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## **Chapter 11: How subversive are human rights?**

### **Civil Subversion and the Ethics of Unarmed Resistance**

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Human rights define a set of *ends* whose special value is commonly held to mandate the coercive powers of those states that respect them and sometimes to justify remedial measures by external intervention or internal resistance against others that don't (Buchanan 2004; Doyle 2015; Finlay 2015). But in addition to specifying its ends directly, human rights can also legitimise political action by protecting a range of versatile civil liberties that may be employed as political *means*. In doing so, rights offer indirect protection (a *political guarantee*) for some other purposes that people might use them to pursue, purposes not inconsistent with human rights but not directly warranted by them either. I want to shed some light on this thought by exploring the possibility that some such rights could provide tools for a strategy to subvert the authority of a state. It is in this sense that I intend the question: how subversive are human rights? I argue that they could have considerable subversive potential if used as part of a method I will call Civil Subversion. Although it might be used to pursue other types of political objective, I will focus particularly on how Civil Subversion could exploit vulnerabilities even in legitimate states in pursuit of secessionist goals.

Civil Subversion combines three techniques: divestment from existing political institutions, the establishment of parallel institutions, and the use of the civil liberties to ensure that whereas everything the resisters do is protected by rights, many of the things the opposing state needs to do to defend against them would violate them. It thereby places the state in a predicament where the actions it might need to take for the sake of its ability to rule in the contested territory would at the same time undermine its legitimacy and thereby diminish its power. By exploiting the political-normative salience of rights in this way as a means of constraining the state and compelling it to concede ends that they don't substantively entail, this strategy may be said to involve a form of *normative coercion*.

The potential for using human rights in this way is most clearly visible in a peculiar subset of confrontations between resisters and government that falls between the two types that receive most attention in the literature. On the one hand, analysis of the ethics of civil resistance and armed rebellion tends to focus on cases where the state fails to satisfy human rights, thus triggering a right to resist on the parts of its *opponents* (e.g. Finlay 2015). On the other, theorists of militant democracy are interested in cases where the threat to human rights is posed by illiberal opposition movements, triggering a right

to resist on the part of the democratic *state* (e.g. Macklem 2006; Kirschner 2014). I am especially interested, by contrast, in intermediate cases where the prospects for human rights satisfaction are equal between (a) the secessionist state at which opponents of the state aim, (b) the original state minus the secession, and (c) the original state had there been no secession (cf. Caney 1997, 371). By focusing on these cases, it is possible to abstract away the more prominent issues triggered by human rights violations in order to reveal a feature of human rights that those issues overshadow. Clarifying this feature may in turn shed light on conceptual and tactical possibilities that could be exploited by a wider range of movements confronting regimes they have legitimate reasons to try to change.

Sections 1 and 2 outline the key features of the technique by drawing on a historical example outlined by the Irish nationalist Arthur Griffith some time before the contemporary international human rights regime was created but in a context in which the legitimacy of the state nevertheless depended on claims about civil liberties. Part 3 then analyses its normative dimensions, focusing on how they might be worked out in the context of human rights.

## **THE METHODS OF CIVIL SUBVERSION**

The methods of Civil Subversion were devised and put into action earlier in the twentieth century during the growing mobilization of secessionist nationalism in Ireland between 1904 and 1921. Later overshadowed as the proponents of armed force came to predominate after 1916, at the beginning of that period Arthur Griffith, the founder of Sinn Féin, drew on examples from Hungarian nationalist agitation in the nineteenth century to formulate a strategy built out of non-violent techniques that, he thought, could undermine the power of the British state in Ireland while simultaneously founding an alternative. His ideas offered both a significant contribution to the tactical repertoire of Irish nationalism and beyond and an early articulation of the essential components of a model for civil resistance that has since become much more popular.

A self-consciously nonviolent strategy, the ‘Sinn Féin Policy,’ as it became, was formulated on the one hand as an alternative to armed struggle. But it was intended equally to rival participation in constitutionally mandated parliamentary politics (‘parliamentarism’). Its aim was to generate a novel form of political power that was *neither* violent *nor* constitutionally authorized but that could exert force in contemporary politics sufficient to secure nationalist goals without the moral and political compromises of its rivals.

