable, if not expressly then at least implicitly, in other contemporary constitutions, thus, for example, in the reigning Italian Constitution. The right to resist has also influenced the independence movements of the Spanish colonies, and worker and anarchist action movements.

3. A STEP FURTHER: CIVIL DISOBEDIENCE

As for civil disobedience, it belongs to a century further on in time, arising in the second half of the 19th century and stretching on into the 20th and may take place as much under despotic régimes, like the right to resist, as (and principally) under régimes of a contrary kind. Today, one is not dealing with resistance in an unjust state, but rather with civil disobedience within a state governed by the rule of law. With regard to material differences, we might say that civil disobedience occurs under forms distinct from those of the right to resist, being therefore a species distinct from the species resistance. So, according to Bobbio, in contradistinction to the characteristics of civil disobedience, the right to resist is not usually peaceful, but violent. It is total (calling into question the entire legal system), not partial. It is normally commissive and active, not omissive and passive. It is carried out by a huge collective (by the majority, not by isolated groups). Moreover, as we have seen, the right to resist sometimes appears positivized, as against civil disobedience which is essentially outside the legal system. On this, Norberto Alvarez says that, should the Constitution or higher order norms authorize disobedience to lower order norms, rather than permitting civil disobedience, what they are doing is limiting obedience to those norms or completely denying their legality.

Human History began with an act of disobedience and it is not unlikely that it will end with an act of obedience. Disobedience to state power is a very ancient phenomenon in the annals of Mankind. Indeed, two men cannot be together half an hour without one acquiring an evident superiority over the other, and, as Oscar Wilde put it, «wherever there is a man exercising authority, there you will find a man who resists authority». The most conservative, along with the most liberal of commentators usually agree that perhaps an individual is not doing wrong, in certain circumstances, in breaking the law. Disagreement begins when considering the diverse answers the state should give to the disobedient person's act. That is one of the reasons why civil disobedience still constitutes a difficult and open topic, rich in content and susceptible of multiple ramifications, being today a subject of rabid reality; to a certain extent, the interest aroused by the theme is a consequence of the crisis which parliamentary democracies have been immersed in now for some considerable time. Few are the legal philosophers who have not touched upon the subject, either directly or tangentially, frequently in connection with the theme of the crisis of democracy and systems of legitimation.

What we will try to do here is approach the subject of civil disobedience from the triple perspective of the ethical, the legal, and the political, but –and herein resides the novelty of our focus–, giving priority to the legal aspect of civil disobedience, specially to the possible *legal justification* of civil disobedience, a perspective always forgotten in the analyses of the phenomenon, and where is to be found the Achilles' heel and, at the same time, a possible unexploited seam, in

the whole thematic, from which we have extracted, among others, the following conclusions.

In civil disobedience there is a situation of antinomy on the planes of values, norms and facts. It is the normative antinomy which has the greatest relevance for the topic of civil disobedience, since it is this which allows us to get to know, amongst other things, whether we might speak of the *existence of a subjective right to civilly disobey*.

Certainly, in those acts in which civil disobedience occurs, a conflict of rights or an antinomy is produced in which at least three types of norms intervene:

1.– The law which the act of civil disobedience *violates*;
2.– The law intended to *substitute* this, which may be a simple negation of the earlier norm;
3.– The law under which the violation of law number 1 *is sheltered*.

If we concentrate solely on the type 1 law, which is what the majority of the doctrines do, we arrive at the, at first sight, irrefutable conclusion that civil disobedience, insofar as it is a violation of a legal norm, is an illegal act. Nevertheless, even with regard to the type 1 law, to the violated norm, some refinement may be made. For example, civil disobedience might not be considered a crime though it is considered an illegal act. If we begin with the definition of a crime as a «typically anti-juridical, guilty and punishable action», we see that civil disobedience is rarely contemplated in any specific penal code. Further, we may find circumstances in civil disobedience which exclude some of the elements of the punishable crime. In civil disobedience, there may exist:

1.– Causes excluding the anti-juridical –exempting causes of justification– such as the case of moral necessity, the state of defensive necessity or the acting in the legitimate exercise of a right;
2.– Causes excluding culpability, like the mistake of prohibition;
3.– Circumstances modifying culpability, like the non-concurrence in principle of aggravating circumstances, or the concurrence of attenuating circumstances –such as incomplete exemptions, the confession of the infringement and exemption by analogy;
4.– Causes exempting penalty, such as the reprieve.

