

J. Raz, **The Authority of Law**, 262-275
A RIGHT TO DISSENT?
I. CIVIL DISOBEDIENCE

The question to be considered in this essay and the next one is whether, and under what circumstances, there is a moral right to break the law for moral or political reasons. I shall assume that if there is such a moral right then there is a presumption for giving it legal recognition. The discussion will encompass some of the considerations affecting the form, if any, which legal recognition should have.

It may be thought that the view (which was defended in Essay 12) that there is no obligation to obey the law opens the way to an easy justification of disobedience on moral and political grounds and that this will be the main respect in which my conclusions will differ from those of most writers on civil disobedience and conscientious objection who assume a prima facie obligation to obey. But this is far from being the case. The argument for denying an obligation to obey turned in part on the fact that on numerous occasions the fact that an act is in breach of the law has no adverse consequences. This, however, is never (or hardly ever) true in civil disobedience (conscientious objection is often more like ordinary violations of law). Such acts are normally designed to catch the public eye and inevitably set people thinking of resorting to disobedience to achieve whatever changes in law or policy they find justified. Thus they have almost invariably some adverse consequences. No doubt, civil disobedience is sometimes justified and occasionally is even obligatory. But the reasoning pursued in the former essays supports the common assumption that in a reasonably just state any consideration in favour of disobedience has to overcome a presumption against it based on its accompanying undesirable results. Having said that, it must be added that the topic of this essay is not the justification of disobedience for political or moral reasons. It is the question whether there is, in certain circumstances, a moral right to such disobedience. The difference between these questions will be explained below, but first the main classes of disobedience for moral and political reasons must be distinguished.

1. FORMS OF DISSENT

Many cases of law-breaking are not backed by a claim that they are justified. The agent may have acted wrongly knowingly or in ignorance. Consideration of such cases and the question of the proper legal attitude to them does not belong to this essay. It is concerned only with cases of law-breaking with respect to which the agent denies that he acted wrongly. Many such cases, probably the vast majority, can be dubbed 'cases of occasional disobedience'. These are breaches of law which the agent thinks, given the character of the law involved and of the particular circumstances in which he acted, were morally permissible (and for which he had what he considered some good reasons). Such occasional disobedience, though claimed to be morally justified, is not undertaken for moral or political reasons. Moral considerations merely render it permissible. Its motivation comes from other considerations. The present essay deals with morally motivated disobedience only.

It is convenient to follow the traditional classification of morally and politically motivated disobedience into three categories: revolutionary disobedience, civil disobedience, and conscientious objection.

Revolutionary Disobedience is a politically motivated breach of law designed to change or to contribute directly to a change of government or of the constitutional arrangements (the system of government).

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.

Conscientious Objection is a breach of law for the reason that the agent is morally prohibited to obey it, either because of its general character (e.g. as with absolute pacifists and conscription) or because it extends to certain cases which should not be covered by it (e.g. conscription and selective objectors and murder and euthanasia).

There is little point in a very extensive discussion and defence of these definitions. No claim is here made that they represent the ordinary meaning of the defined terms. They are presented as a useful classification of certain cases of disobedience. The classification does not exhaust all cases of morally and politically motivated disobedience. It does not, for example, include breach of law in protest against morally unacceptable actions or policies of private agents (trade unions, banks, private universities, etc.). Nor is the classification exclusive. The categories are partly overlapping. A person may break the law on a single occasion for a combination of reasons making his action simultaneously a revolutionary one and a case of civil disobedience (e.g. he wishes to protest against a particular law and thereby directly contribute to a change of government). Selective conscientious objection to the war in Vietnam in the U.S.A. during the Sixties provided many illustrations of people combining civil disobedience and conscientious objection in one act.

These categories are most easily applied to the analysis of action by individuals. But they can be applied to the analysis of action by groups, the character of a demonstration or a sit-in involving breach of law being determined by the reasons of its organizers, or the bulk of its participants. It is important, however, to remember that the character of the reasons and therefore of the actions of individual participants may differ.