Parliamentarism in particular, Griffith argued, demanded a fatal trade-off, selling out the cause of Irish independence properly understood for the sake of political advantages that were mostly illusory in nature. The ‘evil fruits of Parliamentarism masquerading as constitutionalism,’ he wrote, could be seen in a fundamental disorientation of the Irish people, compromising instead of nourishing the culture and

institutions that it should have been the nationalists' chief objective to promote and liberate (Griffith 1918, x). His analysis has a distinctly Schmittian flavour (*avant la lettre*) as he bemoans how by situating their representatives in the British legislature, 'They grew to look upon this English party or class as a friend, and that English party or class as an enemy' and 'ceased to recognize in all English parties and classes the same England in different garments' (Griffith 1918, xi). Griffith needed a strategy that could rival the leverage promised by parliamentarism but without the trade-off.

His idea combined two moments, one negative, one positive (Townshend 2013, 83; cf Gandhi 2008, 164-84). Negatively, its central component was 'abstentionism': the Irish people and its leaders must withdraw from the institutions of English rule. They must divest active support from the political institutions at Westminster and disengage from the political machinations of British politicians and their parties. But disengagement shouldn't stop at politics in the narrow sense: Irish subjects of British rule must not take legal disputes to English courts. Nor must they send their most talented educators and administrators to work in an English education system and civil service. Their diplomats must not serve in the embassies of Britain or contribute to the maintenance of foreign relations focused on London. And in 1919, nationalists added the important tactic of boycotting the Royal Irish Constabulary (the police force before independence), aiming to 'render them harmless, and prevent them getting information,' as Constance Markievicz put it (and also, she added, 'to make them ashamed of themselves') (Townshend 2013, 84).

Positively, the Irish must build for themselves a set of rival institutions and reinvest their active support in them. They must create 'A National Civil Service' to which those currently serving the English may defect (Griffith 1918, 155-6). Only through such a rival institution could Irish administrators serve a truly Irish education policy by means of measures designed specifically to deepen Irish culture and identity. No less important, Griffith argues, 'are National Courts of Law' (156). In the nineteenth century, Hungary had 'established Arbitration Courts, which superseded the courts which Austria sought to impose upon her.' So must Ireland. At the centre of it all, Irish delegates withdrawn from Westminster must attend instead a 'de facto Irish Parliament in Dublin' (156). So far as foreign relations are concerned, instead of 'orating' to the English in London, they ought to represent the Irish case as consuls in foreign states (151). As Townshend writes, 'the counter state' was intended 'to purloin the national administration from beneath the noses of the British authorities' (Townshend 2013, 84).

Following the example of Hungarian nationalists, the 'policy [was to be one] of Passive Resistance – with occasional excursions into the domain of Active Resistance at strategic points' (Griffith 1918, 90). So far as its feasibility is concerned, Richard Davis writes that, 'In 1905 Griffith's ideas seemed to many ludicrously far-fetched' but with 'the establishment of Dail Eireann [the Irish parliament formed by separatists elected through the British general election] in 1919, it was to be a different story.' The

necessary component of a de facto power in the form of an ‘elective representation of Ireland’ was achieved at that point once Sinn Féin demolished their parliamentarist opponents in the 1918 general election and then withdrew en bloc to form an independent Irish legislature (Davis 1976, 14). In fact, the Sinn Féin policy was so successful by 1920 in achieving Griffith’s intermediate goals that the General Officer Commanding in Chief of British forces during the War of Independence, Sir Nevil Macready, claimed ‘to have bought a copy of [Griffith’s] *The Resurrection of Hungary* and ticked off, item by item, each positive action of Dail Eireann’ (34; on the unpromising early years of the policy, McGarry 2010, 27-9).

The precise salience that Civil Subversion had in the Irish independence movement is hard to measure due to the growth of a parallel and in some ways complementary armed force movement from 1916 onwards. But it draws on techniques often cited as key parts of the repertoire of nonviolent resistance that have been employed with varying degrees of success in a number of important cases since the end of the Irish War of Independence in 1921 (notably in India, on which see Brown 2009; on Palestine and Kosovo, see Gross 2015, 242-4; on withdrawal of support, Sharp 67-8 and on parallel institutions, 70).<sup>1</sup> I turn now to the question of how Civil Subversion might be expected to work, exerting a peculiar kind of ‘force’ in pursuit of nationalist aims.

