

## HOW TO DEAL WITH UNJUST LAWS: JUSTIFIABILITY OF CIVIL DISOBEDIENCE

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### KEYWORDS

Civil disobedience, justice, law, society, justification.

### ABSTRACT

The issue of active protests against the injustice of the law aimed at bringing about a change in that conduct is of great relevance for members of the world society. There is no escape from admitting the fact that even the most perfect political system may and will from time to time produce unjust laws. What is as yet unclear is the principles of justification in favour of a civil disobedient who commits an open breach of that laws. The present article defines the features that make an act of civil disobedience something more than a simple breach of a law. The purpose of this article is to justify civil disobedience as a unique political category, which makes social choice and legal change possible.

### I. INTRODUCTION

Political procedure producing all and only just laws cannot be promised, as in political affairs, perfect procedural justice cannot be achieved, says John

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Rawls.<sup>1</sup> The members of the society have no escape from admitting the single fact that even the most perfect political system may and will from time to time produce unjust laws and policies. The matter of civil disobedience in this regard attracts the interest of political scientists, sociologists and philosophers of law.

There are two basic positions. Some claim that one's duty to obey the law is total. In other words, there are no conditions or circumstances in which civil disobedience is acceptable. Others claim that one's duty to obey the law is not absolute. So, there can be certain circumstances in which civil disobedience is justifiable. No matter what side you are on, one thing is for sure: Skilfully organized movements of civil disobedience can be very effective in securing society's desirable changes in the law.

One most commonly referred argument is that there have been lawbreakers as long as there have been laws, but if all law-breaking is defined as civil disobedience, then the term has no value. Then what does exactly make a breach of law an act of civil disobedience? How can it be defined and when is it justified? The following article will explore these questions. I shall focus on the justification to clear up several paradoxes that surround civil disobedience in theory and practice. All I am arguing is that a justifiable civil disobedience is a unique political category that makes social choice possible; that has an assessment value in law-making and is beneficial for the constitutional democracy. That is why, it needs approval rather than a mere tolerance or forbearance.

## **II. DEFINING CIVIL DISOBEDIENCE: WHO CIVIL DISOBEDIENT IS (AND IS NOT)**

Civil disobedience is intentionally unlawful, conscientiously and publicly performed act of protest against a specific law. According to Joseph Raz, civil disobedience is a 'politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one's protest against and dissociation from a law or a public policy.'<sup>2</sup> Raz's introduction presents one of the least restrictive theories of civil disobedience while comparing it to the most famously defended, though overly narrow definition of the concept by John Rawls's. In his most famous work, 'A Theory of Justice', Rawls defines civil disobedience as 'a public, nonviolent, conscientious yet political act contrary

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<sup>1</sup> John Rawls, *A Theory of Justice* (Harvard University Press 1971, Reissue Edition 2005)353/311

<sup>2</sup> Joseph Raz, *The Authority of the Law: Essays on Law and Morality* (Oxford 1979) 263

to law usually done with the aim of bringing about change in the law or policies of the government.’<sup>3</sup>

As it is seen from the definition stated above, there are some commonly accepted elements of a well-suited definition of civil disobedience that can’t be compromised, such as conscientious standpoint, aim to communicate with the lawmakers and ultimate goal for the change in the law. Other often debated features – publicity, non-violence, readiness for punishment – will also be considered here because of their central importance for some occasional justification of acts of civil disobedience.

First thing to mention when starting with the features of civil disobedience is that a civil disobedient person accepts the government as legitimate as she aims to *communicate* with it but disobeys a specific law. When the disobedient faces with the breach of the main principles of justice accompanying law or policy issued by the government, she decides to engage in civil disobedience as a way to communicate her concern to government. She acknowledges the legitimacy of a political institution, which passed the law but resists the authority of the law passed by that institution. Our civil disobedient rejects to obey an unjust, even if that law has been created by institutions via reasonable constitutional procedure.<sup>4</sup> It is not a passive action, but rather is a pro-active strategy of refusal with the capacity to damage the interests of the authority against which it is aimed. Her acts are only disobedient in relation to their setting that invites the order for communication to amend, evolve and respond these settings, which distinguish the act of disobedience from revolution that aims at producing new government and new order.

