

# THE RIGHT TO CIVIL DISOBEDIENCE<sup>©</sup>

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This article compares and contrasts the way Gandhi understands the right to civil disobedience with the way this right is understood by some contemporary liberals. Some of the implications of the right to civil disobedience are also discussed. The right to civil disobedience implies that the authorities should extend some tolerance to civil disobedients not only when they are correct, but also when they are reasonably mistaken in their views. Tolerance here does not involve preventing civil disobedients from breaking the law, and implies that when civil disobedients break the law, they have a claim not to be punished or have their punishment reduced. Of course such claims have to be balanced against other considerations, such as the need for deterrence.

Cet article compare et oppose la façon dont Gandhi conçoit le droit à la désobéissance civile, à la façon dont ce droit est compris par certains libéraux actuels. Certaines des implications du droit à la désobéissance civile sont également analysées. Le droit à la désobéissance civile signifie que les autorités devraient faire preuve d'une certaine tolérance envers les insoumis civils, non seulement lorsqu'ils voient juste, mais également quand leurs perspectives sont raisonnablement erronées. Ici, la tolérance n'implique pas d'empêcher les insoumis civils d'enfreindre la loi, et signifie que lorsqu'ils enfreignent la loi, ils prétendent ne pas devoir être punis, ou à voir leur peine atténuée. Bien entendu, de telles prétentions doivent s'harmoniser avec d'autres considérations, comme le besoin de dissuasion.

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## I. INTRODUCTION

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In this article, I shall examine the views of Mahatma Gandhi and some contemporary liberals on the right to civil disobedience. I shall discuss some of the implications of the view that there is a right to civil disobedience. The way Gandhi understands the right to civil disobedience is fundamentally different from the way that modern liberals such as John Rawls, Ronald Dworkin, and Joseph Raz understand the term.

Moreover, I shall make some suggestions of my own. In particular, I support the view that the right to civil disobedience implies that the authorities should extend tolerance to civil disobedients not only when the disobedients are right, but also when they are reasonably mistaken in their views. This is partly different from the standard liberal view according to which the right to civil disobedience implies that we should extend tolerance to civil disobedients however wrong their cause. According to Dworkin, a prominent exponent of the standard liberal view, a theory of civil disobedience should be sensitive to the type of convictions the disobedients have and insensitive to the soundness of these convictions. On his view in deciding matters such as whether to punish disobedients, it is relevant to ask whether the convictions are integrity-based, justice-based, or policy-based, but the soundness or unsoundness of these convictions is irrelevant. On my view, the soundness or plausibility of these convictions also has some relevance.

The difference here is regarding the scope of the claim to tolerance rather than the weight to be given to this claim: I agree with the standard liberal view that even when there is a claim to tolerance it has to be balanced against other claims. The claim to toleration here can be taken to imply one or both of the following: firstly, there is the implication that the civil disobedients should not be prevented from breaking the law; secondly, there is the implication that when they break the law, they have a claim to no punishment or reduced punishment. Gandhi stressed the first implication only; he was not interested in the second one as he thought that civil disobedients succeed by courting punishment, not by avoiding it. On the standard liberal view, both the implications are stressed.

The right to civil disobedience is a moral right and has important implications for the legal system. A just constitution ought to recognize the right to civil disobedience either explicitly in writing or at least in the way it is interpreted by judges and other state officials. The right to civil disobedience is not a panacea for all wrongs, but when properly interpreted it can help to make a legal system more just and stable.

From time to time some segments of the population are marginalized—their conception of the good life, as well as their interests generally, gets overwhelmed by that of the dominant segment. Civil disobedience is one of the methods these groups have to redress this imbalance. There are, of course, other ways of empowering the weak that also exist which often supplement rather

than supplant civil disobedience. For Gandhi, civil disobedience was related to non-cooperation with injustice when it reached evil proportions, but it was to be supplemented with the economic, educational, and social upliftment of the disadvantaged. We shall see that Gandhi confined civil disobedience to the “barest necessity of the case.” He says that it is not necessary for voluntary obedience that the laws that are obeyed are good laws.

## II. CIVIL DISOBEDIENCE AS A CONSTITUTIONAL DEVICE

Those who think that we have a right to civil disobedience even in liberal societies tend to view it as playing an important role within a constitutional regime. John Rawls contends that civil disobedience is the final device to maintain the stability of a just constitution<sup>1</sup>. Although this mode of action is, strictly speaking, contrary to law, it is nevertheless a morally correct way of maintaining a constitutional regime. Gandhi goes so far as to say that “Civil Disobedience is the purest type of constitutional agitation.”<sup>2</sup>

In fact, Gandhi at times even denies that civil disobedience is contrary to law. There are two senses in which he believes this. Firstly, when the law of the land conflicts with the highest law as revealed by our conscience, we should obey the latter. Secondly, Gandhi writes that “every law gives the subject an option to obey the primary sanction or the secondary, and I venture to suggest that the Satyagrahi by inviting the secondary sanction obeys the law.”<sup>3</sup> Unlike the ordinary criminal, the Satyagrahi (that is, one who follows Satyagraha, which Gandhi explains as soul force or truth force) voluntarily submits to the punishment and so obeys the law in a sense. Let us call this “quasi-obedience” to distinguish it from the full-blooded obedience involved in ordinary law-abiding behaviour; the very name civil disobedience suggests that there is some sort of disobedience involved. Gandhi would have approved of Rawls’ views that civil disobedience expresses disobedience to law within the limits of fidelity to law.<sup>4</sup>

Critics of the Gandhian view will point out that the law is not just giving the option of conforming or paying the penalty, but also involves a normative element asking us to conform. Gandhi admits that many laws reflect moral principles and must not be broken, such as the law regarding the murder of

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<sup>1</sup> John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) s. 59.