### **CIVIL SUBVERSION, POWER, AND UNARMED ‘FORCE’**

The term ‘Civil Subversion’ captures, I think, the key features of Griffith’s idea while flagging a contrast with other more famous examples of nonviolent resistance such as Martin Luther King’s. On the one hand, like King’s *civil* disobedience, it is scrupulously ‘non-military’ in its pure form and pursues ‘goals [that] are “civil” in the sense of being widely shared in a society’ (Roberts 2009, 2). But whereas King sought to modify particular parts of the law in more or less radical ways while upholding the authority of the state as a whole, Civil Subversion attempts to negate entirely the existing source of legal authority and it may or may not seek in doing so to achieve any reform in the way the laws allocate and protect individual rights.<sup>2</sup> In order to get a clearer sense of how it might work, we need to give some attention to how the Civil Subversion strategy relates to *force* and to do this we need to start with its relationship with *power*.

For Hannah Arendt, power is not a question of domination, of ‘Who? Whom?’ as Lenin encapsulated it. Nor, paradigmatically, does it ‘flow from the barrel of a gun’ (Mao) and it isn’t, therefore, a phenomenon intimately connected with the threat of violence. Rather, power arises where people act in concert, coming together and forming political relationships, identifying and committing to common political goals, and

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<sup>1</sup> On the complexity of the varying relationship between civil resistance and armed force, see Roberts 2009, 13-20. Important studies that quantify the effectiveness of nonviolent resistance strategies are Chenoweth and Stephan (2011) and Bailey (2015).

<sup>2</sup> Griffith, for instance, opposed strikes for workers’ rights in Dublin during 1913, which he thought threatened the unity necessary for promoting his nationalist agenda.

‘empowering’ leaders. States and governments that can rely on widespread, active support in this form have what Arendt calls *power*: they are, as it were, *empowered to act* by a population that supports them collectively. By the same token, if a government or state loses this sort of legitimacy, it suffers a commensurate loss of power (Arendt 1972, 143ff; also, Sharp 2006, 8-10 *et passim*). Revolution occurs, then, where a new power emerges through the concerted action of a populace which simultaneously divests power from the established government. Civil Subversion aims to achieve precisely this sort of political transformation: just as it concentrates and deepens the commitments of a secessionist population to political, cultural and economic independence, it dissolves the sinews of power – economic, intellectual, psychological, and institutional – by which ‘foreign’ rule is maintained.

If a popular movement progressively shifted the balance of power in this way within the disputed territory, it would pose a critical dilemma for the regime. On the one hand, rulers could capitulate, conceding their opponents’ demands. On the other, they might seek an alternative basis for ruling by supplementing their failing resources in popular support with the threat of violence, an option available only so long as the armed forces are prepared to carry out its orders. But resorting to coercion in this way poses a problem with three interrelated dimensions: First, violence is widely thought likely to prove a less reliable basis for government than power in Arendt’s sense (Arendt 148-9; also Wolin 2004, 200; Sharp 2006). Second, the more use is made of violence, the more power is likely to leach away as violence itself further erodes support (Arendt 1972, 152-5). The third is a variant of the second specific to contexts in which individuals can claim moral recognition and legal protection for civil rights (cf. Griffith 1918, 26-7 on the first two points and, on the third, 24, 92-3). If the practice of Civil Subversion is able to harness these rights, restricting its methods to those they protect, and if the legitimacy of the state depends on its commitment to civil liberties, then the state is confronted with a dilemma between [a] honouring rights at the cost of losing power and [b] challenging the opposing power at the expense of losing legitimacy. It is in creating this predicament that Civil Subversion may be said to generate a form of force: by ‘force,’ I mean that the secessionists succeed by structuring the alternatives available to the government in such a way as to coerce – ‘force’ – it into making concessions. The force is, of course, unarmed since it need involve no credible threat of violence (it is not ‘kinetic’ in the sense Fabre discusses (2012, chapter 3)). But Civil Subversion nevertheless mimics the coerciveness of threatening violent harm: whereas threats of violence usually take the form, ‘Do this or I harm you’, Civil Subversion declares, ‘Do this or you will harm yourself.’