*Publicity* feature is the second crucial element of the definition and often serves for the justification of a disobedient’s protest. This is the first entry of Rawlsian definition and in Arendt’s terms ‘civil disobedience is a political act for the simple reason that it was conducted with others in public not alone’.<sup>5</sup> This well suits the thorough definition of civil disobedience because first, it is highly recommended for a justifiable civil disobedience to be public, and second, it is interconnected with communicative feature of civil disobedience mentioned above; by conducting her acts with others in public civil disobedient illustrates her aim to address reforms in the current laws and to communicate to policymaker to prevent the development of similar laws in the future.

In addition, she who breaks the law publicly becomes something more than a *conscientious objector* who breaks law simply because it collides with her

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<sup>3</sup> John Rawls (n1) 364.

<sup>4</sup> Jon Mandle, ‘Rawls’s ‘*A Theory of Justice*’: An Introduction (Cambridge Introductions to Key Philosophical Texts, Cambridge University Press 2010)102

<sup>5</sup> Hannah Arendt, *Human Condition* (2nd ed. Chicago: University of Chicago Press. 1998).

individual ideals of justice without meaning to communicate with the lawmakers for reform. Her intentions to bring about a change in society soon turns into a collective dissent as she makes the law violated visible before the eyes of broader society. She leads the society to understand and hopefully to accept her reasons for both condemning a given policy and dissociating herself from its authors.<sup>6</sup> So, people learn about their ability and power to work together and enact change collectively.<sup>7</sup>

Just like Rawls, for many prominent figures of civil disobedience history such as Mahatma Gandhi and Martin Luther King Jr, *non-violence* is the next in the list of ‘must-to-haves’ for the justifiability of their acts of civil disobedience. This feature of civil disobedience is the most debated in academia, and the most defended in jurisprudence. It is true that the destruction and violence of the rioters, especially when combined with unsympathetic media coverage damages the informative motives and educative image of civil disobedience explained above. In many cases, it is decisive in its court hearings that end up with the loss of its ‘civil’ status.

However, as Raz correctly mentions, civil disobedience is something that ‘should ideally be *non-violent*’.<sup>8</sup> Civil disobedient should prefer to refrain from posing threat to life or property of others. Like Raz, other philosopher on civil disobedience, including Ronald Dworkin, Jürgen Habermas and Peter Singer, specify that violence must not be aimed at injuring, or even killing, other individuals. So, there is no general reason why civil disobedient is excluded from destroying a military equipment to demonstrate her disobedience to war policy. Raz also doesn’t exclude violence at all and mentions that sometimes harm done by non-violent actions can be harsher than a violent disobedience.<sup>9</sup> If ambulance drivers were to go on strike, their action, though non-violent, would cause great harm to the population, maybe greater than a violent act would. Then the question arises: how violent can civil disobedience be?

In his article on ‘Features of Paradigm Cases of Civil Disobedience’ Kimberley Brownlee states that the level of violence depends on the society if the use of violence can support, or undermine, the communicative aspect of civil disobedience.<sup>10</sup> Rawls too makes this clear by specifying that civil disobedience

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<sup>6</sup> David Henry Thoreau, *Civil Disobedience* (originally titled Resistance to Civil Government 1849, Mozambique 2001) 15.

<sup>7</sup> Sergio Fiedler, *The right to rebel: Social movements and civil disobedience* (Cosmopolitan Civil Societies: An Interdisciplinary Journal, Vol. 1, No. 2 2009) 46.

<sup>8</sup> Joseph Raz (n 2).

<sup>9</sup> *ibid.*

<sup>10</sup> Kimberley Brownlee, *Features of Paradigm Cases of Civil Disobedience* (Res Publica: A Journal of Legal and Social Philosophy, 10, 2004) 8.

is possible only in a *nearly just society*.<sup>11</sup> This is a well-ordered society, which is regulated by a constitution based on the shared conception of justice with the presence of only ‘some degree’ of injustice.<sup>12</sup> In societies that are far away from these ideals, such as Stalinist or Nazi regime, civil disobedience would hardly produce analogous results: it would without doubt fail as a communicative act, due to the government’s unwillingness to engage into a dialogue with civil disobedient.<sup>13</sup> The results would have been massacre and submission, writes Arendt.<sup>14</sup>

These two examples are too marginal. In addition, between Nazi Germany and an ideally just society, there is a lot of middle ground. Gandhi and King whose movements happened in a social context, which were clearly not ‘nearly just societies’, proved that civil disobedience could be a feasible strategy in a society that is not, in the Rawlsian sense, ‘nearly just’.<sup>15</sup> So, we may conclude that non-violence is not an absolute feature either for the definition of civil disobedience or the justification of it. The only version that might be used is Raz’s version of ‘ideal’ and ‘preference’.