On the other hand, often in the application of a law, by way of the play of a series of recourses, there is room for analogy, equity, the recourse to the nature of things or to those criteria of interpretation which, like logical, systematic or sociological interpretation, go beyond strict grammatical interpretation, which lead us away from a strict interpretation or application of the law and which make that, in a certain way, we obey, although, at first sight, it appears that we are disobeying it.

Even greater novelty stems from the contemplation of civil disobedience from the perspective of norms 2 and 3. Here, it might be objected that, in reality, in civil disobedience neither a law to substitute the law violated nor another which shelters its violation are to be found. Nevertheless, in our opinion, both situations exist in civil disobedience. Thus, we may speak of the existence of a law which substitutes the law violated at least as a project to be realized when civil disobedience reaches a successful conclusion. We must not forget that civil disobedience has innovatory aims, the substitution of the legality in place. This does not deal with whether those disobeying always have or present an alternative legal proposal but simply of a *sensu contrario* one, by way of the negation of the reigning legality, the allegation that to a determinate situation or given facts should be attributed some legal consequences which are not those foreseen by the law for those facts. One would be dealing with a species of new, negative norm, of a general exclusive norm, a simple negation of that which is violated.

However, in civil disobedience there would even exist a third norm which, under the guise of eternal law, divine law, moral or natural law –for those who, following the natural law line, give legal relevance to the super-positivist world– or as a principle, international law or constitutional precept –for the generalized positivist doctrine– cover civil disobedience, even if only in a tangential way, allowing us to speak of the existence, perhaps in a somewhat limited or improper sense, of a «right» to civil disobedience.

Therefore, by way of conclusion, we may affirm that civil disobedience on the normative plane, of the legal *excuse*, would be an illegal act to the extent that it violates legal norm 1, but one whose illegality does not answer to the rigid criminal scheme and which also has a certain legal backing through the existence of other, type 2 norm, together with the violated norm –a norm that replaces the norm violated– and type 3 norm –a law by which the normative violation is upheld.

Perhaps, the most acceptable would be to consider that civil disobedience is neither completely legal, as some maintain, nor completely illegal, as others argue. Legality and illegality are not contradictory, but rather contrary notions: two extremes of the same species. In fact, it would be useful to think of grades of legality (or, contrariwise, grades of illegality). In this sense, an act of civil disobedience is of the nature of a benign illegality or, one might say, a technical illegality, but not a substantial illegality. We can express this intermediate position between the lawful and the unlawful by recognizing a new sphere which we can call the «*paralegal*» (using the Greek prefix «para-» meaning «at the side of» or «close to»). The paralegal is something less than the completely legal, but something more than the clearly illegal, partaking of the characteristics of both legality and illegality. The civil disobedient then would be within the sphere of the paralegal. Consequently, although the civil disobedient may not be completely pardoned (given that his action is illegal to a certain extent), yet he would have the right to a lighter sentence than normal (since his act is, to a certain degree, legal).

In civil disobedience one attempts to achieve moral ends by means of illegal acts, thus, the legitimacy/illegality ratio would be 50%. It is the difference between

whether civil disobedience would be correct, materially just –«*being right*»– and that a formal right should exist –«*having a right*»–, a right as such, the right to civilly disobey. In truth, conflicts of norms are produced in civil disobedience; a conflict between, for example, a national and an international law, or between a positive and a supra-positive law, in such a fashion that in meeting the one correctly, one fails to conform to the other. Hence, in acts of civil disobedience, it is possible to speak at the same time of legality and illegality.