Revolutionary acts and civil disobedience are cases of political action, they are essentially public actions designed to have a political effect. Conscientious objection is not. It is essentially a private action by a person who wishes to avoid committing moral wrong by obeying a (totally or partially) morally bad law. Note that not every case of breach of law which is morally obligatory is a case of conscientious objection. Sometimes it is wrong not to participate in civil disobedience involving breach of a reasonable law. Only where a claim that the law itself is wrong (or at least certain aspects of it) motivates violation of it does one have an instance of conscientious objection.

Civil disobedience can be aimed to be effective or expressive (or both). It is designed to be effective if it is justified as part of a plan of action which is likely to lead to a change in law or public policy. But civil disobedience includes also breaches of law the perpetrators of which know to be ineffective, provided they are justified as expressions of protest against or a public disavowal of a law or a public policy. Given that revolutionary and civil disobedience are political actions, they normally involve public, open, action. This is normally necessary for them to achieve their purpose (be it expressive or effective). But only the fact that an act of disobedience occurred and (at least in most cases of civil disobedience) the nature of its motivation have to be made publicly known. There is no general reason why individuals engaged in those activities should make their identity known or voluntarily submit to punishment. Though such reasons may well exist on occasion, such action proves the purity of one's motives; a trial or a term in gaol may serve as a focal point for the mobilization of more opposition to the law or policy protested against, etc.

Some writers have included submission to punishment in their definition of civil disobedience. This is just one respect in which the definition endorsed here is wider than most of the definitions canvassed in recent years. This definition relates to the reason for the disobedience and nothing more. The justification for such a wide definition is that it is meant to characterize civil disobedience as a certain type of political action. Like all political action it is aimed at a law or a public policy and it is distinguished from other political acts by using violations of law as a means (and from revolutionary action by not being designed to lead to a change of government or of the system of government). The main motivation for the more restrictive definition is to identify the conditions under which political breach of law is justified (only if open, non-violent, etc.). But this definition is not meant to single out a class of *legitimate* political action. I am assuming a definition which is value-neutral so as to separate the classification of types of political acts from the discussion of their justification. Furthermore, and more to our point, I wish to argue in the next section that discussions of civil disobedience favouring a narrow understanding of the expression make sense only on the assumption that there is a right to civil disobedience. I shall then proceed to argue that there is no such general right.

2. COMMON PHILOSOPHICAL ATTITUDES TO CIVIL DISOBEDIENCE

It is common ground to most discussions of the subject, and one which I share, that civil disobedience is sometimes justified or even obligatory. Many authors do tend to favour a stronger view which they often fail clearly to separate from this one, namely that one has, under certain conditions, a right to civil disobedience. It is, therefore, necessary to clarify the difference between these claims.

Consider an analogous case. People have, let us assume, a moral right to freedom of expression. That right extends to cases in which one should not exercise it. One should not repeat stories about people which one does not believe to be true. But one has a right to do so. The right to free expression is not recognized in the law of the Soviet Union despite the fact that it is permissible there to express views agreeable to the Soviet Communist Party. The reason one says that the right is there denied is not because the views of the Communist Party are wrong and should not be expressed. Even one who accepts their truth will have to admit that there is no freedom of expression in the Soviet Union, though he may find no fault in this. Freedom of expression is denied there not because one cannot express true beliefs but because one cannot express false ones, beliefs which one should not have nor express. This and nothing less is implied by the common observation that the freedom is to express any view one wishes (subject to a certain small number of restrictions such as that against libel).

At first blush it may be thought surprising that one should have a right to do that which one ought not. Is it not better to confine rights to that which it is right or at least permissible to do? But to say this is to misunderstand the nature of rights. One needs no right to be entitled to do the right thing. That it is right gives one all the title one needs. But one needs a right to be entitled to do that which one should not. It is an essential element of rights to action that they entitle one to do that which one should not. To say this is not, of course, to say that the purpose or justification of rights of action is to increase wrongdoing. Their purpose is to develop and protect the autonomy of the agent. They entitle him to choose for himself rightly or wrongly. But they

cannot do that unless they entitle him to choose wrongly.¹

Herein lies the difference between asserting that civil disobedience is sometimes right and claiming that one has, under certain conditions, a right to civil disobedience. The latter claim entails, as the first does not, that one is, under those conditions, entitled civilly to disobey even though one should not do so.