*The last feature of civil disobedience, which is often referred in jurisprudence, is the claim that civil disobedient foresees the punishment.* Decisive moment here is that civil disobedient realizes and understands the punishment in advance; however, it does not mean that she is going to welcome that punishment. Scholars such as Hugo Bedau claims that an unjust law can’t immune disobedient from punishment, and therefore, a civil disobedient may be convicted and sentenced to jail.<sup>16</sup> For many pacifists theorists, the argument was that by not resisting the potential punishment, civil disobedient testified her devotion to the *fidelity of rule of law*. The simple equation is that if the cause is justified, then it is justified to the very end and the civil disobedient is ready to take the burden of disobedience and agree for the punishment for breaking the law.

However, as Howard Zinn puts it: ‘One should not accept punishment because there is no duty to obey unjust laws, thus there is no duty to accept punishment as well.’<sup>17</sup> According to Zinn, King accepts being arrested in order to

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<sup>11</sup> John Rawls, (n 1) 320.

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> Hannah Arendt, *On Violence* (Harvest Book 1969) 53.

<sup>15</sup> Piero Moraro, *Violent Civil Disobedience and Willingness to Accept Punishment* (Essays in Philosophy: Vol. 8: Iss. 2, Article 6, 2007) 4.

<sup>16</sup> Adam Hugo Bedau, *Civil Disobedience in Focus* (Routledge 1991-05 (1991) 8.

<sup>17</sup> Zinn suggests this because his conception of history is not focused on particular heroes but the oppressed people have always been engaged into civil disobedience, but they have not been always recognized as civil disobedient. Howard Zinn, *Law, Justice and Disobedience* (5 Notre Dame J.L. Ethics & Pub. Pol’y 8991991).

give his case more resonance, since the arrest of a famous person like him would increase public exposure and attention upon the issue.<sup>18</sup> Thus, for Zinn, King accepts punishment for practical purposes, for publicity, not for moral or philosophical reasons.<sup>19</sup> When all's said and done, refusal to obey an unjust law would already be enough for the action to be justifiable. So, by disobeying the law, civil disobedient does not only violate the law in itself but violates the consequences of violating the law.

Another, although very 'practical reason', to use Ronald Dworkin's phrase, that will deconstruct the requirement of acceptance of punishment is that our society suffers a loss if the justice system punishes a group of its most thoughtful members who are loyal to justice.<sup>20</sup> Such an act will cause their alienation from society, and many like them who are deterred by the threat.<sup>21</sup> Similar reference can be made to Hans Wenzel, who believes that certain conducts should not be punished even if they affect certain individual interests, as long as they do not substantially affect social relationship.<sup>22</sup> So, even if the act of protest or disobedience is found to be a technical violation of law, the purpose of the disobedience should cause the punishment to be nominal. In today's era, this feature loses popularity as special interest groups seek to persuade public opinion. Civil disobedient increasingly seek acquittal of the charge rather than willingly accepting the legal consequences for their acts.

### III. WHEN IS CIVIL DISOBEDIENCE JUSTIFIED?

Disobedience of a person who held values and commitments towards the government that passes the laws and policies is not an easy decision to make. As talked about in the beginning of the article, this is the decision made by a person who wants to illustrate that *the obligation to obey the law is not absolute but relative*. The response of the government to this statement will, of course, be that there is no law to which obedience is optional, no command to which the government attaches an 'if you please'. Government's argument is based on the ground that obedience is essential to the maintenance of the social order, which is a necessary condition to the achievement of larger values. What this argument

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<sup>18</sup> Howard Zinn (n 17).