<sup>2</sup> Mahatma Gandhi, *Young India 1919-1922* (Madras: The Huxley Press, 1924) at 1118, December 15, 1921.

<sup>3</sup> Armand Hingorani, ed., *Gandhi For 21st Century Vol. 4: The Science of Satyagraha* (Mumbai: Bharatiya Vidya Bhavan, 1998) at 59.

<sup>4</sup> *Supra* note 1 s. 55.

innocent people. But there are other laws, let us call them pragmatic laws, such as revenue laws, that are justified as being useful for the governance of the country and are not in themselves moral or immoral. Such laws may be useful or harmful and may be disobeyed for symbolic purposes under certain conditions. The other set of laws that could be disobeyed are the immoral or unjust ones, where obedience would involve directly compromising one's self-respect. The laws that we could break, in principle, are the purely state-made laws, as opposed to those laws which reflect morality and justice.<sup>5</sup> Our duty to obey the latter remains irrespective of the wickedness of the state.

It is not clear what is gained by denying that civil disobedience involves violating the law of the land. The important question is whether such a violation is justified. It might be thought that if civil disobedience does not involve breaking the law, it does not need any justification. But Gandhi would not have welcomed this position as he thought that civil disobedience does need to be justified.

Gandhi did not allow the use of evil means however good the ends. Breaking the law of the land in cases of pragmatic laws is not justified when it involves the use of evil means. However, even though these pragmatic laws express the commands or norms of the legal system, it does not follow that to break these commands or norms in the relevant cases involves the use of evil means. Gandhi would argue that we are not justified in breaking such laws unless the state has forfeited its right to obedience in such cases.

Sometimes when the civil disobedient disobeys a government ordinance or the law of the land, rather than the civil disobedient, it is the executive or the legislature that is acting unconstitutionally. This can be so even if the highest court comes out in favour of the state, for the interpretation of the constitution is not infallible. Civil disobedience, when conducted properly, can play a valuable role in the just working of the constitution. In fact, Gandhi claimed that the true civil disobedient "is a philanthropist and a friend of the state."<sup>6</sup> Only the evil features of the system need to be removed. "Pure Civil Disobedience, therefore, must not be carried beyond the point of breaking the unmoral laws of the country."<sup>7</sup> By openly submitting to punishment, the civil disobedients go some way towards showing their sincere desire to engage in the search for true justice and morality. Gandhi thought that civil disobedience when properly conducted could work as a safety valve, for in its absence there would be

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<sup>5</sup> *Supra* note 2 at 1117, "Complete civil disobedience is a state of peaceful rebellion—a refusal to obey every single state-made law." August 4, 1921.

<sup>6</sup> *Ibid.* at 1118, December 15, 1921.

<sup>7</sup> *Ibid.*, December 15, 1921.

violent threats to the constitutional system.<sup>8</sup> He would have agreed with Rawls' view that it works as a stabilizing device. But he also commended its role in improving the existing constitution and other institutions in accordance with the principles of justice and morality.

### III. CIVIL DISOBEDIENCE AND INTEGRITY

Gandhi did not think that we acquire an automatic right to disobey when the state behaves unjustly or in an evil way. His views on this point are interesting and important, if not always consistent. To Gandhi, civil disobedience is the inherent right of a citizen. He derives this right from the sacred duty not to participate in evil: "Civil Disobedience, therefore, becomes a sacred duty when the state has become lawless, or which is the same thing, corrupt. And a citizen that barter with such a state shares its corruption or lawlessness."<sup>9</sup> Let us call this the argument from integrity or self-respect.

Dworkin distinguishes between two kinds of justified civil disobedience—one based on integrity or conscience and the other on justice. Gandhi would argue that the second one should also be subsumed under integrity. Gandhi believes that individuals should only turn to civil disobedience if the cause is just, and even then only when the injustice is so great that our conscience and self-respect do not permit us to tolerate it. "There are many unjust laws that a good citizen obeys so long as they do not hurt his self-respect or the moral being."<sup>10</sup>

Dworkin provides the example of the African-Americans who broke the law in the civil rights movement:

They sat at forbidden lunch counters seeking the privilege of eating greasy hamburgers next to people who hated them. It would miss the point to say they were there because they could not with integrity, do what the law required ... they acted ... to oppose and reverse a programme they regarded as unjust.<sup>11</sup>

He says that in such cases as well as in the Vietnam War, the protesters were protesting the violations of the rights of the victims.

Gandhi himself felt very humiliated and insulted when in South Africa he was forcibly thrown out of a first-class rail compartment even though he

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<sup>8</sup> See Vinit Haksar, *Rights, Communities and Disobedience* (New Delhi: Oxford University Press, 2001) c. 6 [*Rights, Communities and Disobedience*].

<sup>9</sup> *Supra* note 2 at 944, January 5, 1922.