I have said that more writers than those who openly endorse such a right gravitate towards supporting its existence. This tendency is manifested in their concern with setting formal limits on the permissible forms of civil disobedience. Consider one often discussed limitation: civil disobedience, it is often said, must be non-violent. It is clear that, other things being equal, non-violent disobedience is much to be preferred to violent disobedience. First, the direct harm caused by the violence is avoided. Secondly, the possible encouragement to resort to violence in cases where this would be wrong, which even an otherwise justified use of violence provides, is avoided. Thirdly, the use of violence is a highly emotional and explosive issue in many countries and in turning to violence one is likely to antagonize potential allies and confirm in their opposition many of one's opponents. All these considerations, and others, suggest great reluctance to turn to the use of violence, most particularly violence against the person. But do they justify the total proscription of violence as a means to achieving a political aim? They do not. The evil the disobedience is designed to rectify may be so great, may indeed itself involve violence against innocent persons (such as the imprisonment of dissidents in labour camps in the Soviet Union), that it may be right to use violence to bring it to an end. It may be relevant here to draw attention to the fact that certain non-violent acts, indeed some lawful acts, may well have much more severe consequences than many an act of violence: consider the possible effects of a strike by ambulance drivers.

Some people do of course reject the use of violence absolutely regardless of any other considerations. Pacifists take such a view. But on any other basis violence for political gains cannot be rejected absolutely.² Many writers have argued for similar conclusions. My aim is not to vindicate the use of violence, which I would hope to see used only very rarely and with great caution. My aim is to point to the (often silent) presuppositions of the argument to condemn all violent civil disobedience by people who are not pacifists and do not reject all violence as wrong absolutely. This rejection of violence is due no doubt to a certain extent to a somewhat confused apprehension of the various considerations mitigating against violence mentioned above, but to a certain extent they are inspired by a feeling that if civil disobedience is justified then there is a right to it.

To say that there is a right to civil disobedience is to allow the legitimacy of resorting to this form of political action to one's political opponents. It is to allow that the legitimacy of civil disobedience does not depend on the rightness of one's cause. The comments above make clear that by all accounts the rightness of civil disobedience does not depend only on the rightness of the cause it is meant to support. There is always the question of the appropriateness of the means. Will they not contribute to an even greater evil, are there not less harmful or less risky ways of supporting the same cause, etc.? Those who hold that there is a right to civil disobedience are committed to the view that in general³ the rightness of the cause contributes not at all to the justification of civil disobedience. Such a view leads quite naturally to a consideration of formal limits on the forms such disobedience may take.

The logic of such reasoning becomes transparent once one considers the similar line of reasoning concerning lawful political action. Liberal states do not make the legitimacy of political action dependent on the cause it is meant to serve. People may support political aims of all complexions.⁴ But the right to political action is circumscribed in such states by limitations as to the form of the permissible actions. Given that we are used to thinking in this way of lawful political action, it is only natural to extend the same approach to unlawful political activity. Such an attitude regards pursuit of political goals of all kinds—good as well as bad—through civil disobedience as justified provided one observes the forms of permissible action.

Considered against this background it is understandable that so much intellectual effort has been invested in an attempt to articulate and justify a doctrine of the permissible forms of civil disobedience. It must be used as a measure of last resort after all other means have failed to obtain one's desired goal; it must be non-violent; it must be openly undertaken; and its perpetrators must submit to prosecution and punishment; such acts must be confined to those designed to publicize certain wrongs and to convince the public and the authorities of the justice of one's claims; it should not be used to intimidate or coerce. Such and similar conditions have been much discussed and often favoured. All of them are open to objections similar to those deployed above against

¹ These comments on rights to act are in keeping with the general analysis of rights developed in several articles by H. L. A. Hart, even though they do not commit me to all the details of his views. Cf., for example, 'Bentham on Legal Rights' in A. W. B. Simpson (ed.), *Oxford Essays in Jurisprudence*, 2nd series (Oxford, 1973).

