

CIVIL DISOBEDIENCE, CIVIL LIBERTIES, AND CIVIL RESISTANCE: LAW'S ROLE AND LIMITS

BY JUDY FUDGE* & HARRY GLASBEEK**

The Osgoode Hall Law Journal is a general law journal that provides an interdisciplinary forum for the exchange and expression of original and provocative ideas about law. It aims to publish articles that present new theoretical generalizations, report empirical findings, or address the impact of legal developments on wider issues of social, political, or economic concern. The Journal seeks to inform students, academics, and the legal profession by describing and interrogating the ways in which law maintains and perpetuates stability in social relations.

By midsummer 2001, it had become evident that law and its institutions were facing a serious challenge. The pepper spraying and other incidents at the Asia Pacific Economic Cooperation (APEC) Conference in Vancouver in November 1997; the prosecutions arising out of the so-called Queen's Park riot linked to the Ontario Coalition Against Poverty's (OCAP) demonstration in 2000; the persistent litigation and political agitation around the violent Ipperwash confrontation that occurred in 1995; the protests by Aboriginal peoples at Sun Peaks, British Columbia; the replication and intensification of the violent and dramatic events at Seattle in 1999, Quebec in April 2001, and Genoa in July 2001; the face-off between the illegally striking nurses and the Nova Scotia government in the spring of 2001; the conflicts between environmentalists and governments and loggers in Clayoquot Sound and Temagami—were increasingly being perceived as constituting a pattern of extra-legal challenges to authority, rather than a bunch of isolated incidents involving single issue activists.

Civil disobedience, writ large, seemed to be in the air in a way that it had not been since the 1960s and early 1970s when extra-legal actions, demonstrations, and protests by the peace, civil rights', and women's movements, as well militant workers, spawned large upheavals and raised the spectre of radical change. Like those earlier battles, the contemporary contests between the state and the disparate groups of dissidents were waged in a context where the assumption was that the state was constrained by a welter of legalized civil liberties. There were inevitable struggles around the scope of these civil

* Editor-in-Chief of the Osgoode Hall Law Journal and Professor, Osgoode Hall Law School.

** Guest Editor, Professor Emeritus, Osgoode Hall Law School.

liberties and the extent to which activists could call upon them. Our clutch of constitutionally enshrined civil liberties are revered and celebrated by lawyers as necessary restrictions on the state's coercive powers. Because it is an article of conventional faith that they are effectively administered by an apolitical judiciary, lawyers claim we are guided by the Rule of Law, that is, by reason, not by the irrational exercise of power that reigns when we are subject to the Rule of Men. Protestors and political movements challenging the status quo and acting illegally in the process, therefore, always cause a testing of the breadth and depth of civil liberties. This interaction raises many issues about the nature of law combined with the role of professionals and the judiciary.

The emerging civil disobedience pattern we discerned was, therefore, of great interest to the Journal's Board of Editors. And, when the events of September 11, 2001 (9/11) rocked the world, the legal importance of the civil disobedience/civil liberties relationship became even more evident: civil liberties were curtailed in the name of national security and civil disobedience was given less political space, even though the underlying reasons for it had not gone away.

By then the Journal had already launched a two-year project. Its goal was to engage students, faculty, and all members of the wider Osgoode and professional communities in an ongoing discussion about the nature and limits of law, seen through the lens of civil disobedient conduct in a legal polity that had developed mature democratic and civil liberty-enhancing institutions. To this end, a variety of panels, seminars, and lectures were organized, beginning in the Fall of 2001. They were interpellated into the law school's curriculum. A culminating event was a conference in the Fall of 2002, to which a select number of scholars, professionals, and activists were invited. The contributions in this collection were generated from this project's activities.

The project was launched by lawyers. The intuitive, initial focus was on the way that law responded to political activists whose conduct led to breaches of existing rules and laws. As the investigation unfolded, it became increasingly clear that, for lawyers to come to grips with the contested role of law, it was necessary to be informed by the understandings developed in other relevant disciplines. Historians, philosophers, activists, political and social scientists, as well as lawyers and judges were asked to participate. The contributions in this special double issue reflect the richness of this approach.