<sup>19</sup> *ibid.*

<sup>20</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press 1977) 250.

<sup>21</sup> *ibid.*

<sup>22</sup> Andras, Sajó (ed), *Free to protest: constituent power and street demonstration* (Issues in Constitutional Law, Eleven International Publishing 2009) 64.

ignores is that, order in itself is necessary but not sufficient for the realization of those values, and a government that merely secures order without, or at the expense of, those larger values, such as justice, is not a desirable government at all.

The theory of civil disobedience claims the acknowledgment that obligations beyond the law might compel lawbreaking. Just as street signs guide all cars and pedestrians on the highway to drive or walk in a particular direction, the law has a corresponding responsibility to walk the society towards a path of equity. But law in itself does not mark the end of the road. It only points the way to justice. Laws, as King lays out, are not the ends in themselves but rather means of achieving justice and there are several features distinguishing any act of protest from that of civil disobedience, the first of which is the existence of injustice.<sup>23</sup>

Rawls's highlights an act of civil disobedience as *call on common sense of justice* of all members of a diverse society.<sup>24</sup> In this article, I share Rawlsian view that the disobedience is justified by appeal to the righteous reason, which is the commitment of the people to the same principles of justice.<sup>25</sup> Ronald Dworkin goes far even classifying it as a special category of civil disobedience – 'justice-based' disobedience,<sup>26</sup> and narrows it down to the situations when citizens violate the law in order to make a claim to some rights denied to them on a discriminatory basis.<sup>27</sup> Indeed, the main examples for a justice-based defense of civil disobedience were from the cases raised about equal basic liberties such as abolition of slavery or women suffrage movements. Such principled civil disobedience has been witnessed in recent years over climate change, economic strife and the treatment of animals.

All in all, the motivation behind the civil disobedience is to prioritize the fulfilment of the duty of justice over the constant preparedness to obey every law just because government adopts it. Subsequently, civil disobedience helps as a probe to illustrate how a conception of justice held by disobedient and state differ. Therefore, a well-ordered society should encourage people to make strong public appeals to the shared sense of justice, when they sincerely believe that it is perpetrating as significant injustice.

Civil disobedience motivated by a righteous common sense of justice can occasionally be justified based on the ground of the consequences of such a decision. No matter how much stability a passive, reverent citizenry may generate,

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<sup>23</sup> Martin Luther King, *Love, Law, and Civil Disobedience* (Speech given to the Fellowship of the Concerned, November 16 1961).

<sup>24</sup> John Rawls (n1) 363.

<sup>25</sup> *ibid.*

<sup>26</sup> Ronald Dworkin (n 20) 206.

<sup>27</sup> *ibid.*

the stability produced by decisional effectiveness<sup>28</sup> will be preferable than that generated by passivity and apathy, whereby the citizens of the state are prepared to obey every law just because a legally elected body legislated it. Government will be stable if social authority patterns are identical with the governmental pattern.

I partly disagree with the consequential justification based on mode of action which is built on the argument that when civil disobedience exposes society to harm, and thus, encourages disrespect for the law, it gets far from being justifiable. The thing is, this type of consequence focused arguments prioritize non-violent movements and indiscriminately excludes successful examples of violent forms of civil disobedience from being justifiable. The consequence grounded justification of civil disobedience that I argue in this article is linked to the ideals of democracy and constitutionalism.

Perhaps that is what Jürgen Habermas saw when he said civil disobedience plays a key role in promoting public participation in the context of the intrinsic imperfections of liberal democracy.<sup>29</sup> If we develop these ideals, we can justify civil disobedience not only as an integral part of democracy and of democratic expression but also as a check of democracy or a way of limiting its dangers. Civil disobedience can serve as a counter-majoritarian tool against the excessive democratic rule.

According to Daniel Markovits, civil disobedience is a democratic disobedience as it has a wider function of addressing the democratic deficit in law that inevitably threatens every democracy.<sup>30</sup> Such deficits exist when the policies deviate from the will of the people and the collective process of decision making is broken down. The whole function of the government law-making is to embody the will of the people in a legal regime. When the government exceeds its authority and all the practical alternative avenues towards changing the law have been closed off, civil disobedience serves as the ‘last resort’<sup>31</sup>. So when democracy is out of balance, civil disobedience may be one of the few tactics left for citizens.