² Some will say that violent action cannot be considered civil disobedience because by its meaning civil disobedience does not apply to such action. But even if right this is irrelevant. Such a linguistic point cannot prove the wrongness of my action.

³ Many if not all political theories rule out certain political goals as altogether illegitimate and do not extend to them any toleration.

⁴ Subject to the proviso above.

the non-violence requirements. Why, for example, should civil disobedience be always thought of as a measure of last resort? True, other things being equal, it has by-products (setting a bad example even if the act is justified in the instant case) which lawful political action does not have. But other things are rarely equal and sometimes civil disobedience should be preferred to lawful action even when that action will be effective. Which is worse: a miners' march in London which perpetrates various offences such as obstruction to the highway, or a lawful lengthy miners' strike?

Such objections are correct. But to be completely successful they must tackle directly the reasoning which leads to such apparently arbitrary restrictions on legitimate civil disobedience. It is necessary to examine the question of the right to civil disobedience.

3. A RIGHT TO POLITICAL PARTICIPATION

There are some bad arguments for a right to civil disobedience:

(1) It could be argued that since one's own acts of civil disobedience may well encourage others to break the law in pursuit of their wrong political objectives one is not entitled to engage in such activities unless they are similarly entitled. This is a *non sequitur*. If one's otherwise justified disobedience may lead others to disobey in circumstances where it is wrong to do so, then one's own disobedience is permissible only if it is justified to run the risk of this happening, that is only if the advantages of one's disobedience are sufficient to outweigh this as well as all the other resulting disadvantages. It does not follow that others have a right to disobey for wrong objectives, only that one should be cautious in considering disobedience for it may lead others to do so.

(2) It could be argued that there is a right to civil disobedience, for the contrary is conceivable only if there is a moral authority to judge which causes are right and which are wrong. Since there are no such moral authorities, since everyone has an equal right to judge for himself what is right and what is wrong, it follows that everyone has a right to civil disobedience in support of a cause which he finds to be right, even if it is in fact wrong. But this argument is valid only if it follows from the admitted fact that there are no general moral authorities, that each person is an ultimate and unchallengeable authority concerning the morality of his own actions. But in fact all that follows is that nobody is. Therefore, moral disagreements cannot be resolved by appeal to authority—not even that of the individual concerning his own actions—but, if at all, only by resort to substantive rational argument. Therefore, it does not follow that there is a right to disobedience, though it is true that there are no moral authorities who can judge whether the disobedience is justified or not.

(3) It could be argued that since it is unfair to deny to others what one allows oneself, it follows that if one allows oneself to resort to civil disobedience in support of one's political goals one should allow others the right to use civil disobedience to support theirs. But this is at best an argument *ad hominem*. People who defend their own disobedience by reference to their right to pursue their political goals by such means cannot in fairness deny a similar right to their political opponents. But a person who supports his action by argument to show that it is in defence of a just cause can without unfairness deny a right to civil disobedience. He allows others to perform similar actions in pursuit of similarly just aims. He denies both himself and others the right to disobey in support of morally wrong aims.

(4) Some may argue from relativism. Since there is no rationally conclusive proof of moral right and wrong, one could not defend civil disobedience by relying on the rightness of one's cause. It cannot be proved and hence if one is justified in acting on one's beliefs one must, to be consistent, allow others the right to act in support of their beliefs. This argument is flawed. If interpreted in the spirit of radical scepticism it leads to the conclusion that no moral conclusions can ever be rationally held or defended and therefore it is rationally impossible to hold or defend the view that there is a right to civil disobedience. Interpreted as an argument for relativism rather than scepticism, it means that though one can rationally hold moral views one cannot conclusively prove their validity so that people presented with the evidence will be irrational not to endorse the conclusion. But then if one rationally believes a certain political ideal to be invalid, the fact that others are not irrational to reject this view does not entail that one cannot hold them immoral for acting on it. On the contrary, by one's very (rational) commitment to the view that the ideal is wrong, one is committed to the view that so is action based on it. No right to civil disobedience can be established in this way.⁵

