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Obligations of Law: A Theory and Justification of Civil Disobedience

Introduction

Recently there has been a huge environmental and humanitarian cry about the growing climate changes and the implications of the same. Most of the politicians, legal institutions and individuals argue the need to prioritise environmental protection over other things. But when a group like Delta 5 resorts to civil disobedience to gain attention and highlight the issues with environmental laws, the same politicians and individuals demand the need for “law and order”;
the same legal institutions prosecute these groups in order to avoid “lawlessness”. Thus exactly at the moment when we begin to suspect the congealed injustices in the law and when we begin to take actions to change or highlight the fossilised structures present in the society, a cry of “law and order” supersedes all our activities in most of the cases.\textsuperscript{135} It thus becomes imperative to justify the actions of such groups who work for the society’s benefits. Now even though justifying civil disobedience becomes easier in societies such as Nazi Germany wherein most of the laws were abhorrent and unjust, the issue arises when societies which are considered to be fundamentally just, have certain unjust laws.\textsuperscript{136} The question thus arises that whether there is a prima facie obligation to obey all laws at all points of time and if not, can civil disobedience with certain characteristics be justified in a society?

Through the course of this paper I intend to answer this question further. The paper has been divided into two sections. The first section takes upon the task stipulate a definition of civil disobedience for the purpose of this paper and then specify some characteristics of the same. I spend a considerate amount of time on this phase since, the justifications I provide for these characteristics, themselves become an answer to various criticisms of civil disobedience. In the second phase, I will then try and justify civil disobedience using concepts of act utilitarianism, social contract and moral obligations.

**Characteristics of Civil Disobedience**

Unlike a revolutionary who intends to change or overthrow the civil body and bring about a change of the structure rather than in the structure, a civil disobedient understands his

\textsuperscript{135} Disobedience and Democracy: The Nine Fallacies on Law and Order, Howard Zinn
\textsuperscript{136} Should we ever disobey the law, Stephen Grant
obligations towards the legal system and merely intends to bring about changes in certain unjust 
laws.\textsuperscript{137} So the definition of civil disobedience which I stipulate for the purpose of this paper 
(using genus differentia method) is that “Civil Disobedience is the deliberate and public violation 
of law without the fear of a punishment which is done due to the moral obligations for the 
society and in order to maintain democratic ethos.” The concept of “democratic ethos” which I 
refer to can be traced in Paul Fower’s work “Civil Disobedience as Functional Opposition”\textsuperscript{138}.
Now there are three important aspects of this definition which I intend to take up that would 
eventually help in developing my theory of civil disobedience. But before I explain these aspects, 
I wish to notify the reader that the characteristics mentioned are not supposed to be taken as a 
universal theory for legitimising or de-legitimising the civil disobedience movements since most 
of the movements have to be justified contextually. Rather these characteristics merely serve the 
purpose of giving some basic understanding of civil disobedience movements which I intend to 
justify in the due course.

The first characteristic is the ambiguity in the definition on whether civil disobedience 
should be violent or non-violent. This I believe is one of the most important characteristic of 
civil disobedience movements as various political theorists including John Rawls stress on the 
need for civil disobedience movements to be non violent.\textsuperscript{139} Now even though I agree with the 
theorists on the need for prioritising non violence over violent civil disobedient movements, but I 
believe a black and white characterisation of the same should not be in order. Through this I do

\textsuperscript{137} Civil Disobedience and Nonviolence: A Distinction with a Difference, Berel Lang
\textsuperscript{139} John Rawls, A theory of Justice 1971
not advocate the vindictive use of violence, rather argue that the effectiveness of a civil disobedient movement might require the disobedient to resort to violence from time to time. For example as seen in the case of Liberty City and South Central, the peaceful demonstrations were largely ignored by the media and recognised completely ineffective.\textsuperscript{140} Another example of resorting to violence in order to maximise efficiency of the movement is given in Lang’s work on Civil disobedience\textsuperscript{141}. He supposes the existence of a law of conscription which drafts men into the army but is inequitable in its formula for the process of selection and if the personal records used for the selection process were to be acquired by the citizens protesting, then it would be reasonable on the citizens part to destroy the records in order to maximise the efficiency of their movement. So the first principle to be taken into consideration while qualifying the validity of a violent civil disobedient movement is the principle of efficiency. Preempting the criticisms of the principle of efficiency such as it becoming a tool for justifying any form and amount of violence, the second qualifier which I intend to add for justifying violent civil disobedience movements is based on the principle of proportionality see under International Humanitarian Law. Even though proportionality is considered to be an international relations principle but the idea behind it i.e. the harm done by the violent actions should be necessary and proportionate to or not in excess to the advantage gained, should be taken into consideration while qualifying the legitimacy of a movement. An important remark to be taken note of is that minimum threshold violence should be given priority in all cases of civil disobedience and proportionality should be kept only as a determinant for maximum possible violence allowed and and that too only if it becomes necessary. Due to limited space, I will not