Historical accounts throw light on how it has come about that some people and groups have won more unmediated civil liberties than others. Bryan Palmer's article, "What's Law Got to Do with It? Historical Considerations on Class Struggle, Boundaries of Constraint, and Capitalist Authority,"¹ shows

¹ (2003) 41 Osgoode Hall L.J. 465.

how legal repression of working-class resistance was fierce, causing much upheaval and doing little to dampen militance. This couplet of resistance and repression led to legal reforms that, in turn, have contained demands for radical change. This article demonstrates that the push for more political and economic liberty may bring freedoms that themselves are encapsulating, telling status quo-favouring lawyers something about the need for some elasticity when faced with lawlessness. The ambiguous genesis and nature of freedoms and civil liberties are brought into further relief by Andrew Parnaby and Gregory Kealey's article, "The Origins of Political Policing in Canada: Class, Law, and the Burden of Empire."² It details the impact of the state's imperial ambitions on the nature and development of civil liberties. Reg Whitaker's contribution, "Keeping Up with the Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context,"³ recounts the ways that the Canadian state has responded to perceived threats to its security in the past. This tale of curtailment illuminates today's tensions between existing civil liberties and rather draconian security measures.

These stories force us to ask how the judiciary reacts to struggles between repression and accommodation. This questioning may aid us in understanding our contemporary judicial responses. One of the arguments that lawyers take for granted all too easily is that the courts are peopled by judges who, because of their independence and commitment to a constraining legal methodology, are not likely to be dragooned into doing the state's bidding, especially if the state inhibits dissent and change. Here Doug Hay's short piece on Chief Justice William Osgoode—whose name graces this law school and this journal—furnishes a cautionary tale. At the very least, it tells us that the extent to which the courts will tolerate civil disobedience depends a great deal on the guidance they receive. Where is that guidance to be found?

Philosophers provide something of a framework, or better, a spectrum of conduct that might be characterized as civil disobedient behaviour and also might, or ought to, be acceptable to our liberal democratic polity. In his article, "Civil Disobedience and Academic Freedom,"⁴ Leslie Green argues that, properly defined, civil disobedience is an appropriate means to push for needed change, so much so that academics ought to impart its legitimacy to their students. His characterization of what is acceptable tends to be on the 'soft' end of the spectrum, concentrating on behaviours that push for reforms that do not require a questioning of the bases of the overall political regime. Vinit Haksar's

² (2003) 41 Osgoode Hall L.J. 211.

³ (2003) 41 Osgoode Hall L.J. 241.

⁴ (2003) 41 Osgoode Hall L.J. 381.

contribution, “The Right to Civil Disobedience,”⁵ pushes the envelope, endorsing civil disobedience that engages the state, and accepts its right to punish disobedients while questioning the legitimacy of its reign. For both these philosophers, violence is not an acceptable means. Kai Nielsen in “On the Moral Justifiability of Terrorism (State and Otherwise)”⁶ speaks of the validity of violence in certain circumstances and draws attention to the acceptability of using disobedience not just to advance a reform programme, but to promote radical change or revolution. His discussion of state violence is pertinent to this argument and is of contemporary significance.

This range of uses people might, and do, make of strategies that involve conscious breaches of the law to attain what they perceive to be justifiable ends, is reflected in the stories told in some of the other contributions. In “Social Resistance and the Disturbing of the Peace,”⁷ John Clarke gives an account of how OCAP marched on Queens Park to protest the deprivation inflicted on its constituents by a government that wrongfully denied basic democratic access to the poor and vulnerable. At one level, OCAP’s story of confrontation with the police is one arising out of a straightforward demand for change to what was asserted to be an unjust and immoral policy. From this narrow perspective, it was a garden-variety kind of protest that could be placed at the ‘soft’ end of the civil disobedience spectrum. But the story also reveals that *both* the activists and the government perceived the mass march on the legislature as an attack on the nature of the political economy itself. This perception is reflected in the government’s launching of a third prosecution against John Clarke. He is charged with inciting a riot, that is, he is accused of being a political subversive, rather than a reformer.⁸ Janet Conway’s article, “Civil Resistance and the ‘Diversity of Tactics’ in the Anti-Globalization Movement: Problems of Violence, Silence, and Solidarity in Activist Politics,”⁹ shows how difficult it is to categorize an instance of civil disobedience as falling on one point of the spectrum or another. She describes the political and legal dilemmas created by the diverse tactics and (often implicit) differing goals of the many participants in any mass movement or specific protest action. If classification as, say, reform

⁵ (2003) 41 Osgoode Hall L.J. 407.