### **CIVIL SUBVERSION AND HUMAN RIGHTS**

The strategy of divestment combined with parallel institutions is likely to benefit in a very practical sense from some of the civic privileges now codified as human rights. Without at least an implicit permission to exercise them, creating the new loci of popular support that it requires would be much more difficult. But in contexts where these

privileges are explicitly protected, it contributes in a further way to the forcefulness of Civil Subversion as a strategy. Part 3 analyzes this additional component by which the strategy could exploit their status as *human rights*.

#### *Human Rights as Guarantees*

First let's return to the suggestion that individual (human) rights might *guarantee* further, collective ends, such as that of self-determination through secession. There are two ways in which they might be thought to do so. The first is *substantive*, i.e. where the ends specified by the right include or entail some further end as a corollary. The other I will call *political*.

As regards *substantive* guarantees, Jack Donnelly, for instance, writes that 'there is substantial overlap [between collective self-determination and] well-established individual human rights':

For example, the right of a people to determine its political status and path of development can be seen as a collective expression of the right to political participation [...] Likewise, the right of a people to its natural wealth and resources can be seen as a guarantee that the material means to satisfy a wide range of rights will not be subject to continued plunder by foreign states or corporations.

Consequently, the chief demands arising from a right of self-determination are satisfied by 'respecting all other human rights and, in particular, the rights to political participation and freedom of speech, press, assembly, and association' (Donnelly 2003, 222).

On this view, then, any state honouring fully the standard set of individual rights would *ipso facto* also find itself satisfying collective projects for self-determination. In many cases, presumably, these would be realized through policy and law-making in parliaments and so on. In some instances, the policies might further realize collective self-determination through constitutional changes that permit a degree of intrastate autonomy. And conceivably, it might even be possible for one part of the population to agree with the others, through its constitutionally appointed public representatives, that it will secede, founding a breakaway state.

What isn't clear, however, is that individual political rights would mandate unilateral secession even if it was strongly desired by those seeking it, i.e. an actionable (still less, enforceable) decision to secede in the face of opposition from (political representatives of) the other human-rights-wielding citizens who would remain behind. Some theorists argue that whereas secession might be claimed unilaterally as a remedy for prior or threatened violations of *other* (human) rights or of intrastate autonomy agreements, for example, it cannot be claimed unilaterally as a *primary* right (Buchanan 2004, 331, 343, 351-9; Seymour 2007; for contrasting views, see Caney 1997; Moore 2015, 128-34, 231-4). What I want to draw attention to, however, is a second, distinct way in which individual rights could be said to *guarantee* collective ends, even (to a certain extent) such as unilateral, non-remedial secession.

Human rights can potentially offer a *political* guarantee insofar as any state honouring them might thereby be exposed to attempts by individual rights holders to force it into accepting radical changes to its boundaries or institutional arrangements. Stated formally, a *political* guarantee has the following components in its strongest (and pure) form:

A set of rights  $x$  may be said to *guarantee* a further end  $z$  when [1]  $x$  equips its owners with means  $y$ ; where [2]  $y$  is sufficient for an attempt with a reasonable chance of success at securing  $z$ ; and where [3]  $z$  is neither included in, a corollary of, nor forbidden by the scheme of rights to which  $x$  belongs.

In the type of case we are considering, let  $x$  be the set of civil rights guaranteed by the major human rights conventions;  $z$  is the ambition of various members of a particular state to break away. Component  $y$  is utilized in the strategy of Civil Subversion. The degree to which  $x$  should be thought to *guarantee*  $z$  depends, of course, on the efficacy of  $y$  in any particular situation, which will vary. In any case, this specifies how a legal *right* might protect certain *means* ('forceful' in the sense indicated in section 2) which, in turn, *guarantee* further *ends* (cf. Benjamin 2004, 237).