\textsuperscript{140} When the Law is not One’s Own: A case for violent civil disobedience, Barbara La Bossier
\textsuperscript{141} Civil Disobedience and Nonviolence: A Distinction with a Difference, Berel Lang
be engaging in elaborating the exact method of determining proportionality in this discourse, but an understanding of the same can be gained from Michael Newton’s work on proportionality.\textsuperscript{142} Even though proportionality has not really been applied to cases of civil disobedience by political theorists, but the essence of the same can be understood using the example. Under the Fugitive Slave Act of 1850, escaped slaves upon capture had to be returned to their masters and all free citizens had to cooperate with the same. So now if person X tried to let a slave escape and in the process of the same he has to punch the slaveowner to grant the slave the adequate time to escape, then person X would be a civil disobedient but he would completely morally justified in using violence to help the slave escape.\textsuperscript{143} Essentially the proportionate attack would maximise the efficiency of the morally justified civil disobedience. Hence as we have seen, justifying violent acts becomes more of a relational concept to the law as compared to an absolute concept of de-legitimising it and thus a more contextualised analysis of the same is necessary as compared to a simple black or white characterisation of calling all civil disobedient movements ill-legitimate.

The second characteristic which I shall be focusing about is the ambiguity in the definition on whether civil disobedience should remain as a last resort i.e. whether civil disobedience should only be followed if all legal redressal mechanisms have failed. Critics of Civil Disobedience argue that a movement can never be justified if people have not used the mechanism available in the structure which can resolve the issue peacefully and lawfully even if done slowly. There are two major issues with this assertion. The first contention that this

\textsuperscript{142} Proportionality in International Law (Oxford University Press, forthcoming in 2014) , Ch 6
Michael Newton and Larry May
\textsuperscript{143} The Justifiability of Violent Civil Disobedience, John Morreall, Canadian Journal of Philosophy, Vol. 6, No. 1 (Mar., 1976), pp. 35-47
assertion seems reasonable only if those disobeying the law are fine with the prolonged delay specifically when the delay in remedy has already been excessive, and greater speed of action through lawful channels seems extremely unlikely. Hence in the cases when judicial decisions take a lot of time, it may be justified to use civil disobedience as a tool to over turn imperative decisions. The second contention is that the assertion neglects the fact that civil disobedience movements themselves become a way of expediting legal decisions and without the expedited decision, great levels of unjust activities could take place as seen in the case of Vorkuta Prison Camp in the summer of 1953 in the Soviet Union or the 1956 disorders in Ponzan, Poland against the Polish laws. Hence in some scenarios civil disobedience becomes a tool to attain greater and faster justice. Thus such movements may be justified in the cases where they have not been used as a last resort.

The third important assertion in the definition which becomes my responsibility to defend is the idea that the disobedient must be ready for punishments at all times. Now I wish to remind the reader that the notion of being ready for punishment is not the same as punishment being necessary for all cases of civil disobedience. Through this discourse I won’t be engaging into the latter issue, rather I will be justifying the need of the former by using Walzer’s concept of “moral seriousness”. Now even though I understand that passing judgments on the movement by characterising the person can be reduced to being an ad hominem argument, but in this case the willingness and self sacrificial element of the civil disobedient to increase social utility in spite

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144 DEFENDING CIVIL DISOBEDIENCE, Carl Cohen, The Monist, Vol. 54, No. 4, Legal Obligation and Civil Disobedience (October, 1970), pp. 469-487
146 The Obligation to Disobey, Michael Walzer ,Source: Ethics, Vol. 77, No. 3 (Apr., 1967), pp. 163-175 Published by: The University of Chicago Press
of the punishment acting as a deterrent does speak for the good faith and imperative belief that the disobedient has for the law. The fact that civilly disobedient citizens might be punished not only contributes to the symbolic meaning and impact of their protest, but also acts as a built-in disincentive to its commission. Yet again I realise that there have been cases wherein citizens have irrationally and publicly disobeyed laws out of self interest but there are fundamental distinctions in such cases as compared to the ones that I am talking about due to the concepts of morality and social utility which I shall argue in the next phase.