We need to make a new beginning, to find a way of relating the general principles governing the right to lawful political activity to the question of civil disobedience. But it is not possible to return here to first principles. Instead I shall take it for granted that every person has a right to political participation in his society. Let me call this the liberal principle. I do not call it the democratic principle for in itself it does not commit one to a democratic government, only to a right to a certain degree of political participation. Nothing in the argument that follows depends on one's assessment of the precise limits of the right and I shall not attempt to specify them. It is clear, nevertheless, that the right to political participation is limited. It is limited because of the need to respect the same right in others and because the right to political participation is neither the only nor

⁵ This argument shows that nothing in this essay presupposes either the truth or falsity of relativism.

an absolute value and it has to be limited in order to safeguard other values. It is further clear that, subject to certain limited possible objections, the limitations on the scope of the right are independent of the political objective sought. The right means nothing if it does not mean the right of every member of a society to try to get his society to endorse, at least to some degree, political objectives which he supports, be they what they may. Given that by and large the limitations on the right are independent of the political objectives the right is used to support, they must inevitably turn on the means used to support such objectives. It must be a right confined to certain forms of action and not to others.

The most direct implication of the limited right to political participation is that it is binding on law-makers. It should be recognized and defended by the law. In other words the law should set limits to one's legal right to political activity and these should coincide with those which are right on moral and political grounds. To say this is not to imply that the extent of the moral right should affect but not itself be affected by legal rules. Many alternative determinations of the precise boundaries of the right may be largely equivalent in value and many more possible determinations are better or worse than the optimum by small margins. Furthermore, it is greatly desirable to have the limits declared in an open and public way by a generally accepted authority. Therefore if the legally declared boundaries of the right of political action fall within the area of reasonable potential determinations the fact that they are legally declared makes them morally binding. An argument in favour of an otherwise slightly superior potential solution will not succeed in undermining the morally binding force of an otherwise slightly inferior but legally endorsed boundary. In this way the law affects one's moral right to political action. But principally it should be moulded by it.

All states can accordingly be divided into those in which the liberal principle is adequately recognized and protected in law and those in which it is not. Let states of the first kind be called 'liberal states' and the others 'illiberal states'. The main presupposition of this essay is that all states ought to be liberal states. The two main conclusions entailed by this view are that (1) there is no moral right to civil disobedience in liberal states; (2) normally there is such a right in illiberal states.

4. CIVIL DISOBEDIENCE IN A LIBERAL STATE

Given that the illiberal state violates its members' right of political participation, individuals whose rights are violated are entitled, other things being equal, to disregard the offending laws and exercise their moral right as if it were recognized by law. Of course, other things are rarely equal. In the illiberal state to exercise one's right may involve breaking the law and such action will sometimes have undesirable consequences which would have been avoided had the action been lawful. Therefore, the illiberality of the illiberal state may have the effect of narrowing down the *moral* right to political action of its members. However, subject to this reservation, members of the illiberal state do have a right to civil disobedience which is roughly that part of their moral right to political participation which is not recognized in law.

The case is reversed in a liberal state. Here there can be no right to civil disobedience which derives from a general right to political participation. One's right to political activity is, by hypothesis, adequately protected by law. It can never justify breaking it. Put it another way: Every claim that one's right to political participation entitles one to take a certain action in support of one's political aims (be they what they may), even though it is against the law, is *ipso facto* a criticism of the law for outlawing this action. For if one has a right to perform it its performance should not be civil disobedience but a lawful political act. Since by hypothesis no such criticism can be directed against the liberal state there can be no right to civil disobedience in it.