Consequently, civil disobedience is also justified from a legal production point of view. The processes of governmental mechanisms to produce law may end up with limited reflection of social choice in the act that comes out from the law-making apparatus. Hence, upon Thoreau’s premises, civil disobedience is

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<sup>28</sup> Harry Eckstein, *Regarding Politics: Essays on Political Theory, Stability, and Change* (Berkeley: University of California Press, 1992).

<sup>29</sup> Jürgen Habermas, *Civil Disobedience: Litmus Test for the Democratic Constitutional State* (Berkeley Journal of Sociology, no. 30, 1985) 95.

<sup>30</sup> Daniel Markovits, *Democratic Disobedience* (Yale Law Journal, 2005) 6.

<sup>31</sup> John Rawls (n1) 364.

the necessary tool to stop government from imposing upon its people, and, essentially, the people imposing upon themselves.<sup>32</sup>

Civil disobedience is one of the best legal procedures to protect rights. It is closely related to the right to political activity, which is, by hypothesis, adequately protected by law. There is the sense of right to protest embodied in the act of civil disobedience as well. However, certain features of the forms of enjoying one's right of protest technically exclude civil disobedience from becoming one of those means. First and foremost, protests at large do not involve violating the laws of the state, but are rather acts of free enjoyment of legally entitled rights, such as freedom to assembly and association. Thus, in general, the protests are often not civil disobedience, but in fact 'obedience'.<sup>33</sup> However, what makes civil disobedience a broader concept than the right of protesting is that it is not just confined to use by organized political or social unions or associations, but rather a strategy that is available to all of us, as individuals, or in groups.

Civil disobedience broadly benefits society by liberating views divergent from the status quo—in much the same manner as free speech itself. Moreover, as Arendt puts it, civil disobedience permits people to experience freedom in a manner that was simply not possible in the private life.<sup>34</sup> The proponents of civil disobedience also reject the idea that disobedience to a law can become a right in a sense similar to the right to protest. Civil disobedience cannot have the same legal status equal to a right because, if it were recognized by the law, there would no longer be any need for civil disobedience.<sup>35</sup>

Of course, today's criminalized attitude towards civil disobedience accepts it as a violation of laws. Currently, the legal minimum shown towards civil disobedience is tolerance based on necessity. However, as mentioned above, disobedient has a righteous reason for disobeying the unjust law, and therefore, a right to do the right thing even though she cannot be constitutionally entitled to this right. Even though no legal right to civil disobedience exists, the legal system could recognize civil disobedience indirectly.

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<sup>32</sup> David Henry Thoreau, *Civil Disobedience* (originally titled *Resistance to Civil Government* 1849, Mozambook 2001).

<sup>33</sup> Harrop A Freeman, *The Right of Protest and Civil Disobedience*, (Indiana Law Journal: Vol. 41 : Iss. 2, Article 31966).

<sup>34</sup> Arendt H, *Crises of the Republic* (Harmondsworth, Penguin 1973).

<sup>35</sup> Joseph Raz (n 2).

## IV. CONCLUSION

Disobedience movements has played a crucial role in shaping our modern values, including freedom, equality, and justice. Therefore, civil disobedience is always newsworthy. It is a unique, justifiable and sometimes even necessary, political category. The article found out that the justification of this unique category is usually exceptional, meaning that it is based on occasion. Searching for the justification of civil disobedience, this article concludes that depending on different cases of civil disobedience, it is sometimes justified based on the motivation behind it and depending on the mode of action, or consequences it brings.

No matter how paradoxical it sounds, this deliberate breach of law makes social choice possible, has an exclusive impact on law-making and is beneficial for the ideal of constitutional democracy. Of course, this is not to say that civil disobedience is always good. Moreover, civil disobedience can and sometimes is linked to counterproductive populism and this is another reason which makes it important to agree upon the formula over a justifiable civil disobedience. If civil disobedience is here to stay, and the recent development all around the globe shows that it is, we need to build a justified attitude towards it. The question of its compatibility with the laws should better be of prime agenda for the sake of both government and civil disobedient to survive of change without revolution or civil war.

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