Turning to clause [3], human rights cannot be said without self-contradiction to guarantee ends that are conflict with them substantively, such as the introduction of a system of laws prejudicial to the dignity of women or minorities. A state confronted with resisters bent on such ends could cite human rights to justify necessary and proportionate measures to defend against them (on the ethical complexities of this sort of case focused on democratic rights, see Kirschner 2014). On the other hand, although it is possible that the set of rights,  $x$ , might guarantee *politically* a set of ends that  $x$  also guarantees *substantively*, the focus here is on how it might do so for ends *not* guaranteed *substantively*, thereby offering political guarantee in its 'pure' form. The focus is therefore on the way human rights *politically* guarantee ends that are neither directly required by human rights nor at odds with them.

Unilateral, non-remedial secession by a particular population would seem to be an end of this kind. Whereas the right to participate in a self-determining polity of *some* sort might either be a human right or a corollary of other human rights (per Donnelly's point, 2003, 222), to exercise it in a *particular* territorial-jurisdictional form arguably is not (per Buchanan 2004, chapter 8). Moreover, the metajurisdictional power-right to alter existing, otherwise legitimate constellations of populace, jurisdiction and territorial sovereignty (Stilz 2009) is neither a human right nor the logical corollary of such either. However, it is not true that pursuing such aims is necessarily prohibited by human rights either.

Permissible as they may be, a successful pursuit of these aims could challenge the form and authority of an existing legitimate state. It raises the question, by what rights (if any) might the state seek to justify such actions as may be necessary to thwart the secessionists? The answer depends partly on how we interpret the powers conceded to the

state by human rights conventions to curb the exercise of some rights in the interests of ‘national security’ and ‘public order’, which I discuss in 3.3. But first, in 3.2, I ask which individual human rights specifically could be claimed as equipment for secessionists committed to a strategy of Civil Subversion.

### *Subversives Versus the State*

Since the strategies I am concerned with are based on extra-parliamentary means of resistance, we have to set aside the ‘political’ rights of democratic participation (e.g. UDHR, art. 21). Civil Subversion chiefly harnesses the sort of ‘civil’ (human) rights that are generally characteristic of liberal-democratic states (cf. Gandhi 2008, 348-9). Indeed, Griffith’s contemporaries could count on being permitted to exercise a similar array of abilities in the first quarter of the twentieth century in Britain.

The key civil rights include, first of all, the right to assemble and associate. The UDHR, art. 20, for instance, states that, ‘(1) Everyone has the right to freedom of peaceful assembly and association’ and that ‘(2) No one may be compelled to belong to an association.’ Secondly, Civil Subversion harnesses the right to speak, write, and publish freely: UDHR, art. 19: ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’ Underpinning both sets of rights is the protection of rights of conscience and opinion (UDHR, art. 18).<sup>3</sup> Taken together and used in a concerted way, this cluster of civil rights alongside personal freedoms of movement (UDHR, art. 13), from violence (UDHR, art. 3) and arbitrary arrest (UDHR, art. 9) provide the necessary minimum equipment that Civil Subversives would need.

Positively, rights of assembly and association would make it possible to establish a movement like Sinn Féin and protect its members’ ability to meet and formulate views and plans. Moreover, further institutional arrangements arising from their discussions could also be protected, provided they didn’t wrongfully infringe on the human rights of others (which would risk justifying suppression by the state). If courts of arbitration, for example, were offered as a non-compulsory alternative to de jure courts and if participants explicitly consented to abide by their judgements, then it is hard to see how they could be accused of entailing direct human rights violations. Similarly, a more ambitious move like the establishment of a rival representative political assembly could harness the rights of some (of assembly, association and speech) without directly violating those of others. Within such an assembly, then, the exercise of civil liberties would enable delegates to discuss political vision and policy.<sup>4</sup>

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<sup>3</sup> See especially ICCPR Arts: 18, 19, 21, & 22. The public freedoms bestowed by these rights are clearly important but so too, arguably, are privacy rights.