⁶ (2003) 41 Osgoode Hall L.J. 427.

⁷ (2003) 41 Osgoode Hall L.J. 491.

⁸ Three members of OCAP, John Clarke, Gaetan Heroux, and Stefan Pilipa, were charged criminally with inciting a riot. A four month trial of the three came to an end on May 11, 2003 when a deadlocked jury led to a mistrial. On June 18, 2003, the crown prosecutor, Paul Culver, declared that it would not be in the public interest to proceed against Heroux and Pilipa. On the ground that the charges against Clarke were more serious, however, he announced that a new jury trial for him will go ahead and would begin on October 7, 2003. Gay Abbate, “Judge declares mistrial in activists’ case” *The Globe and Mail* (12 May 2003) A8.

⁹ (2003) 41 Osgoode Hall L.J. 505.

or rebellion, is to be a guide as to whether or not tolerance should be shown toward a set of actors or activities, courts are going to face many conundra.

Judges find it easiest to deal with civil disobedience in the classic sense, that is, where there has been a breach of law to attain a specific, narrow end and the activists are willing to accept the punishment for their violation of law. Still, the courts' responses will not be all that predictable because the amount of discretion vested in them is great. It is likely that where the activists were violent or that directly interfered with private property rights, courts will not be very sympathetic to the dissidents although overt antipathy to them may not be expressed. In "Bail, Global Justice, and the Limits of Dissent,"¹⁰ Jackie Esmonde relates how the discretion in the bail process may have the effect of targeting prominent activists and curtailing civil liberties and stifling dissent. The exercise of restraining powers is presented as a neutral application of procedural safeguards of public security. This is an insidious means by which to inhibit civil disobedience because it does not invoke political reasoning. The 'neutral' denial of bail can do much to dampen activists' capacity to rebel and to organize. But just as the law's flexibility permits the state to restrain dissidents in this somewhat subterranean manner, activists may be able to exploit the supposed neutrality of the processes to make it difficult for the state to rely on breaches of the law to dampen anti-state activism. Frances Olsen's contribution, "Legal Responses to Mass Protest Actions: The Dramatic Role of Solidarity in Obtaining Generous Plea Bargains,"¹¹ illustrates how the coordinated use of non-compliance with the normal routines of criminal prosecutors limited the effectiveness of criminal prosecutions launched against anti-globalization protestors.

At the other end of the classification scheme, it might be expected that when courts are confronted by activists who deny the legitimacy of system, rather than one of its laws or policies, the judiciary, as a state institution, would be more than willing to use illegality as a hammer to squash such a menace. Judges who are aware of the need to protect those laws that have a clear claim to legitimacy and morality may be tested when they are not sanguine that the principles on which the law or policy is based are justifiable. One of the more obvious examples is the set of cases that arise when Aboriginal peoples breach one of the numerous laws that protect property in order to advance their cause. These difficulties are evidenced in James MacPherson's contribution, "Civil Disobedience and the Law: The Role of Legal Professionals."¹²

He acknowledges that a judge's primary responsibility is to apply the

¹⁰ (2003) 41 Osgoode Hall L.J. 323.

¹¹ (2003) 41 Osgoode Hall L.J. 363.

¹² (2003) 41 Osgoode Hall L.J. 371.

