



XVIIth Conference of the *International Association of Legal Methodology*
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Theme

« BREAKING THE NORM: HOW DISOBEDIENCE CONTRIBUTES TO LAW »

Introduction

While jurists usually and justifiably highlight the dangers of disobedience, psychologists have amply demonstrated the perils of excessive obedience. In this conference, we propose to reverse this perspective and explore how deviation from the norm can contribute to nourishing and enriching the Law.

The term "disobedience" has a moral connotation and so, we thought it might be useful to replace it with an expression that more neutrally highlights the inherent relationship between a norm and its transgression. Breaking the norm can have both positive and negative connotations. We certainly do not wish for this conference to become a plea in favor of transgression. Léon Duguit was perfectly aware of this risk when, a century ago, he defended the legitimacy of disobedience to the law: "the refusal to obey a legislative text that is contrary to the law is perfectly legitimate. ... When one formulates this proposition, one is generally accused of being an anarchist because, it is said, there would be no possible society if all citizens could refuse to obey a legal rule on the pretext that it is contrary to the law".

Transgression, far from being outside the law, actually reveals its profound nature. As Jean Carbonnier reminded us: "Between the legal rule and its violation ... a conceptual couple is formed, that is part of law. Those who transgress the law are still making law in their own way".

First axis: disobedience, a driving force in the evolution of the law

Legal norms thrive on transgression. Sociologically speaking, the cause is clear: transgression of established rules can be considered a *driving force behind the law's evolution*. For Emile Durkheim, "[q]uite often, in fact, [crime] is merely an anticipation of a future moral standard, a progression towards what will be!" Jean Cruet, a forgotten pioneer of the sociology of law, summed up this idea in a striking quote: "Isn't disobeying the law, in short, a way of modifying it without formalities?" Advocating a moderate respect for the law, he developed the idea that illegality, once it became collective, constituted a warning to the legislator: "Illegality, moreover, does not seriously endanger the law, if it remains individual. When it becomes collective, it constitutes a warning to the legislator, indicating the growing disagreement between society and the law. It shows the legislator that "the social world, as Spencer put it, is very far from being a dough to which the cook can give any shape she pleases, a pie crust, a turnover or a tartlet". It would be too easy to legislate if unsuitable statutes were always applied. In a way, one can say that illegality has a legal function, just as one might say heresy has an intellectual one."

Without going back to the establishment of the *right of resistance to oppression*, this is where the notion of *civil disobedience* finds its roots, the aim of which is to question the legislator on the relevance and justice of his choices by the perpetration of an illegal act in a transparent, non-violent and asserted manner thus ensuring that the question is put on the politico-legal agenda. *Information leakage, ethical hacking, and whistleblowing*, committed in the name of activism, also illustrate disobedience's driving force that tests the limits of the law.

However, attempting to change the law through disobedience is not reserved for major social, climatic, or environmental causes, but also for purely private economic interests, as demonstrated in The Uber Files that revealed that Uber managers clearly claimed internally that they were operating illegally ("We're just fucking illegal").

Second axis: the juridical legitimization of disobedience

The possible *right to disobey* raises a question of formal logic, since one no longer disobeys when one has the right to do so! This right will endeavor by any means possible to ensure

that deviations from the norm are integrated into its orbit as soon as their legitimacy is recognized.

Usually the problem is solved when legal rule is *repealed* (Rosa Parks no longer breaks the law since everyone has the right to sit on a public bus, without discrimination). However, the "out of the ordinary" *exception* resolves the contradiction in a more subtle way: I obey the rule that establishes the exception, which will then lawfully deviate from the principle. One could say that the exception "disobeys" the rule with good reason, so that the use of this word in such a context becomes unusual, while remaining revealing. *Derogation* and *fiction* operate according to the same mechanism.

The *right to strike*, the *right to conscientious objection*, the exemption from criminal responsibility from the *crime of solidarity*, the right to commit minor offences as part of a *peaceful demonstration*, the right of *lawful disobedience to orders* in military, civil service or labor laws, the protection of *ethics alerts*, of pilot projects on cannabis use in *experimental law*, etc. all follow this model.

In contrast to repealing, the exception model allows the general principle to remain in the legal system, while accommodating the once deviant deviation: any new act subsequent to the adoption of the exception will be lawful. This temporality reveals another group of stars: one in which legal legitimization, although taking place at a later date, only targets specific past behaviors, without addressing similar future acts, which will remain illegal in principle. This is illustrated by the *regularization of undocumented immigrants* in migration law, the regularization of unlawful construction in town planning law, *tax amnesties*, and even the *right to use unlawful evidence* to elucidate serious offences.