<sup>4</sup> For comparable claims in the Irish context, see Griffith 1918, 92: ‘even under the Coercion Act,’ he wrote, ‘there is no violation of the law committed by 300 gentlemen



Hence, human rights could provide secessionists with the positive abilities needed to arbitrate in disputes between members of its population (and even, conceivably, between them and others if the others also agree to abide by decisions of the courts), outline and define policies, and legislate for the secessionist population. But whereas a legitimate state can enforce its laws and judgements issuing from its courts coercively, it is unlikely that secessionists could do so citing human rights alone. Trying to do so would risk offering a pretext for coercive measures against the subversives by a state citing as grounds that they are private parties committing serious violations of the rights of those under the state's protection. Subversives, however, might be able to develop some enforcement capabilities based on consent. If, for instance, a private club required its members to abide by certain rules, it could stipulate and the members might agree that persistent defaulters be subject to expulsion and, as an intermediate step before cutting ties, they might also agree on financial penalties (enforceable on pain of losing membership). Secessionist subversives might follow this model, permitting them to function collectively in a manner with some resemblance to a democratic state.

So the secessionists might have considerable scope within human rights to engage in the positive aspects of a subversion strategy, but what about the negative? Negatively, the strategy of Civil Subversion involves abstention from parliament, a practice unlikely to break any enforceable human-rights-based rules. But more than this, in the Irish case it also required withdrawal from the institutions of 'foreign' rule more generally. Moves like withdrawal from the civil service might be unproblematic in a human rights perspective. Likewise, insofar as boycotting the police involves *not bringing problems to them for help*, it is less likely to be illegal than positive non-compliance with prima facie legitimate orders. On the other hand, failure to volunteer evidence concerning a serious crime might be a punishable offence (and punishment might be prima facie morally justifiable). But it is also covert, and one therefore that might go undetected. So, more passive methods are likely to avoid the kind of direct confrontation that will (appear to) permit the state to repress a secessionist opposition. By contrast, if the secessionist strategy demands more direct, *active* disobedience in the face of orders from the police or de jure courts, it is more likely to run into difficulties. There may be *moral* objections to face if their actions impose costs on innocent parties within the non-secessionist population, whether through the campaign to secede or the resulting secession, and these might give rise to political difficulties if the collateral costs in turn justify coercion of the subversives by the state.

Gandhi's policy of refusing to pay tax in the context of general civil disobedience in India throws the ethical complexity of the question of disobedience into sharp relief (Gandhi 2008, 348-9; cf. Griffith 1918 on the Hungarian policy). On the one hand,

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meeting in Dublin and recommending the adoption of measures to the Irish people calculated to improve their condition...'

insofar as the state is able to claim that an obligation to pay tax on the parts of citizens arises from a duty to support institutions necessary to satisfy human rights, it might try to justify enforcement. On the other hand, as Gene Sharp writes, the ‘withdrawal of support’ envisaged in Gandhi’s practice of *satyagraha* was supposed to ‘be in proportion to “their ability to preserve order in the social structure” without the assistance of the ruler’ (Sharp 2006, 85). If Civil Subversion follows this principle and commits credibly to satisfying human rights for the secessionist population through its parallel institutions, then it brings into question the state’s justification for taxing the same individuals. This is, of course, provided that the secessionists do not compromise the ability of the original state to maintain human rights protections among the residual population or violate other justice-based duties, for instance by withdrawing a much wealthier part of the state and leaving the remainder uncompensated and impoverished (cf. Moore 2015, 128-34; Caney 1997, 370-71). Where this is not the case (or where, per Moore’s analysis, duties of reciprocity and distributive justice are satisfied by means of resource transfers (ibid.)) and provided just institutions are probable in both the residual and the secessionist states, secessionists might justifiably levy funds through contributions from their ‘home’ population in order to support their own ability to satisfy human rights requirements without providing the state with an obvious human-right-based pretext for action against them.

#### *States Versus Subversives*

I am assuming that if secessionists mobilize enough people behind a strategy of Civil Subversion within a continuous territorial space, then it could effect a critical reduction in the power of the state within that zone and threaten to replace it with a new source of political authority were it not resisted by state forces of some kind. To defend against such an exigency, the state, we must then suppose, will have to use means that infringe upon the capacities that facilitate the strategy, capacities I have identified with key human rights. Whether involving armed force or not, such means will manifest themselves as a forceful curbing of the exercise of assembly and association rights and those of speech and expression along, perhaps, with some other freedoms such as those of movement. To do so without trading off legitimacy and wider support, the state will need a morally compelling justification. But in what terms can it be expressed?

One line of argument might draw on hints dropped in the major international human rights covenants. In the European Convention on Human Rights, for instance, freedom of expression is subject to potential limitations:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information

received in confidence, or for maintaining the authority and impartiality of the judiciary.