Justification of Civil Disobedience

At the beginning of this paper, I set out my thesis as determining whether there exists a prima facie obligation to obey laws at all points of time and if not can civil disobedience with certain characteristics be ever justified? Having justified some basic characteristics of civil disobedience, it now becomes imperative to justify the entire process of civil disobedience in a democracy. To do the same, I resort to three major concepts: 1) act utilitarianism 2) social contract theory and 3) moral obligations.

Act Utilitarianism

Act utilitarianism in its most naive understanding, is a principle of ethics which states that a person's act is morally right if and only if it produces some amount of greater good as compared to any other act that the person could perform at that time.

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So a legitimate justification of civil disobedience under the umbrella of act utilitarianism would be if I am able to argue that civil disobedient acts, resolve democratic issues and promote efficient laws which I assume could be translated as being the greater good in the democratic society as compared to letting the democratic issues exists or having inefficient and unjust laws. (Even though I will not engage in determining the characteristics of unjust laws through this discourse due to limited space, but to increase the ease in understanding the same, we can refer to the Letter from a Birmingham Jail which Dr. Martin Luther King, Jr. wrote. He said “An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law.”)\textsuperscript{149}

Civil disobedience can be perceived as being a socially necessary function to correct various democratic deficits of a society. The idea and examples of various democratic deficits present with regards to the legislative system can be seen in Daniel Markovits work on Democratic Disobedience. One of the reasons he gives for such deficits is that democratic deficits can arise because the very same procedures needed to generate a “sovereign will” are open to manipulation and abuse by special interest. For example if in a representative democracy, a determined faction gains majority and controls the legislature proceedings and outcome, then there is a huge chance of the faction imposing its preferences without regards to the preferences of others which might just go against the idea of liberal democratic structures. So essentially civil disobedience acts as a functional opposition and works towards reducing these democratic deficits by ensuring that a check on the legislations is maintained. In this discourse, I

\textsuperscript{149} Letter from a Birmingham Jail, Dr. Martin Luther King, 16 April 1963
will be highlighting two such examples in which civil disobedience manages to resolve democratic deficits.

First, I argue that in representative democracies, civil disobedience becomes a tool to manifest a better form of General Will which Rousseau has talked about in his work “The Social Contract”. In his understanding of the procedure used to reach the General Will, men assemble together and have only one common will since the “common good makes itself so manifestly evident”. Now, Rousseau while developing his theory on General Will thought of a direct democracy wherein men voted on legislations to manifest the purest form of general will. Now even though a reincarnation of direct democracy like that of Athens which Rousseau wanted is highly problematic in today’s world, let us assume that the best model which we can work with is that of a representative democracy. In a representative democracy, the biggest issue which arises is that a few politically motivated individuals vote on laws and this voting may be based on self interests. Rousseau highlights this point correctly, in his work, Histoire des Moeurs, wherein he says, “it will always be difficult to submit the dearest affections of nature to country and virtue” and thereby agrees to the difficulty in eliminating particular wills. If the removal of particular wills is so difficult, making sure that votes are not manifested by self interests becomes highly problematic. Hence it is extremely possible that in a representative democracy, the ‘general will’ reduces down to being an amalgamation of a few particular wills.

The other way to put this issue of only having a few particular wills in representative democracies, is to argue the absence of a more wider view in the formation of laws. It is usually considered important that the net political system determines the parameters of systemic rule

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150 The Social Contract, Rousseau
151 A Possible Explanation of Rousseau’s General Will, Riley, p 94
making, application, and adjudication by means of constitution making and revision and most importantly everyone’s (public) opinion. But this notion of public opinion playing an important role is not always carried forward as argued by Greenwalt who claims that in a representative democracy, our chances of influencing the legislature are extremely less and highlights the same using certain examples. So in lieu of the importance of people’s opinion, civil disobedience then becomes one of the most effective and symbolic tools (considering the issues with legal mechanisms as highlighted in the previous section) to notify the government about the same.