This conclusion does not mean that civil disobedience in a liberal state is never justified. A liberal state was defined in a rather technical and narrow sense. It is simply one which respects the right to political participation. It may contain any number of bad and iniquitous laws. Sometimes it will be right to engage in civil disobedience to protest against them or against bad public policies. The practical implications of the argument above concerning disobedience in a liberal state are as follows:

Generally two kinds of arguments are relevant for judging another person's action, two kinds of argument that a man can use to convince another rationally that he is entitled to perform a certain act. He can show that the act is right (or that there is reason to think that it is) or he can show that he has (or that there is reason to think that he has) a right to perform it. To show that the act is right is to get the other person to approve its performance. To show that one has a right to it is to show that even if it is wrong he is entitled to perform it. In a liberal state the second argument is not available in defence of civil disobedience. It can be rationally supported by people who approve its aims, but it has no claim to the toleration of those who do not. There could, for example, be no claim that the general public or public authorities shall not take action to prevent the disobedience or to punish its commission (provided such action is proportionate to the offence, etc.) which is based on a right to toleration.⁶ The only moral claim for support or non-interference must be based on the

⁶ If the state authorities come to share (to a sufficient degree) the views of the civil disobedients they should not, other things being equal, prosecute them, for people should not be punished for doing the right thing. If a judge

rightness of the political goal of the disobedient.⁷

I said that the practical implications of the absence of a right to civil disobedience in a liberal state affect one person's judgment of another's action and the agent's way of defending his action to others. Does it not affect the agent's own practical deliberations? Having a right to perform an action is no reason to do it. One has to be convinced that the action is right. Otherwise one's action will be an abuse of one's rights. But it is sometimes thought that having a right to act is, in general, a precondition for its being right to do so. No doubt this is sometimes the case. For example, since one has no right to interfere in a stranger's private affairs it is never (or almost never) right to do so, even though having a right to interfere in one's wife's private affairs does not mean that it is generally right to do so. But whether or not having a right to act is a precondition of the rightness of the act depends on the underlying reasoning supporting the claim of a right and its limitation. The reason for the limits on the right to political participation is to set a boundary to one's toleration of unjustified political action. It therefore does not affect the agent's own reasoning so long as he is confident that his action is justified.

Yet more indirectly the absence of a right to civil disobedience in liberal states does affect even the agent's own reasoning. First, he may be less than certain that his action is justified and, therefore, caution may advise desisting from an action to which one may not be entitled. Secondly, civil disobedience is a very divisive action. It is all the more so because of the absence of a right to it (in liberal states). In taking a civilly disobedient action one steps outside the legitimate bounds of toleration and this in itself adds to its disadvantages and should make one very reluctant to engage in it.

The argument above explains the sense in which civil disobedience is an exceptional political action. It is exceptional, in liberal states, in being one beyond the bounds of toleration, beyond the general right to political action. It is not necessarily, as is sometimes said, justified only as an action of last resort. In support of a just cause it may be less harmful than certain kinds of lawful action (e.g. a national strike, or a long strike in a key industry or service). It may be wrong not to resort to civil disobedience and to turn to such lawful action first, or give up any action in support of a just cause. The claim that civil disobedience is justified only when all else has failed or is certain to fail, like the claims that it should be open and nonviolent, etc., reflects a failure to conceive its true nature. It is an attempt to routinize it and make it a regular form of political action to which all have a right. Its exceptional character lies precisely in the reverse of this claim, in the fact that it is (in liberal states) one type of political action to which one has no right.

or a prosecutor comes to side with the protesters against the authorities he may find it necessary to resign or civilly disobey or both.

⁷ Two possible objections should be mentioned and dismissed. It may be said that the law cannot set the right limits to political action for it cannot set limits to specifically political action. If a road is closed it must be closed to all. If it is open it will be open to all. It cannot be closed to some and open to others, closed to the general public and open to demonstrators. The answer to this objection is just to deny its premiss. It is often possible and practical to permit action for political reasons where similar action for other reasons is proscribed. Admittedly sometimes this is impractical, but there is no reason to think that, given the many alternative forms political action can take, the law cannot set reasonable boundaries to political action.

Some may think that the argument in the essay disregards the desirability of encouraging pluralism in the society. Pluralism would lead to dissent and to civil disobedience and if it is desirable its inevitable consequences should be tolerated. The fallacy in this argument is to suppose that pluralism must lead to dissent and disobedience. It will do so if the law does not allow for pluralistic forms of life to flourish. If the law encourages and respects pluralism it need not lead to dissent from law. It can find adequate expression within it.