Freedoms of assembly and association may also be limited by laws if ‘necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, [...] and for the protection of the rights and freedoms of others.’ Further unspecified ‘lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State’ are likewise envisaged. Moreover, article 15 permits ‘derogation’ from obligations defined by the ECHR ‘[i]n time of war or other public emergency threatening the life of the nation.’ The same is indicated in ICCPR, article 4, which permits derogation from rights to free expression (art. 19, para.2), assembly (art. 21) and association (art. 22). All three may be curtailed by law insofar as doing so is necessary to ‘national security’ and ‘public order’ (arts 19, 21, & 22) ‘in a democratic society’ (arts 21, 22). But these hints are perhaps nothing more than that. Cited by a state that faces Civil Subversives who didn’t themselves violate human rights or prejudice the prospects for human rights protection, all would beg the question of what humanly significant value is being protected.

If ‘national security’ and ‘public order’ don’t mean ‘human rights protection’ or ‘capacity for protecting human rights,’ then an alternative grounding for argument is needed, in the absence of which the state would be left with a vital deficit when it comes to legitimizing actions necessary for preserving its territorial integrity. One other possibility is to argue from rights of collective self-determination. It might be claimed that laws and orders issuing from the state that fulfil its obligations vis-à-vis individual human rights (either directly or indirectly) generally mandate coercive enforcement. But among those human rights are included political rights of democratic participation and, whether considered as a collective or an individual right, self-determination. Both rights may be understood to undergird the authority of a democratic state to issue laws and orders that extend beyond human rights insofar as these reflect popular will. It might be argued on this basis that even laws that are indifferent from a human rights point of view in the abstract – that is, neither directly (substantively) entailed by them nor violating them – may realize human rights indirectly insofar as they reflect the will of a particular self-determining, democratic community. Human rights might therefore be cited as ends the protection of which justifies coercive measures necessary to enforce such laws.

The problem with such an argument, however, is that the stronger the subversive threat the secessionists pose, the weaker is the basis for any claim the state might make that it reflects popular self-determination in its present form. The strength of the threat increases, that is, with the strength of dissent concerning the validity of the claim that the state represents a single, legitimate self-determining community. More specifically, if we cash out the respective claims by the opposing agents to express legitimate rights of self-determination, the state can only accurately describe its claim as representing those members of the *de jure* community who remain once we subtract the dissidents, whether

we consider them as an aggregate of individual rights-holders or as a collectivity (a ‘people’). And then it is hard to see why the rights of the individuals it *can* accurately claim to represent negate the dissidents’ rights or can uphold a claim on their obedience or continued membership. The same problem, incidentally, would arise from arguments citing consent. Even if we supposed that states could commonly cite widespread consent as a basis for political legitimacy, the nature of Civil Subversion is such as to give the lie to the claim that consent mandates rule in the contested region and over the population asserting the secessionist claim.

Another argument to consider is that the risk that permitting one movement to effect secession through unresisted Civil Subversion could encourage other nationalist movements to imitate them. If there were enough such imitators, it might be claimed, it could give rise to widespread attempts at state-breaking and if human rights law did not permit actions necessary to prevent this, it could pose a wider danger to political order and, in turn, to human rights protection globally. This argument relies on the empirical assumptions that not only [a] are there many nationalist claims internationally that could in principle express themselves in a desire for secession but that [b] many of them could pose a real threat to their existing rulers by means of Civil Subversion and that [c] this would have disastrous effects on political stability.

