CIVIL DISOBEDIENCE, NON-VIOLENCE AND CONSTITUTIONAL TEST-CASES

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In this paper, I want to take a careful look at what I regarded, in an earlier article, as a defining characteristic of civil disobedience, namely, non-violence.[1] I maintained then that the word 'civil' suggests or implies a variety of sub-properties such as are usually associated with politics (e.g. publicity, rights and duties, mutual forebearances, to mention a few). Perhaps more insistently, the word has been used as a rationale for non-violence. In revisiting the issue of non-violence in the characterisation of civil disobedience as a "civil" form of protest, I intend to go beyond merely re-assuring a distraught and confused public to determining the precise claims of non-violence in the conception of civil disobedience and two other forms of opposition to law, namely, constitutional test cases and conscientious refusal.

I

Rawls, in A Theory of Justice, maintains that violence (or, at least, forms of it) is incompatible with an understanding of civil disobedience as a mode of public address or speeech. The civil disobedient is allowed the right to warn and admonish but he is not entitled to use violence or even threaten violence in order to achieve his avowed aim. The civil disobedient, ex hypothesi, affirms his fidelity to the rule of law and order — an affirmation which will be impossible if he, at the same, resorts to violent political gimmicks. There is, to be sure, a time when certain social and political injustices in the polity call for violent reactions. When that time comes, Rawls argues, forceful resistance (and not civil disobedience) would be an appropriate response.[2]

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These Rawlsian arguments are strong and persuasive but not completely satisfying. They are not satisfying because they have assumed (like most other arguments) only one form of violence, namely, physical violence or violence which manifests itself in the destruction of life and property and the use of offensive weapons. Accordingly, one is inclined to react against its introduction into democratic politics and in doing so, one has been inclined to throw out the baby with the bath water by failing to take due account of the power of non-violent resistance as an instrument of social change.[3] Very briefly, then, I shall show that the difference between violent and non-violent methods of social change is not absolute and may, in fact, share remarkable resemblances in their overall effects on the political economy.

There is no doubt that persons who share the notion of violent action as action likely to cause destruction of property, bodily injury or physical death, will tend to classify actions that do not produce these effects as non-violent and, in one bold stroke, depict non-violent action as all-of-a-piece. And yet such classification obviously obscures such perfectly legitimate questions as to whether or not the apparently non-violent action has been obstructive of the economic interests of others (in which case, it would be economic violence); or disruptive of political campaigns and electioneering at whatever level (in which case it would be political violence); or whether it has prompted cheap and scurrilous publication and lampoons designed to misinform the public about the social and moral realities of their cause (in which case it would be social - psychological violence): or whether the action deprived some or all of their right to hold and practice a religious faith of their choice (in which case it would be religious violence).[4] Victims of this kind of violence are no more difficult to identify than are the victims of the other kind of violence, namely, violence which manifests itself in the throwing of 'molotov - cocktails'. In each of the cases mentioned above, no stones had been thrown, no windows broken, no bodily injury had been caused. It is perhaps reflections of this kind that have forced Emma Goldman to say that the logical and inescapable end of civil disobedience is the destruction of public order. [5]

II

Even though we need not accept Goldman's verdict, we need to clarify the claims of 'non-violent' disobedience. To do this, we must take two steps:

(1) We must reject the assumption that all behaviour is either violent or non-violent, and then,
(2) We must choose between (a) eliminating non-violence as a characteristic of civil disobedience, or (b) re-stating the claims of non-violence so that it only delimits the range of eligible demeanours.

By eliminating non-violence from the list of defining characteristics, one is not necessarily holding brief for violent tactics of disobedience. In other words, one can be committed to the reduction and elimination of violence and yet deny that the civilly disobedient is logically committed to non-violence. What such elimination purports is that in any case of civil disobedience the burden of justification rests on him who would employ violent tactics. Such a position has been taken by Christian Bay among others. Bay argues that civil disobedience should be kept apart from non-violent action. The latter concept by definition rules out violent acts while the former does not.[6] The difficulty with Bay's view, however, is that by eliminating 'non-violence' from our understanding of civil disobedience, it leaves us confused at those crucial moments when we want to be able to distinguish between acts of civil disobedience and acts arising from other forms of protests (such as confrontationist tactics).