law as he or she finds it. If an act of disobedience leads to a trespass, nuisance, obstruction, or assault, then it should be treated as such. Although there is little room for flexibility, MacPherson contends that it is possible to find some. If the violation of a law is committed with laudable intent, judges should find some way to help out those actions that advance liberal democratic practices. In this vein, he notes that as much civil disobedience is designed to show that a law is invalid and immoral, the incidence of actual violations of law—those breaches that create the judicial problem in the first place—could, and should, be minimized by making it easier for those who dispute a law or policy’s validity to come to court to make their case. And, when the dissidents actually want to challenge the very legitimacy of what is acknowledged to be a troubling law or policy, courts should not force a confrontation if it can be avoided. Again, one obvious example is Aboriginal peoples’ challenge to the white settlers’ right to deal with Aboriginal peoples’ lands as they see fit. Here MacPherson details how he approached the issue in the *Daishowa* case¹³ as an illustration of what can be done when conduct that technically might be illegal is seen as meritorious and undeserving of a strict interpretation of penal law. As Andrew Orkin shows in “When the Law Breaks Down: Aboriginal Peoples in Canada and Governmental Defiance of the Rule of Law,”¹⁴ however, this imaginative approach cannot be counted on. It is bounded by the overall pressure on the judiciary and the legislature and its executive to keep a lid on the more radical rejections of legal and political authority. Orkin sees the patience of Aboriginal peoples as remarkable and contends that it should cause the state to refrain from treating the physical blockades in which they eventually feel themselves forced to engage as unacceptable exercises in civil disobedience. They should not be treated as ordinary criminals; but, often, they are.

These contributions, then, tell us that the lack of finite definitions and specific decision-making criteria, allow for both benign and malignant treatment of civil disobedient conduct. Emily Walter’s article, “From Civil Disobedience to Obedient Consumerism? Influences of Market-based Activism and Eco-certification on Forest Governance,”¹⁵ records how this uncertainty casts doubts in the minds of members of a protest group. This kind of pressure was a contributory factor to a shift in strategies in the British Columbia environmentalist movement. Rather than directly confront the state’s forestry policies, activists turned their attention to the private actors in the industry and used market-based strategies. The target now was not so much the state’s law or policy as it was the entrepreneur’s decision making. This change in

¹³ *Daishowa Inc. v. Friends of the Lubicon* (1998), 39 O.R. (3d) 620 [*Daishowa*].

¹⁴ (2003) 41 Osgoode Hall L.J. 445.

¹⁵ (2003) 41 Osgoode Hall L.J. 531.

tactics—in part dictated by apprehensions about what the law would and would not permit, in part a result of the increasing hold of neo-liberal policies and ideology—has led to a change in focus of the environmentalist movement described by Walter. It emphasizes self-regulation as a means to control market activities and downplays demands that the state should not promote the production of welfare by the pursuit of private gain; that is, it moves activists away from a challenge to the foundations of the ruling regime.

These stories about the elasticity of the notions of civil disobedience and civil liberties should make lawyers more aware of the contingency of the rights and privileges that they conventionally assume to be entrenched. These rights and privileges are a reminder that the civil liberties that we take for granted, many of which are enshrined in the *Canadian Charter of Rights and Freedoms*,¹⁶ are themselves the product of struggles aimed both at particular laws and the status quo itself. Despite their apparent legitimacy, they are contingent—and not just because they are vague and require interpretation. They are not guaranteed politically.

In times of national insecurity, the citizenry is easily persuaded by the state and its elites of the need to curtail, even to abandon, its hard-won civil liberties that make democratic change and civil disobedience possible. In “The War on Terror: Constitutional Governance in a State of Permanent Warfare?”¹⁷ Wesley Pue demonstrates how an all-too eager and willing state has compromised some of our most widely accepted civil liberties. Reem Bahdi’s article, “No Exit: Racial Profiling and Canada’s War Against Terrorism,”¹⁸ provides an account of the immediate impact of the new approaches to civil liberties in the post-9/11 era and the discriminatory application of the security measures that justify this dilution of rights and freedoms. This discussion of the most recent curtailment of civil liberties returns attention to the articles by Parnaby and Kealey and Whitaker that detailed how, in the past, the state has used crises and perceived threats to security to advance its authority at the expense of its citizens. Pue and Bahdi both question the efficacy of these suspensions of civil liberties on the basis that they may not, in fact, advance the security of the nation or its citizenry.

The notion that the curtailment of civil liberties is not consonant with improved security is buttressed by Conor Gearty’s article, “Reflections on Civil Liberties in an Age of Counterterrorism.”¹⁹ He reasons that the civil liberties that we do have are there to promote and perfect electoral democratic practices

¹⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) c. 11 [Charter].

¹⁷ (2003) 41 Osgoode Hall L.J. 267.

¹⁸ (2003) 41 Osgoode Hall L.J. 293.