The temporal shift can be taken a step further in the case of *rehabilitation* or *memory laws*, which allow us to take a new, legal-symbolic look at what disobedience has in retrospect contributed, or could have contributed, to the law.

In the preceding examples, these "redemptive" exceptions were cast in the mold of the law. In practice, they can also be factual, as in the case of the *tolerance* of unlawful situations, while revealing that this tolerance can, depending on the circumstances, have legal consequences and contribute to the law's evolution.

In constitutional jurisdictions, the legal order sometimes compels litigants to disobey in order to bring about a *concrete review of normative acts*.

Finally, *contra legem interpretation* can also be understood as the legal legitimization of a kind of "deviation" to the norm by its interpreter (judge or other authority authorized to state the law). *Systematic interpretation*, on the other hand, authorizes judges to choose between

contradictory norms, and thus to decide which norm to put aside, and which one should be retained to ensure a coherent legal order. This view of interpretation is the reason behind Jean Carbonnier's provocative question: Isn't interpretation the intellectual form of disobedience?

These last examples illustrate the central role played by the interpreter empowered to say the law: the person who deviates from a norm will often try to demonstrate that he or she is *disobeying in order to comply* with a different norm, whether contradictory or superior, legal or moral: interfering with the right to free movement of vehicles to ensure compliance with the Paris Agreement on Climate Change, revealing a secret to ensure respect for the principles of the rule of law, or to override King Creon's law to obey the "unwritten, unshakeable laws of the gods".

Third axis: limits to excessive obedience to the law

If, according to Jean Cruet, "when the law, in a transformed environment, continues to be applied in its entirety, it quickly becomes dangerous - or absurd", for François Ost and Michel van de Kerchove, "just as an excess of legalism can prove harmful (*summum ius, summa iniuria*), ... so too an excessive demand for effectiveness and efficiency could be counterproductive; should we write: *summa efficia, summa iniuria*?"

The legal system is not immune to this criticism. The principle of proportionality, for example, requires legislators to provide *escape clauses* in cases of excessive stringency. The principle of equality requires a more flexible standard to counter the discrimination it could create by providing for *reasonable accommodations*. The *prohibition of excessive formalism* principle penalizes the overly strict application of procedural rules.

The *development of obedience technologies*, both psycho-behavioral (*nudges* and behavioral science) and technological (algorithmic control and cyber-surveillance), as well as the unnatural marriage of the two, are aimed at modifying an individual's psyche or placing said individual in an architecture that effectively compels him to behave in accordance with the law. Their aim is to make the norm impervious to disobedience.

Is it not time, in these societies of control, already condemned by Gilles Deleuze, to remember Michel Foucault, who explained that, "under the Ancient Régime, the different social strata each had their margin of tolerated illegality" and that "[t]he most disadvantaged strata of the population ... benefited, on the margins of what was imposed on them by laws and customs, from a space of tolerance ... and this space was for them such an indispensable condition of existence that they were often ready to rise up to defend it"?



Fourth axis: disobedience in the context of normative pluralism

By referring to norms rather than to legal rules, it is not our intention to limit our study to State law alone. Not following a *recommendation*, for example, is a form of disobedience, even if it is not officially prohibited by law. The debate on inclusive writing is a reminder of this to anyone who tries to deviate from the norms of linguistic doxa.

More generally, what does it mean to disobey the new, more fluid, more reticular, more flexible - but also more elusive – sources of *informal regulation* in a globalized world?

Finally, moving a bit further away from exclusively legal normativity: *boycotts* can be *cultural* when they concern a literary or artistic work, and artistic, literary, musical, religious, scientific, political, linguistic, clothing, social or cultural all evolve *by breaking down successive codes*.

Wouldn't the study of these phenomena contribute to the debate on the potential of deviations from the norm, without becoming a glorification of disobedience?

Directives for the proposals

Interested participants must send their written proposal before the **October 1st 2023**. Proposals must have a bilingual title, contain a short summary (between 100 and 150 words) in French or English and mention the name and affiliation of the author.

The proposals should be sent to the following email address:
aimj-ialm2024@usherbrooke.ca

Selected participants will be invited to contribute to a collective publication. Although a proposal can discuss other issues than the ones described above, the scientific committee can give preference to proposals more directly related to the specific topics described above. Resources permitting, financial support may be offered to scholars who wish to participate.

Scientific Committee:

Alexandre Flückiger	Mathieu Devinat	Clotilde Aubry de Maromont	Nader Hakim
Professor Université de Genève	President of the IALM Professor Université de Sherbrooke	Professor Université de Nantes	Professor Université de Bordeaux



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