<sup>10</sup> R. Duncan, ed., *Selected Writings of Mahatma Gandhi* (London: Fontana, 1971) at 75.

<sup>11</sup> Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 107.

possessed a first-class ticket.<sup>12</sup> He would argue that no self-respecting person should have to put up with such injustices. Moreover, Gandhi would say that even when the state is victimizing other people, you could, as a person of integrity, dissociate yourself from such a state by civil disobedience and non-cooperation. Thus, for Gandhi, the argument from justice is linked to integrity and self-respect. And when it is not so linked, one should not break the law in order to deal with such injustice.

Of course the mere presence of substantial injustice does not imply that people should resort to civil disobedience. There may be less radical ways of dealing with the injustice, such as the reform of laws and legal protests. There may be more radical ways of dealing with the injustice, such as those that involve violence against the perpetrators of injustice but not against the innocent, and still more extreme ways, such as terrorism, that include violence against the innocent. Whether one should resort to civil disobedience in particular cases depends partly upon ethical considerations and partly on a judgment of its efficacy and its costs in terms of suffering and resources compared to that of the alternatives available.

Gandhi ruled out violent methods as a matter of principle and because he thought that non-violence was, in the long-term, much more effective. The suffering of the Satyagrahi appeals to the understanding of the opponent through the heart. Such reasons also explain why Gandhi wanted those who break the law to submit to punishment. It is not because they have a political obligation to obey the unjust law or to submit to punishment. Rather, it is because the suffering involved in punishment will impress the opponent as well as society at large and help to promote the truth by involving all the parties in a dialectical search for the truth.

#### IV. THE RIGHT TO CIVIL DISOBEDIENCE AND ITS IMPLICATIONS

Gandhi and Rawls both think that people have a right to civil disobedience, even in liberal democratic societies, whereas some others think that we should not embark on civil disobedience, especially in liberal democracies where people have scope for participation in the process of making or influencing laws.

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<sup>12</sup> Mahatma Gandhi, *An Autobiography or The Story of My Experiments with Truth* (Ahmedabad: Navjivan Publishing House, 1940) c. 8.

Joseph Raz has an interesting position in between: he thinks that the right to civil disobedience is confined to illiberal societies.<sup>13</sup> In such societies, this right is derived from the right to participation. He contends that in liberal democracies people can exercise their right to participation without resort to civil disobedience. Indeed, he defines a liberal society as one where there is right to participation.

However, Raz does admit that even in liberal democracies there may be a case for civil disobedience where it is the morally right thing to do. Thus, Raz grants that even liberal societies may contain any number of bad and iniquitous laws, but he is anxious to deny that there is any right to civil disobedience for such a right extends tolerance to people to indulge in civil disobedience even when it is wrong to do so. His view is that civil disobedience in liberal societies can be rationally supported by those who approve of it, but it has no claims to toleration by those, such as the authorities, who do not support its aims. Raz is against such tolerance of civil disobedience in liberal societies, for there is participation in the making of decisions and legal ways of trying to persuade others to accept one's objectives.

There are disadvantaged minorities who may attempt to convince others of their views, but suppose they regularly fail in those attempts. Raz allows them to commit civil disobedience in cases where it is right to do so. I contend that it is unjust to deny such people the right to civil disobedience. These are not just academic points—they have important practical consequences. The view that people have a right to civil disobedience implies, firstly, that even if they are punished, they have a claim not to be prevented from breaking the law. Secondly, they have a claim not to be punished or to have a reduced punishment. Of course, such claims have to be balanced against other considerations, such as the need for deterrence.

Liberal political philosophers such as Rawls distinguish the right to civil disobedience from the wise exercise of it. This distinction would imply that the relevant right covers cases of unwise exercises of the right. At times, Gandhi takes a similar view. Thus he says

It is therefore possible to question the wisdom of applying civil disobedience in respect to a particular act or law; it is possible to advise delay or caution. But the right itself cannot be allowed to be questioned. It is a birthright that cannot be surrendered without surrender of one's self respect. At the same time that the right of Civil Disobedience is insisted upon, its use must be guarded by all conceivable restrictions. Every possible provision should also be limited to the barest necessity of the case.<sup>14</sup>

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<sup>13</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press 1979) at 266-75.

<sup>14</sup> *Supra* note 2 at 944, January 5, 1922.

At other times, Gandhi appears to take a somewhat different view, arguing that stringent conditions must be satisfied before people acquire the right to civil disobedience:

A Satyagrahi obeys the laws of society intelligently and of his own free will, because he considers it to be his sacred duty to do so. It is only when a person has thus obeyed the laws of society scrupulously that he is in a position to judge as to which particular rules are good and just and which unjust and iniquitous. Only then does the right accrue to him of the civil disobedience of certain laws in well defined circumstance.<sup>15</sup>

I suggest that Gandhi's view is that everyone possesses this right in potential form, and to actualize the right one has to do the relevant deeds and learn the relevant discriminations. So, in a sense the right is both natural and earned. "Let us all strive to be perfect Satyagrahis. The striving does not require any quality unattainable by the lowliest amongst us; for, Satyagraha is an attribute of the spirit within. It is latent in everyone amongst us. Like Swaraj it is our birthright."<sup>16</sup>

One problem facing Gandhi's view is this: if people have a sacred duty to disobey certain evil laws, then how can they perform this duty if they do not yet possess the necessary qualifications? One answer suggested by Gandhi is that the unqualified people can follow a well-qualified leader. But there remains the problem that to choose the leader wisely also requires good judgment. However, it is consistent to hold that people do not have enough judgment to decide whether particular laws should be broken, but they do have enough judgment to choose a leader or guru who can make such judgments. Something similar happens in other areas, especially within representative democracies. Hence, most of the electorate is not well-qualified to run the government, but they probably have enough sense to choose appropriate representatives who will carry out such activities.