Civil disobedience in such scenarios compels the legislators and the representatives to re-consider their laws, to take remedial actions and incorporate public views as a major consideration in the same. This idea can be seen using the case of the British Campaign for Nuclear Disarmament (Referred to as CND). The CND in the early 1960s decided to act arbitrarily on the British Nuclear Deterrent. This was met with great reluctance from the public as people frowned upon the negligence that CND showed towards people’s view. The Conservative party’s actions were met with major skepticism for the same and the party took a huge hit in the elections of 1964. So the next time when the issue of NATO’s deployment of additional nuclear missiles on British soil was seen in the early 1980s, the CND was highly

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considerate towards the indirect disobedience movements aimed against the policy and was even seen endorsing such movements in the name of a healthy democracy.\textsuperscript{155}

Now, I am not arguing that whatever the CND did in 1960s was out of self interest, but the purpose of this example is to elucidate the idea that civil disobedience helps in avoiding certain particular wills of the people supersede the general will. So essentially the civil disobedience movements reduce the gap between the representative democratic structures and the citizens, and thereby push towards a better form of ‘general will’ by incorporating a more accepted view.

The second deficit that civil disobedience is able to rectify is the issue of unjust laws in a democracy. In a society, as soon as we consider the possibility of allowing unjust laws to strive, we implicitly recognise standards of justice external to the democratic political process. These external standards then become the grounds for disobedience to unjust laws, as the citizen stops seeing any form or political or moral obligations in them.\textsuperscript{156} Historically we have seen civil disobedience being efficient ways in repealing or changing these unjust laws in a lot of cases. This can be seen using the example of the anti-poll tax campaign of 31 March 1990. Various economists such as Charles Moore were seen arguing that this law was an unfair way of raising revenue for local councils as taxes were levied on houses as compared to individuals so essentially the he rates meant that someone living alone had to pay the same amount towards the cost of local services as a multi-person household living next door.\textsuperscript{157} “In the case of the poll tax, a nationwide network of campaigns and non-payment unions had developed. These groups

\textsuperscript{155} PAUL BYRNE, THE CAMPAIGN FOR NUCLEAR DISARMAMENT 132 (1988)
\textsuperscript{156} Civil Disobedience, Rex Martin, Ethics, Vol. 80, No. 2 (Jan., 1970), pp. 123-139
brought people who were ordinarily isolated, or not politically active, together. Their strategy was to resist at every step: refusing to register for the tax, contesting liability orders from the council (thus clogging up the legal system) and finally refusing payment. Eventually the conservatives, were seen repealing off this unjust law. So civil disobedience essentially using the pressure of dissent made a statement which compelled the legislators to review their decision and hence was able to resolve the issue of unjust laws.

Apart from these, there are various other ways in which civil disobedience has been seen as an effective tool be it via increasing political participation or reducing the time gap in changing unjust laws. So under act utilitarianism, civil disobedience movements are justified since they help reach the greater goods for the society.

The Contractarian Justification

The traditional social contract theories have usually been attributed to Hobbes, Rousseau and Locke. There are two kinds of legal positivists views that we get from these traditional contractarians. The first is a Hobbesian understanding of civil disobedience. Hobbes in his Leviathan rests extreme authority with the sovereign by arguing that disobedience shouldn't be given much priority as the citizens have consented to give up their major rights to the sovereign while forming the contract. But historically as we have moved towards democratic structures, we have seen that at least in theory, the relations between the government and citizens, which Hobbes has been talking about have not been so extreme. The second understanding is that of Locke. Locke argues that the essence of the commonwealth is the preservation and protection of

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158 Five examples of civil disobedience to remember, Richard Seymour, The Guardian
159 Leviathan, Thomas Hobbes
the citizens” lives, liberties and wealth.” That being the case for Locke, it is only logical that the commonwealth loses its mandate as soon as it fails to keep to the dictates of the contract. Therefore, Locke provides the first contractarian reasoning for justifying civil disobedience.

The second justification of civil disobedience movements using the social contract theory can be traced using the evolving concept of consent and agreement. Most of the traditional contractarians have used the term consent in evolving their theories. For example even Locke argued that “consent of free men” could make them members of government. “Now in the hands of these theorists—and in much ordinary discourse—the idea of “consent” implies a normative power to bind oneself. When one reaches “the age of consent” one is empowered to make certain sorts of binding agreements—contracts.” So essentially consent creates various kinds of obligations in the social contract theory.