It is generally held that the legalization of civil disobedience, its being constituted a legal category, its institutionalization, is not justified. We agree in part with this affirmation, but only in part. We believe that perhaps «positive» –or *prescriptive*– legalization of civil disobedience might be neither possible nor advisable, since it would divest it of its very essence, but certainly there should be «neutral» –or *permissive*– legalization and, in no case would it be proper that there should be «negative» –or *prohibitive*– legalization against such an action.

In our view, the correct solution to the question of civil disobedience is neither to *prescribe* nor *proscribe* it, but to contemplate its possibility when the freedom of the subject should exercise it. To forbid civil disobedience as just another crime would be unjust, because disproportionate; to legalize it would be dangerous and create legal insecurity; we should simply open the floodgates 50%, to a certain extent promoting the conditions of tolerance which favour disobedience and thus the system will regenerate and oxygenize by its own dynamic.

Nevertheless, that a right to civilly disobey be recognized does not mean that anyone may disobey in any circumstances whatever and in a limitless fashion. Quite the contrary. Civil disobedience has various prerequisites attached to its exercise and is subject to certain limits. It also has its own rules for use. Not just anything goes. One might even speak, metaphorically of course, of a *handbook* of the good civil disobedient.

Here, we shall consider civil disobedience as «the conscious and intentional breaking of a legal norm, as having a public and collective nature, as, in principle, being peaceful, as *appealing to ethical principles, to reasons of conscience,* with legal system innovation and reform in view». It is an idea about which no absolute agreement exists, but which is generally accepted as outlined by the majority of writers, especially in the English-speaking world, where the phenomenon has been much studied.

It might not be pushing reality too far to consider civil disobedience as an equitable application of law rather than as an open, pure infraction of it. [2] This conclusion may be arrived at using any of the two main meanings of equity as usually defined in either Roman-Canonical law or Ancient Greek practice.

According to the Roman-Canonical idea, equity is humanity, benignity, mercy when applying the law, lessening its rigour and humanizing it to prevent the

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2 To have a general idea on the subject of equity, see our works, *Equity and Law* (Preface by Juan Igartua Salaverría), Martinus Nijhoff, Boston-Leiden, 2008; and *A Three-Dimensional Theory of Law*, Martinus Nijhoff, Boston-Leiden, 2010.

aphorism «*summum ius, summa iniuria*» from coming true. It is a conception of equity which goes into the material aspects of law, into its very content.

Contrariwise, the Greek idea of equity, as «*epieikeia*», makes us focus on the merely formal or external aspects of law, while equity is justice in the specific case, the adapting of law, abstract by definition, to singularities, without entering into any knowledge of whether this is more or less benign, better or worse, from the content point of view.

Whichever of these two meanings we adopt, we may relate it to civil disobedience. It might happen that whoever civilly disobeys is doing nothing but asking for an equitable application of the law, in any of these two senses. In some cases, there is a law which is too strict, which, if applied mathematically would cause injustice. In other instances, the law is too general and there is a certain group, a minority, which requires that justice be adapted to the demands of their peculiar situation.

In both events, the disobedient judges that justice as an absolute should turn into fairness, justice for the specific case. Sometimes this requires a sweetening of the law, at others it calls for making an exception to the law. It is true that, if what we are looking for is a rigorous application of the law, in these cases, we must admit the norm has been infringed. However, if we are not speaking in absolute terms, but rather in relative ones, if we do not look only rigidly ahead, but rather open up our field of vision, if we do not argue for «all-or-nothing», but admit grading, then, we might say that what we have done is simply an equitable application of the law. It could be objected that, in the case of these equitable applications of the law, there is then no real violation of the law and, hence, we cannot truly speak of any civil disobedience. The fact is, in reality, the frontier separating law-breaking from the non-application of law for reasons of equity is uncertain ground, its confines are poorly defined, it is a zone of quicksands where the one who judges must act with care and stealth, of course, but also with flexibility, keeping his balance, seeking out the happy medium, between disobedience pure and simple and equitable disobedience, or, in 90% of cases, resistance to injustice.