Gandhi also distinguished individual civil disobedience from mass civil disobedience. Mass civil disobedience involves many people acting together and is much more risky and prone to violence and other evils, whereas individual civil disobedience is easier to confine to those who possess the requisite moral authority.

One might argue on behalf of Gandhi that the person who has conscientious objections to a particular law but does not have the requisite qualifications and judgment might embark on individual civil disobedience if that person does not find an appropriate leader to guide him or her to mass civil disobedience. Gandhi would have been embarrassed by this defence, since to him one reason

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<sup>15</sup> *Supra* note 12 at 287.

<sup>16</sup> *Supra* note 2, December 26, 1924.

why individual civil disobedience is less likely to lead to violence is that it is easier to ensure that the disobedience is confined to those who possess the requisite qualifications.

Gandhi believes that there is a right to civil disobedience only when the cause is just and conscience or self-respect are involved. If the cause can be served without breaking the law, then there should be no civil disobedience. What if we think the cause is just but in fact it is not just? Do we have a right to civil disobedience in such cases? Gandhi did not make room for a right here, for he thought that the civil disobedient in such cases should be given the full penalty.

In 1922, Gandhi told the British judge who tried him, C.M. Broomfield, that if he thought that Gandhi was right in regarding the regime as evil, then he should resign, whereas if the judge thought that Gandhi was mistaken in his view, then he should impose the highest penalty.<sup>17</sup> Gandhi implicitly ruled out the view that the judge should reduce the sentence if he was sincerely mistaken in his views. (Raz also says that if the civil disobedients are right then the judge should resign or even join the civil disobedient.) The judge, in fact, gave a reduced sentence of six years imprisonment and expressed the hope that the actual sentence served might be less. This sentence reflected the belief of the judge that Gandhi was wrong in breaking the law, though his guilt was much less than that of the ordinary criminal.

Some of the western liberal theorists view the right to civil disobedience as including cases in which the civil disobedience was not right but wrong. It has been argued that it is pointless to only allow the right to civil disobedience in cases where civil disobedience is right. Thus, Raz maintains that one needs no right to do the right thing. If the cause is right, this provides all the justification one needs. He concludes that it is an essential element of rights to action that they entitle one to do that which one should not. In Gandhi's view there is no right to do wrong.<sup>18</sup>

Is Gandhi's view based on confusion, as Raz alleges? I suggest that Raz has overlooked something important here. The cause might be right, but this does not automatically entitle anyone to pursue it and break the law. Some people may not be ready for it. The reply could be that if it is right for a particular person to embark on civil disobedience, then he or she does not need any right to civil disobedience. But this overlooks the possibility that having a right to civil disobedience might be a precondition of it being right for an individual to embark on it.

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<sup>17</sup> See the Report of the Trial of Mahatma Gandhi, *supra* note 10 at 142-52.

<sup>18</sup> For a sophisticated discussion of the right to do wrong, from the liberal standpoint, see Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993) c. 3.

It is right to provide health care to a sick person. However, it does not follow that there is nothing to be gained by asserting that the sick have a right to health care. Rather, one thing that is gained is that we are given a reason why it is right to provide health care. The right to health care does not only make sense if the sick are allowed the right to choose between “quack” medicine and ordinary medicine. It would be wrong to argue that the right to health care is different from the right to civil disobedience in not involving a right to action. If we have the right to health care, we have the right to accept health care. Though we can choose whether or not to accept it, it does not follow that the right itself implies that we should be able to choose between receiving “quack” medicine and receiving ordinary medicine. Why then must the right to civil disobedience imply that we have this right even when civil disobedience is wrong? Thus, the Gandhian view is not absurd. But is it correct?

In the case of free speech, a person who has the right to speak the truth also has the right to preach false views, including those that are absurdly false, even though there are well-known limits to the right. Civil disobedience resembles the right to free speech more than the right to health care, since it involves a form of address to the authorities. But it is unlike both these rights in that it is much more closely linked with breaking the law. It might be suggested that in this respect the right to civil disobedience is nearer to the right to self-defence; though even here there are differences, for justified self-defence does not involve breaking the law.