¹⁹ (2003) 41 Osgoode Hall L.J. 185.

and institutions and that these practices and institutions are enhanced by allowing some elbow room for change greater than that permitted by the letter of the law. He contends that assaults—as we are presently witnessing—on these civil liberties will have a contradictory impact. They may cause the erosion of the political authority sought to be bolstered by the undermining of civil libertarian rights and activities. In short, liberal democracy and its Rule of Law will be problematized.

As the project unfolded, we came to realize that its original title, “Civil Disobedience,” did not capture the complexity and many meanings of the vast amount of legal and extra-legal conduct that are part and parcel of our legal and political reality. We had to find a way to capture the idea that, at any one time in history, law has to make room for a vast array of actions that it notionally does not permit. Hence, the eventual title, “Civil Disobedience, Civil Liberties, and Civil Resistance: Law’s Role and Limits” was adopted. The array of commentaries and articles collected offer a wide-lens approach to law students, academics, and practitioners that ought to make it clear that, if legal functionaries want to maintain and perpetuate a liberal capitalist democracy, they cannot afford to be narrow, politically indifferent technicians. The historians offer evidence that some extra-legal activity always has had to be, and always will have to be, accepted by the legal system. Philosophers provide us with the rather uncomfortable insight that many brands of intentionally disobedient conduct may be justifiable and that there is no bright line to help lawyers and courts, who, unlike philosophers, actually have to make decisions. What is certain is that to demand obedience to a law because it was validly created, that is, that it was constitutionally and procedurally justifiable, would unduly circumscribe the zone of tolerance for disobedient behaviour. In liberal capitalist democracies, the state, its law, and its functionaries have only a contestable claim to legitimacy; coercion and repression on narrow legalistic grounds remind people that their rights and freedoms do not yet make them fully autonomous human beings in charge of their own lives.

The order we have imposed on the contributions in this special double issue is somewhat arbitrary; many of them take up several aspects of this complex set of issues. Our presentation is based on the emphasis that we detect in these various pieces. Several of the contributions were presentations that were made in teaching and seminar settings. Others were part of the conference, and some were presented at special lectures that were part of the project. Many

of the contributions are conventional articles (which have abstracts), while others are less formal but complement the more traditional offerings.

We begin with Gearty's discussion of the centrality of civil liberties to democratic politics, followed by the contributions of Parnaby and Kealey and Whitaker. These articles remind us how the state's security agenda is often antagonistic to civil liberties and frequently provides a stimulant for their enrichment. We then turn to the contemporary struggle between civil liberties and national security: Pue's article, which began as the Laskin Lecture in Public Law, and Bahdi's account of the impact of new security measures are our exemplars.

The role and the potential role of the judiciary in striking a balance between liberty and security is illustrated by the contributions of Hay, Esmonde, Olsen, and MacPherson. The more philosophical questions as to when disobedience may be justified and what means are appropriate when it is justified are discussed in the contributions by Green, Haksar, and Nielsen. Accounts of resistance and disobedience that test these justifications for civil disobedience—both its objects and tactics—are found in Orkin, Palmer, and Clarke. And, in the final grouping, the articles by Conway and Walter are concerned with the strategies and changing objectives of protest groups. The special double issue concludes with reviews of books that shed light on the relationship between law, liberty, and disobedience.

This special double issue is the tangible result of the two-year project that we began in the Fall of 2001. This project was a collective endeavour that required institutional support. We would like to thank Peter Hogg who, as Dean of Osgoode Hall Law School, was unstinting in encouragement of, and generous with the institutional resources of the Law School for, our attempt to engage the Osgoode community in a larger debate about law's role and limits in maintaining a civil society. We would also like to thank the Laskin family, the trustees of the Laskin Lecture in Public Law, and the Social Sciences and Humanities Research Council for their financial support of the conference, which enabled us to bring in scholars, lawyers, and activists to share their perspectives and research. We invite readers to continue the discussion by submitting their responses to the contents of this special double issue to the Forum section, which is designed to encourage reader engagement with ideas published in the Osgoode Hall Law Journal. Submissions to the Forum section can be as short as several paragraphs in length, should not exceed 1,500 words, and should be directed to the Board of Editors. The responses can be in either English or French.