Even if we granted [a] for the sake of argument, I presume that if [b] falls then so does [c]. There are two reasons to doubt [b]. First, for Civil Subversion to be effective to any extent, it requires widespread popular support and energetic mobilization, which I presume narrows the range of probable cases. The cases I am focusing on, moreover, are only those in which secession serves no remedial purposes because human rights compliance is already adequate (or optimal) in the existing state or at least no worse than is to be expected in a breakaway state. So there will be no motive to secede based on escaping human rights violations and injustices. Imitators will have to mobilize sufficient support based purely on the appeal of political independence as such and successful cases are therefore likely to be few and far between. Secondly, we are interested here only in cases where *neither* side has a human-rights-based claim against the other; where either side *does* have such a claim, then it *substantively* guarantees ends that ground a claim against its adversary. A state facing a subversive movement that aimed to reduce human rights protection could justify repressive action against attempts at subversion *directly* or *indirectly* on human rights grounds and the secessionists therefore wouldn’t be able to secure the shielding that Civil Subversion aims at.<sup>5</sup> This is another reason to think that the claim a state might make of setting a dangerous precedent as grounds to justify repressing a human-rights-compliant secessionist opponent would be rather weak: not many such cases where human rights expectations are equal between opponents are likely to arise that could lay claim to such a precedent. On the other hand, we should be at least equally

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<sup>5</sup> Such cases are the focus of a good deal of scholarship in recent years. See, for instance, the work on ‘militant democracy’ by Macklem (2006) and Kirschner (2014).

worried about the example a state might set to others by forcefully suppressing a secessionist movement with strong support and a good record and prospect of human rights compliance.

If the arguments above fail, then the state might be forced as a last resort back onto an argument from territorial rights. But if the foregoing arguments have already been rendered moot, it would have to be a variant that is independent of claims about self-determination as well as individual human rights. For instance, Margaret Moore summarises (and rejects) one sort of ‘property’ based argument that could serve:

On a property theory of territory, when we say that state S has territorial rights in land L, what we mean is that the relationship between the state and the land is analogous to the relationship between an individual property-owner and his or her property, and encompasses rights to make decisions about the land, to exclude people from it (control over immigration), and to exploit the resources on the land for the property-owner’s instrumental benefit (right to resources). The central relationship is between the state and the land: the relationship of people to both these (the state and territory) is purely contingent (Moore 2015, 16).

Other ways of trying to anchor the state’s territorial claims might invoke historic ties of the residual (i.e. non-secessionist) people to the current extent of the territory as a whole, whether by invoking ancient texts, origin myths, national narratives, or merely a familiar image on the map (for the latter in Ireland, see Bowman 1989; in liberal nationalist political theory, see Miller 2007, Meisels 2009 and, as a critic, Moore 2015, 82-3). But arguments of this sort, I presume, will have relatively weak salience in a political atmosphere dominated by human rights.

### **POLITICAL CONSEQUENCES**

The strategy of Civil Subversion as I envision it attempts to instantiate a peculiarly acute variant of what Alexander Kirschner calls ‘the paradox of militant democracy: the possibility that efforts to stem the challenges to self-government might themselves lead to the degradation of democratic politics’ (Kirschner 2014, 2). The idea that democracies might need to adopt a militant stand in the face of hostile domestic movements arises in response to *anti*-democratic and *illiberal* movements such as those that brought down the Weimar Republic in 1933. In its pure form, however, Civil Subversion creates a similar dilemma by confronting a democratic state with forces that oppose *neither* human rights *nor* democracy, but only that state’s specific territorial form and extent. As such, it confronts the general legitimacy claim a state can make on grounds of individual rights with something we might call a concrete particularity problem: whereas the state can claim legitimate authority to rule within *a* territorial unit of *some* shape, it cannot do so in a way that specifies its claim over the entirety of *this particular* territory (cf. Simmons 1979, 31–35; also Laudani 2013; Sitze 2013, xi).

The true potential for subversion that human rights offer is such that even a state that was *wholly* compliant with all possible human rights-based duties could conceivably

be forced into retreat by Civil Subversives. Confronted by wholly human-rights-compliant secessionists, it would face a dilemma between conceding power and territory, or defending its rule. But if defence requires force (especially *armed* force) it is likely not to be justified either directly or indirectly by human rights. Unless an alternative grounding for sovereign authority can be invoked whose persuasiveness equals that of a human-rights-based claim, repressive actions are likely to delegitimize the ruling authority in the disputed territory. As one of Griffith's contemporaries, Robert Lynd, remarked in 1919, the method relies on 'a paradoxical belief that [the state] cannot injure [the Subversives] without injuring itself.' Even if they couldn't hope to defeat the military means that might be deployed against them, Civil Subversives might therefore 'believe that they could defeat the *purpose* of those who make use of the armed force' (in Townshend 2013, 85, my emphasis).