## V. TOLERATION OF CIVIL DISOBEDIENTS

How much tolerance should the authorities show to civil disobedients? Must the state allow people to break the law if they are willing to pay the penalty? Clearly the answer is: not always. In the case of murder, we try to prevent people from carrying out their attempts, even by force if necessary. In the case of certain other laws, especially where no serious irreversible harm is involved, people can be free to choose to obey the law or to pay the penalty. In some cases, civil disobedience can involve the risk of serious harm. In 1919 in Kheda and Ahmedabad, civil disobedience led to violence. Gandhi admitted to his “Himalayan blunder in placing civil disobedience before those who had never learnt the art of civil disobedience.”<sup>19</sup> Civil disobedience may not be justified even when there is no physical violence used, for the cause may not be just or the means employed may not be good. Gandhi distinguished Satyagraha, of which he approved, from Duragraha, which involves coercion. Duragraha means obstinately persisting in one’s cause, without a commitment to search for

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<sup>19</sup> Mahatma Gandhi, *Non-Violent Resistance* (New York, Schocken Books, 1961) 365.

the truth. In the undesirable cases, Gandhi would admit that the state could inflict the full penalty on the civil disobedients, and that the state is not under any special obligation not to prevent the relevant demonstrations from taking place.

If the right to civil disobedience implies the right to engage in all kinds of undesirable activities, then we should be deeply suspicious of it. We do not want to extend tolerance to civil disobedients however misguided and dangerous they may be. That does not mean that we must then embrace the view that only allows the right to civil disobedience in the cases where civil disobedience is right. Rather, we should extend toleration (rather quasi-tolerance as I shall argue) to cases of reasonable, but not unreasonable, mistake. Even if our opponent is not right, but is sincere and reasonably wrong, this should be taken into account in sentencing as well as in deciding to prosecute. But if our opponent is unreasonably wrong, we should be less tolerant.

Consider two recent examples from India. There has been a protest movement at the building of the Narmada Dam, which has displaced many Adivasis who lived in that area. While the dam is intended to benefit many people by providing electricity and other facilities, the human cost is enormous. Apart from the havoc of displacement, the resettlement being offered is most inadequate, and there is enormous corruption involved in the process of giving compensation. There are competing values here, for the dam will also benefit many, including the poor. The protest movement has been unsuccessful in preventing the dam from being built, although it has increased the social awareness regarding the plight of the displaced in such cases. As a result, it is possible that the authorities will be more careful before embarking on such projects elsewhere. People such as Arundhati Roy, the novelist, who took part in this protest movement, have performed an invaluable public service; they had to break the law to make their point forcefully. And this could be true even if the building of this particular dam is justified, all things considered.

Another recent case that has aroused public interest is the Ayodhya dispute. In 1992, Hindu zealots, known as Ram Sevaks, who wanted to build a temple on the site, demolished the Babri Masjid, a mosque. They claimed that the site was the birthplace of their beloved God Ram. The case is before the Supreme Court. Some months ago the zealots threatened to break the law, if the verdict goes against them. At the time of writing this article, the Ram Sevaks have taken the view that they cannot wait for the verdict of the Supreme Court, and have launched a civil disobedience movement, under the patronage of the Vishwa Hindu Parishad (a right-wing Hindu organization), demanding that the Indian government allow them to construct a temple at the disputed site.

One might say that these zealots are risking violence as well as increasing communal tension, so it is quite consistent to be more lenient with the Narmada Andolan movement than with the Ram Sevaks. But what is the underlying

principle here that explains the leniency? There are several broad criteria that might be suggested. Firstly, there is the fact that we should be more lenient towards those who break the law in an open and civil way. Secondly, there are integrity considerations; we should be more lenient with those who acted from considerations of integrity. Thirdly, there is the reasonable mistake test. Fourthly, there is the belief that the disobedient may be right.

People like Arundhati Roy are clearly different from the common criminal. The ordinary criminal tries to run away from punishment, while the civil disobedient breaks the law in an open and civil way. The latter co-operates with the authorities both at the stage of committing the crime and in jail. This is relevant to the amount of punishment that should be meted out to the civil disobedient quite apart from considerations of sincerity or integrity. Irrespective of the motives of the defender, the fact that the defendant co-operates with the authorities at the time of the crime or afterwards is a point in favour of the defendant, from the point of view of the authorities.

This is not to deny that considerations of integrity may also be relevant. Some of the judges and other authorities who dealt with Gandhi were certainly impressed with him and took such factors into account in deciding whether he should be punished and what the punishment should be. Thus, Judge Broomsfield, who tried Gandhi in 1922, did not heed Gandhi's advice to resign or inflict the full penalty. He did not resign because he thought that Gandhi had done a legal and moral wrong. Though Gandhi preached disaffection against the state in a non-violent manner, he must be held responsible for the ensuing violence. Nor did Judge Broomsfield follow Gandhi's advice and inflict the highest penalty on him. He said, "Even those who differ from you in politics look upon you as a man of high ideals and of noble and of even saintly life ... I do not forget that you have consistently preached against violence and that you have on many occasions done much to prevent violence."<sup>20</sup> In view of such considerations, Judge Broomsfield sentenced Gandhi to six years imprisonment, and expressed the hope that the actual term served would be less.