This notion of a consent based social contract seems to be evolving to an agreement based social contract at least theoretically as we start resting more agency with the citizens. Contemporary social contract theorists such as Freeman, are seen employing the language of agreement as opposed to consent. This notion of citizens having the agency to agree to certain laws, then makes us question the idea that there exists a blanket obligation to obey all laws. As Lessnoff argues, the agreement in itself is not a binding act and doesn't create obligations but is merely reason revealing.

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160 UNJUST LAW AS A JUSTIFICATION FOR CIVIL DISOBEDIENCE, Arinze Agbanusi
162 id
163 id
Let us take now take the case of the Pentagon Papers which revealed that many lawmakers, let alone common citizens, were tricked or bamboozled into support of policies they would have rejected had the whole truth been available to them. So the entire Gulf of Tonkin Resolution, and the entire legislative justification for the Indochina War, were apparently based on frauds. In such scenarios where the people had no part in framing the laws and were not in agreement with the same, the contractarian approach helps us understand that the citizens would be completely justified in not obeying the law as they don’t seem to have any prima facie obligation towards such laws and ipso facto, civil disobedience would be justified in such cases.

The Moral Obligations Justification

Lefkowitz in his work argues, that is our moral responsibility and political obligation to reduce the degree to which it remains a matter of luck whether one attracts the needed attention to support for one’s reasonable views regarding what justice requires. Critics of this view argue that moral responsibility clashes with the legal obligations which citizens have towards the laws and hence is not justified. There are two issues with this assertion. The first being the social contractarian contradiction as argued before. The second issue is the diminished importance that this assertion levies on morality. Most of the legal understandings that we come through, have been abstracted and then codified from certain forms of beliefs, practices which have been moral in nature. The hope of morality getting abstracted from legality is the same as hoping to find moral reasons to justify what Nazi legislations did to the Jews. So essentially establishing a

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hierarchy of obligations wherein the legal obligations take precedence over moral obligations in all cases becomes highly redundant. Not to mention that imposing legal obligations, following unjust laws and not letting the citizens shape the laws which then govern their lives, essentially denies autonomous lives to the agents and has no non instrumental value attached to the same.  

This idea of certain moral obligations taking precedence over legal obligations has also been accepted by various courts themselves wherein the disobedient have used the principle of necessity so as to highlight the morally imperative nature of their actions. Even though there are certain requirements which are supposed to be met for the necessity argument to qualify as a valid one, yet this defence has always been accepted as a legitimate one be it in the case of United States v. Bailey or United States vs Dorrell.  

T. R. S. Allan in his work titled, “Citizenship and Obligation: Civil Disobedience and Civil Dissent” claims that laws usually require agreement from citizens on the ground of their contribution to the common good and to acknowledge an obligation of obedience in such cases is to accept that conformity of such rules is justified by the requirements of the common good. So essentially legal obligations themselves derive their legitimacy on the grounds of them serving the common good. So if the citizen challenges the particular law’s claim that it serves the common good, then that citizen has an “individual moral responsibility” to disobey the law and highlight the common good.  

166 Id  
169 Id
Now various claims have been made that people might have wrong moral notions and hence disobedience might create various issues. To respond to this I use Professor Dworkin’s argument in which he claims that laws aren’t created using some arbitrary metaphysical principles but are a product of rigorous deliberations between the agents working on them. There is no denying that some people might have wrong moral notions on just and unjust laws, but the costs of tolerating these wrong notions are far less than the costs of disallowing disobedience and then not letting people with right moral notions highlight the common good.

Having said that, through this argument we can see that civil disobedience then becomes a morally imperative tool to highlight more efficient laws, thereby it serves to foster the true purpose of laws and ipso facto the legal obligations and hence is justified.

Conclusion

Through the course of this paper, I have tried to develop my theory on the legitimacy of civil disobedience movements by highlighting few characteristics of civil disobedience movements, stipulating a definition and then justifying these movements using the concepts of act utilitarianism, social contract and moral obligations. I finally conclude this paper by claiming that civil disobedience movements can be justified in some cases and there exists no blanket obligation to obey laws at all times.

170 Taking Rights Seriously, Ronald Dworkin Ch 8