On the other hand, we can re-state the claims of 'non-violence' to mean a delimitation on the range of behaviour in which the civilly disobedient may engage. The argument here would be that the limitations are reasonable in the light of the aim of civil disobedience and in view of such characteristics as law-violation and publicity. Thus, for the purpose of defining civil disobediene, the characteristic of non-violence could be taken to mean no more than that the civilly disobedient (1) does not initiate violence, and (2) does not resist or seek to evade arrest, (that is, he

is willing to take punishment for his law violation). I have argued earlier that the civilly disobedient violates a presumptively valid law. In saying that the law is presumptively valid I have implied that disobedience is generally thought to be punishable and that the civil disobedient must submit to such punishment when required.[7] However, I do not mean to settle this issue by definition. The case for the willingness of the civil disobedient to accept punishment can also be made on substantive grounds.

In as much as a political minority does not challenge the integrity of the state or the whole legal system, there is a prima facie case for submitting to the penalty for law violation. First, such submission has the merit of pointing up the depth of the commitment which the civilly disobedient has for the politico-legal structure. The re-inforcing effect of this submission is also underlined by Marshall Cohen's argument that accept suffering and punishing may force the majority to re-consider the law or policy which the minority is challenging.[8] Secondly, in as much as the violation of a valid law may interfere with the legitimate interests of others, the frustration and resentment caused to these people will be substantially reduced if they realise that those who have caused this harm are themselves willing to pay the price. Furthermore, it will dissuade them from contemplating unilateral action (such as setting up a vigilante group) designed to bring the violators to justice. Thirdly, accepting punishment serves to underscore the seriousness of the dissenter's views and the strength of his conviction. Realising that his action may call for legal prosecution and possibly a jail sentence, the prospective civil disobedient will consider more carefully his proposed action and its cost-benefit trade-off. He will consider, in other words, whether the benefit of staging a protest march is commensurate with its costs and possible imprisonment. In one word, submission to punishment helps to check the irresponsible recourse to civil disobedience tactics and it sets an important limit on what might otherwise have resulted in a proliferating example of disrespect to law.

III

I wish to distinguish between civil disobedience and two other forms of opposition to law, namely, constitutional test-cases and conscientious refusal. A constitutional test-case is a law violation in which a person deliberately breaks a law and claims that the "law" so violated is not properly law because it is unconstitutional and, eo ipso, null and void. In a constitutional test-case the disobeyer makes a two-fold claim. First, he breaks the law in order to find out how the law in question will be administered or enforced and calls on the court to make a pronouncement or ruling.

In as much as the court can only rule on a case before it, it is necessary that the law which is being tested is broken directly. The necessity for a test-case of this kind seems to arise from the realisation that a law which is valid on its face may be questionable or objectionable by reason of its discriminatory application. In other words, apresumptive valid enactment may become unjust if unfair, discriminatory tactics are employed in its enforcement. Suppose Government were to enact a law which requires citizens to obtain a permit in order to use the town hall for meetings. Such a law would be valid on its face, or, at least, there is nothing evidently unjust about it. But suppose further that the local Government Council consistently refuses to issue permits to people who belong to a particular ethnic group or to a political minority. The law's constitutionality becomes suspect. Now by breaking the law and holding meetings without permits the disobeyer calls attention to the unfair and discriminatory application of the law.[9]

The second aim of constitutional testing relates to the law's probable invalidity. In this case, the law's constitutional status is doubtful. Such a doubt may arise in several ways. Quite apart from the more common situation in which a doubt arises as to whether a particular law has been enacted with the requisite majority support, doubt about the validity of a law may arise from its presumed incompatibility with the conventional political morality of the people. Suppose a law were enacted by the National Assembly in Abuja which disenfrancises women or which makes it illegal to hold any form of political discussions on the eve of an election or even that

the National Assembly could make laws by Decrees. Surely, such laws would compromise our traditional principle of free thought and free expression and free debate and the constitutional validity of such laws would be questionable.

A doubt may also arise from an individual or group of individuals thinking plausibly that the demands of a law are not clearly evident. For example, does the law exempting citizens from military service on religious grounds also apply to citizens who oppose a war on grounds of personal moral conviction? How does such a law square with pacifism? Or again, does the Decree which requires that all Newspapers be registered include "Newspapers"which have only a private circulation? Or, again still, does the law which prohibits the use of automobile in recreational centres apply to carts?