While Gandhi's sincerity or integrity seems relevant here, sincerity or integrity by themselves do not always carry the same weight. Much also depends upon the cause to which one is committed. Thus, to go back to the comparison of the Roy case and the Ram Sevak case, many of us are impressed not just with Arundhati Roy's sincerity or integrity, but also with the cause to which she is committed. In the case of the Ram Sevaks, we are not just suspicious of their sincerity (in other words do they really believe they know so precisely where Ram was born when no one even knows which millennium he was born in?), but we are also disturbed by the fact that their cause seems to

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<sup>20</sup> *Supra* note 10 at 151.

lead to violence and communal disharmony. One cannot argue that if the movement leads to violence, then it cannot be civil disobedience. Even Gandhi recognized that his movement sometimes led to violence. Gandhi allowed indirect violence, but not direct violence. If a movement inherently requires its participants to be violent against the person, it is not permissible civil disobedience. But if unforeseen violence occurs after all reasonable precautions have been taken that is a different matter.<sup>21</sup>

A sincere fascist might be even more dangerous than one who is less sincere, for the former may pursue a cause with greater zest. Especially in cases of dangerous offences, moral sincerity by itself does not extenuate. When it is shown that a person's moral beliefs were a result of mental illness, we do tend to excuse the defendant, as under the M'Naghten Rules.<sup>22</sup> When a person has made a reasonable mistake, we are more sympathetic to that individual's case than when he or she has made an unreasonable mistake. Even if Arundhati Roy is wrong, she is not absurdly wrong; whereas the Ram Sevaks are both absurdly and dangerously wrong. In such cases, we should not excuse them unless their sincerity is a result of mental illness. But this raises the problem about whether such judgments can be made from a neutral standpoint. My view is that neutrality here, in the sense that will convince all the relevant parties, is not possible. Thus, the supporters of the Ram Sevaks, some of whom occupy high offices in contemporary India, would argue that the Hindutva agenda should be promoted, and even that people who are overzealous in promoting this cause should be treated leniently, for their hearts are in the right place. They would blame communal tensions on those individuals such as the "pseudo-secularists" who they claim deny Hindus their legitimate role.

Let me make it clear that I do not support the Hindutva agenda, and, for what it is worth, I believe that Arundhati Roy's heart is in the right place. The point I want to make is that judgments, such as whether someone's heart is in the right place, cannot be made from a neutral standpoint. The denial of neutrality here is not the same as the denial of the view that there is a right answer. How then should the courts and state officials use their discretion? This problem arises whenever the authorities have discretion. The government of the day could well favour protest movements with which it has affinities and penalize those movements with opposing ideologies. The danger of state abuse

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<sup>21</sup> See *Rights, Communities and Disobedience*, *supra* note 8 c. 6. See also Jawaharlal L. Nehru, *An Autobiography* (New Delhi: Oxford University Press, 1980) c. 29.

<sup>22</sup> The M'Naghten Rules were laid down in *Daniel M'Naghten's Case*, [1843], 10 Cl. & F. 200 at 210 (H.L.). The M'Naghten Rules state that in order to establish a defence on the grounds of insanity, it must be shown that the accused was, at the time of committing the crime, "labouring under such defect of reason ... as not to know the nature and quality of the act ... or, if he did know it, he did not know he was doing what was wrong."

of discretionary powers can be lessened, though never eliminated, by having a separation of powers. An independent judiciary is a vital safeguard. It would be wrong to claim that on the standard liberal view there is no danger of abuse of state power. The standard view involves balancing the claims of the disobedients against social interests, thus giving considerable power to those who do the balancing.

The authorities must act within the constitution, but the debate at the moral level can go beyond the existing constitution. One might assume a standpoint such as that of an existing constitution or of an ideal constitution and then argue from that standpoint certain judgments can be made. One will then have to face opponents who will interpret the constitution differently or argue that it needs to be revised or even replaced by a text that represents different ideals.

To come back to the problem regarding whether the right to civil disobedience extends to cases of civil disobedience that are wrong, my suggestion is that the right to civil disobedience extends to cases where we are reasonably wrong but no further. It may be argued that to talk of a right here is inaccurate because the language of rights goes along with justification rather than excuse. To pursue the analogy with self-defence, if a person kills in self-defence, the killing is justified. But if a person makes a mistake and kills an innocent person, wrongly thinking the latter is about to kill him, this at best serves as an excuse rather than a justification.

Sometimes the line between excuse and justification is a thin one. Consider, for example, free speech. We encourage free expression of opposing views even when we believe some of these views to be wrong, because it is thought that in the long run more good than harm comes from such toleration. Mill gave an eloquent defence of why we should honour the right to free speech. The consequentialist arguments that he gave provide a justification, not just an excuse, for tolerating false views. With civil disobedience too one could give a similar justification. Civil disobedience conducted according to Gandhian principles involves a dialogue between the disobedient and the authorities, and such dialogues can enlighten not only the parties to the dispute but the community as a whole. It is true that other things being equal, the case for civil disobedience is stronger in a society where the right to free speech is not recognized and people do not have access to legal methods of participation. But it would be wrong to rule out civil disobedience in liberal democracies. The plight of the weak, oppressed, and marginalized members of the society tends to be neglected even in liberal democracies and civil disobedience can help to redress this imbalance.

Gandhi stressed that civil disobedience, when conducted properly, does something that ordinary free speech does not. Experience has shown that mere appeal to reason has no effect on those who have settled convictions. "The eyes of their understanding are opened not by argument but by the suffering of the

Satyagrahi. The Satyagrahi strives to reach the reason through the heart.”<sup>23</sup> For this tactic to work, the civil disobedients must be not just willing to undergo punishment, but they must also invite the authorities to punish them. However, their right to civil disobedience does not mean that they can demand punishment. They must not coerce the state into having a dialogue.

One important question is how lenient authorities should be with cases of civil disobedience. Gandhi maintains an extreme view that, unless the civil disobedient is right, the full penalty should be used. This view implies, in effect, that civil disobedients will tend to get a “raw deal” even when they are in the right. Those in authority will either deny that the civil disobedient is right, and so will feel entitled to enforce the full penalty, or they will acknowledge that the disobedient is in the right, in which case they should resign, according to Gandhi (and Raz), and they will be replaced by someone who believes the civil disobedient is wrong and deserving of the full penalty.<sup>24</sup>

The way out of this dilemma is to extend tolerance to those civil disobedients who are reasonably wrong. An added advantage of this position is that since those who are reasonably wrong also do not deserve the full penalty, tolerating them is good (quite apart from the fact that often this is in effect the only way of tolerating those civil disobedients who are right). But toleration here should not be taken in its full-blooded sense; it should not imply that we should never punish such civil disobedience. It should rather be taken to imply that the case for being lenient with such civil disobedience should be balanced against the social need for punishment in such cases. Perhaps we should talk of quasi-toleration here.

Total toleration of civil disobedience in general would lead to its death as it would mean that civil disobedients would not be able to demonstrate their sincerity through their willingness to undergo punishment. Nor will they be able to hope that the authorities will be converted as a result of the soul searching that sometimes accompanies their infliction of punishment on sincere human beings.

It might be suggested that the standard liberal view which allows the right to civil disobedience, however unreasonable the wrong, has not been shown to be implausible. This view does not imply that we must fully tolerate civil disobedience by fascists and other extreme groups, rather it only implies that we should quasi-tolerate them. These groups have a claim on the authorities to be tolerated, which needs to be balanced against the utilitarian case for preventing

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<sup>23</sup> *Supra* note 19 at 191.

<sup>24</sup> In some cases there is another possibility. The courts may sometimes declare that the government ordinance that the protesters are breaking is itself illegal or unconstitutional. In such cases the disobedients could be let off punishment altogether.

or punishing such acts of disobedience. So, the standard liberal view in practice could lead to similar results as the alternative view that I have suggested.

My reason for preferring the alternative view is that I find that the standard liberal view implies that movements which profess highly immoral views have a claim to tolerance even when they break laws. This seems morally repugnant even when the claim is defeated by utilitarian consideration. It is repulsive to balance the pleasures that fascists get from persecuting their victims against the misery caused to their victims, even when the balancing shows that the misery outweighs the pleasures. To deny that fascists have a claim to tolerance in such cases is not to deny that sometimes there is a utilitarian case for tolerating their activities, even when they break the law. For example, punishment in such cases may be counterproductive, by giving publicity to such causes or making martyrs of those punished.

The case for civil disobedience has sometimes been understood as an extension of the case for free speech. This is plausible on the address model according to which civil disobedience is a form of address to the authorities. However, the address model is only one of the models. Another important role of civil disobedience as part of non-cooperation is to put pressure on the authorities, and not just moral pressure.<sup>25</sup> Even on the address model of civil disobedience, whether or not it is justified is more than just an exercise of free speech, for it involves a form of direct action.

The right to free speech is also limited, but a person's exercise of the right will be fully tolerated within the limits, whereas the civil disobedient will only be quasi-tolerated. In some cases, but not in all, quasi-toleration will have the same effect as toleration. Thus, sometimes, when the social case for punishment is weak, the civil disobedients may be let off punishment altogether.

Although the toleration extended to the civil disobedient is quasi-toleration, it does not follow that the right to civil disobedience is a quasi-right. It is true, as we have seen, that the right to civil disobedience has to be weighed against other considerations. But the same is true of other rights, such as the right to free speech. The right to civil disobedience does have significance not just at the level of prosecuting and sentencing but also in deciding whether to prevent the protesters from carrying out their activities. Provided this is granted, it does not matter whether we use the term quasi-right. Some would argue that it is not a full right since we do not have total toleration of civil disobedience even in the central cases. It is not clear that even the weak and vulnerable sections of the population must be given total toleration.

Gandhi used the term "right to civil disobedience" to imply a moral authority among people to break the law. He emphasized that this authority has

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<sup>25</sup> See *Rights, Communities and Disobedience*, *supra* note 8 c. 7.

to be acquired or earned by the relevant past conduct of the person. Gandhi was not concerned with reducing the sentence of the disobedient, as he believed in the power of suffering to convert the authorities and society as a whole. "Our triumph consists in our being imprisoned for no wrong whatever."<sup>26</sup>

There remains the question of whether the authorities are justified in imposing penalties on the civil disobedient and whether such penalties should be lessened if a person has the right (in the sense of moral authority to undertake civil disobedience). Gandhi thought that a person, who makes a mistaken judgment, however reasonable his mistake, must "suffer the consequences whatever it may be."<sup>27</sup>

I have disagreed with Gandhi on this point, and stressed that reasonable mistake could be a ground for reduction of sentence if all other things are equal. It does not make a difference if the person who made the mistake had the moral authority to break the law. I am inclined to think that the relevant matter from the point of view of whether to reduce the sentence is whether the mistake was reasonable rather than whether the person had earned the moral authority to break the law.