Again, the constitutional validity of a law may be in doubt if what the law prescribes flies too flagrantly in the face of reality or makes impossible demands on citizens. If the legislature were to adopt a Bill which maintains that mini-skirts caused cancer in the eyes of the beholder or that no bachelor should have a female companion in his car after certain hours, surely, such a bill would put the Legislature to ridicule and the validity of such laws in doubt. In cases of this kind, the law in question is disobeyed in order to force a court ruling concerning its doubtful validity. In constitutional test-cases, the disobeyer is normally expected to abide by the decision of the court (especially if the decision is handed down by the supreme Court). Such a decision amounts to an authoritative interpretation of law. On the other hand, the civil disobedients are usually prepared to continue their protest even when the courts have ruled against them. I shall now quickly look at conscientious refusal.

Conscientious refusal (or objection) is a special type of law violation. It is disobedience to a specific, identifiable law or norm having the force of law. The conscientious "refuser", unlike the civilly disobedient, is not politically motivated: he is more interested in bearing witness to a set of values which he holds to be incompatible with the law than he is concerned, if at all, about political structures. His disobedience springs from conscience or from faith. The refusal of the early christians to perform pagan sacrifices, the refusal of the Jehovah Witnesses to salute the flag, the objection of the pacifist to enlist for military service typify this kind of disobedience to law.

Conscientious refusal may be contrasted with civil disobedience. The man who disobeys a particular law from a conscientious or religious standpoint is not necessarily appealing to the majority to reconsider their decision or policy, nor is he invoking a commonly shared sense of justice. Hence, the action of conscientious refusal need not be public or reported to the authorities. (It is merely a contingent matter that his refusal becomes public knowledge). Those who disobey the law on conscientious grounds or claims of conscience recognise that the issues they realise may be incapable of resolution by substantially unanimous agreement. And so, their disobedience or refusal is not an act of civil disobedience.

However, there is an important sense in which the conscientious refuser, unlike the civilly disobedient, makes a request to be allowed to benefit from everyone's deference to law without himself sharing in the burdens. It is the sense that his objection may become recognised in law. I have particularly in mind cases of objection to wars (no matter how just) based on reasons of conscience or religious convictions. In Britain, for example, where the conscription law provides that all able-bodied men of certain ages are liable for military call-ups, exception is madefor those citizens who satisfy a tribunal that they have a conscientious objection. And is some countries all men in orders or the clerical state (priests, monks and bishops, etc) are, by a concordat, exempt from active military service. However, the decision to recognise the objection of the conscientious refuser lies wholly in the province of law. The moral beliefs and religious convictions of a man absolve him from obedience to the law only when or where the law itself allows. The law may decide to recognise and, in so doing, admit conscientious objection as a reason for non-compliance with a legal injunction. Where this is the case, conscientious objection thus becomes a legal ground of exemption from the application of some other rules — the burden of proof resting on the claimant. On the other hand, the law may refuse to recognise an appeal from conscience as a legal ground for non-compliance. If this happens, it is open to the conscientious refuser to disobey and then face the penalty.

IV

In conclusion, I would like to draw attention to two points which I have glossed in this paper. First, I have not, in arguing the case for accepting punishment, insinuated in any way that an act of civil disobedience is justified by the willingness to submit to punishment and to pay the price. The civil disobedient, I am persuaded, is not committed to any such naive legal realism. It is thoughtless to suppose that law-breaking is justified by his willingness to go to jail or to the gallows. The law logically cannot take the point of view that a breach of law in the course of a public protest, however civil or non-violent, is no breach. Similarly, the law cannot promote or protect its own testing and, therefore, those who pry the constitutional validity of law through an act of disobedience are liable.

And secondly, even though the civil disobedient is willing to pay the penalty, it does not necessarily follow that the state should exact a pound of flesh. The willingness of the disobedient to submit to punishment does not foreclose the issue of prosecution. Ronall Dworkin has developed a strong case against prosecuting the civil disobedient. Although the focus of Dworkin's argument was the conscientious objector, many of the reasons he gave are relevant and pertinent here. For example, Dworkin argues that the prosecution may decide not to press charges if the disobedient is young; if the law which is being protested is unpopular, unworkable or generally disobeyed or in abeyance. He may decide not to prosecute on the ground that this disobeyer is a first offender or sole bread-winner and/or that this offender's violation of law had no criminal intent or mind nor was it motivated by a desire for self-advantage or for political subversion. By and large, the characteristic of non-violence requires that the civilly disobedient does not himself initiate violence and does not resist or seek to evade arrest.

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