This is not to deny the importance of Gandhi's emphasis on acquiring the relevant moral authority. For Gandhi was concerned primarily with distinguishing who should be encouraged to undertake civil disobedience in general from those who are not yet fit to disobey, even when there is an objective need for civil disobedience. He believed that the British Raj had become inherently evil and did not deserve obedience. There is no political obligation to cooperate with an evil regime. But this does not automatically give the people the right in the sense of a moral authority to disobey. As late as 1938, much after he had lost faith in the British Raj, Gandhi complained that, "Congress has not yet become fit to substitute the British authority. We must face this naked truth however unpleasant it may be."<sup>28</sup>

In deciding whether to punish civil disobedience in a particular case, it seems that if a person makes an unreasonable mistake, he should be given the proper penalty, even if he acquired the moral authority to undertake civil disobedience by his past behaviour. Indeed, one might even argue that those who have acquired the moral authority in Gandhi's sense have less excuse for making an unreasonable mistake. On the other hand, some of their exemplary behaviour in the past, which helped them to acquire the moral authority, may

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<sup>26</sup> *Supra* note 19 at 172.

<sup>27</sup> Raghavan Iyer, ed., *The Moral and Political Writings of Mahatma Gandhi: Civilization, Politics, and Religion*, vol. 1 (Oxford: Clarendon Press, 1986) at 246.

<sup>28</sup> *Supra* note 10 at 76.

also help to provide mitigating circumstances when considering punishment for their present disobedience.

We have examined Gandhi's sense of right to civil disobedience and compared it to that of certain liberal thinkers. Rawls, Dworkin, and Raz seem to use the expression right to civil disobedience in the same sense. The difference is that while Rawls and Dworkin think that we have a right to civil disobedience even in liberal democracies, Raz thinks we do not. Raz can be criticized for not allowing us the right to civil disobedience in liberal democracies.

There are plenty of examples of situations where civil disobedience is justified not just in third world countries, but even in affluent liberal democracies. For even in the latter there are disadvantaged people (for example, Aborigines in North America) who are dominated by the powerful sections. Raz's view that in such cases civil disobedience is justified but there is no right to civil disobedience implies that there is no claim on the authorities to tolerate the civil disobedient. The civil disobedients could therefore be given the full penalty even when they are reasonably wrong and indeed even if they are right. Also, they could be prevented by the authorities from carrying out their civil disobedience.

We have seen that a similar corollary follows from Gandhi's views with regard to punishment of civil disobedients, though Gandhi uses the right to civil disobedience in a different way from the way that Raz uses it. Perhaps Raz should be more upset by this point than Gandhi. Gandhi was not concerned with getting a reduced sentence for the civil disobedient (though as we shall see he was concerned that the state should not prevent legitimate acts of civil disobedience so there would be the problem that this goal can only be achieved if the state is prevented from banning at least some cases where civil disobedience is not just). Raz, however, is concerned that illiberal regimes should show tolerance. It seems unfair not to extend similar tolerance to the disadvantaged in liberal societies merely because they possess what in some cases is little more than the right to talk and be outvoted in debating chambers.

Even if Raz is right that in liberal regimes people can try to persuade others of their views through legal channels, this may not be very helpful if they are unable to succeed in getting these legitimate and deep-seated grievances rectified. In India a couple of years ago when Christians were being persecuted and sometimes murdered for attempting to convert the Hindus, the Prime Minister offered as a panacea a national debate on conversion where all the relevant parties would participate. If the persecutions persist in spite of such debates, the authorities must show tolerance to Christians who civilly break the law to protest the persecutions or to protest the laws enacted by some state governments that make conversions difficult. For if the authorities did not need

to show any tolerance, they could even prevent the Christians from carrying out their protests, even when there was no serious risk of violence.

I have stressed that for Gandhi the right to civil disobedience was concerned with the civil disobedient having the moral authority to conduct civil disobedience rather than with getting a reduced sentence for the civil disobedient. But Gandhi did think the state should not try to prevent the civil disobedient from carrying out his disobedience, and so in this respect his view resembles the liberal theorists who were mentioned earlier. Thus, Gandhi says, “to put down Civil Disobedience is to attempt to imprison conscience. ... A civil resister never uses arms and, hence, he is harmless to a state that is at all willing to listen to the voice of public opinion.”<sup>29</sup> Gandhi’s view at times seems to be that, at any rate in the case of purely state-made laws, individuals should not be prevented from being disobedient (though of course they can be punished for their disobedience).

This view needs to be toned down. Even when disobedients have the moral authority to disobey the law, and even when they disobey purely state-made laws, mass civil disobedience can get out of hand and lead to violence. Gandhi was aware of this, which is why he used the safety valve argument. Gandhi thought that the risk of violence might need to be taken because not doing anything might lead to more violence.<sup>30</sup> But it would be dogmatic and dangerous to infer that civil disobedience, when it is inherently non-violent, should never be prevented from taking place. For sometimes the risk of a mass protest movement that was intended to be non-violent getting out of hand might be sufficiently great to justify the state in banning the protesters from carrying out their disobedience. The safety valve argument at best provides a claim on the authorities to quasi-tolerate the civil disobedient.

The case for the view that individual non-violent civil disobedience should not be prevented by the state is much stronger, other things being equal, for the risk of violence is much less.

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<sup>29</sup> *Supra* note 2 at 943-44, January 5, 1922.

<sup>30</sup> I have discussed this argument in *Rights, Communities and Disobedience*, *supra* note 8 c. 6.