

Civil Disobedience, Conscience and the Rule of Law

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Introuction: What is civil disobedience?

Civil disobedience involves intentional violation of the law to protest a wrong or injustice the protesters believe is sufficiently serious to morally justify that violation. In 2008, Greenpeace activists unleashed a banner at a political meeting in Alberta which said “Stelmach: the best Premier oil money can buy” during a speech by then Premier Ed Stelmach. In doing so, the protesters intentionally violated several laws, including criminal trespass – they had no legal right to be at the meeting or to do what they did. But in their view, their actions were morally justified because the government led by Stelmach was complicit in the environmental harm caused by oil and gas production.

Civil disobedience has always to be distinguished from a broader resistance to the established order. It is not intended as a step in the direction of full-scale rebellion or revolution. It is rather a targeted defiance of, or protest against, an identified law or policy. For example, in 2018, Elizabeth May, Member of Parliament for Saanich-Gulf Islands and leader of the Green Party of Canada, along with about 100 other people, was arrested for violating a court-ordered injunction to protest expansion of the Trans Mountain Pipeline which runs from Alberta to Vancouver. Elizabeth May appreciates the importance of respect for law in sustaining Canadian democracy but felt impelled as a matter of conscience to demonstrate in an atten-

tion-getting way that current policy on expanding Canada’s oil and gas production is deeply wrong-headed. At her sentencing hearing in Vancouver, May acknowledged the authority of the court to impose a fine on her but said she believes “non-violent civil disobedience has a place in a functioning democracy.”¹

A typical definition of civil disobedience runs like this: it is “a public, non-violent and conscientious breach of law undertaken with the aim of bringing about change in laws or government policies.” The goals of civil disobedience are “to publicize an unjust law or a just cause” and “to appeal to the conscience of the public” so as “to end complicity in the injustice which flows from obedience to unjust law.”

Sometimes the goals of civil disobedience are more strategic, that is, aimed at pressuring the authorities to take a particular step towards alleviation of the injustice, for example, “to force negotiation with recalcitrant officials.” Road obstructions by some Indigenous groups as part of the “Idle No More” movement were undertaken with the goal of pressuring government officials to agree to meet with certain chiefs.²

Civil disobedience pits the conscience of participants in it against an established law or policy and seeks to appeal to the conscience of others in their society so they will in turn demand change. In the above example, Greenpeace protesters were motivated by their beliefs that the oil and gas industry is doing

great harm to the environment, and exacerbating climate change in the process, and that the then-premier of Alberta was under the thumb of that industry and thus not governing in the public interest. Indeed, in a similar action protesters hung a banner from the Calgary Tower saying “Separate Oil and State,” in an obvious reference to the democratic injunction to separate church and state.

Direct versus indirect civil disobedience

Sometimes the law violated in a civilly disobedient action is the very law that protesters seek to change. This was the case in an iconic instance of civil disobedience: in 1955 a young black woman, Rosa Parks, defied the Montgomery, Alabama, law requiring city buses to be racially segregated by confining black passengers to the back of the bus, giving white passengers preference over them. She was asked to vacate her seat, in the first row of the back section, because a white man wanted to sit as close to the front of the bus as possible; she refused. Her conviction for violating the law led to a boycott of the city’s bus system and eventually to a repeal of that racist law.

But the wrongness of a law or government policy cannot always be highlighted directly. Take, for example, the 2012 legislative changes which weakened protection for Canadian waterways and were of particular concern to the “Idle No More” movement. Bill C-45 removed many bodies of water from protection under the *Navigable Waters Protection Act*. Unlike a legal command, such as “black people must sit at the back of the bus,” a law which *removes* statutory protection cannot itself be violated. Other means of civil disobedience must be found, such as obstruction of roads or the occupation of government offices.

Public opinion and civil disobedience

As noted above, non-violence is usually cited as a defining characteristic of civil disobedience. Some challenge that requirement but, not only is violence probably contrary to

the very civility of civil disobedience, it is also likely to get in the way of achieving protesters’ goals. Thinking strategically, are people more or less likely to be inspired to demand the legal or policy change protesters believe is needed if the disobedience is violent? In stable democracies such as Canada – where mass disorder and public displays of violence are rare – the public’s response to violence is likely to be strongly negative. Thus, violence is likely to hinder rather than help advance protesters’ goals. If it is important to appeal to “the conscience of the public” and to “end complicity” with injustice, then how the public is likely to react to the protest must be taken into account.

The law on civil disobedience

From one point of view, the law on civil disobedience is quite straight-forward. By definition civil disobedience involves a deliberate breaking of the law. The fact that the law was broken as a matter of conscience to point to a serious problem would not be relevant to a conviction. It is well-established in Canadian law that motive – the reason people break the law – is irrelevant to guilt or innocence. All that matters to a finding of guilt is whether you intended to do what you did and whether what you did constituted a breach of law.

When it comes to sentencing, a broader range of considerations can come into play but that a person acted on the basis of her or his conscience will not necessarily mitigate the punishment meted out. For example, when Elizabeth May was sentenced for violating an injunction, as noted earlier, the judge handling the case said May “exploited her position to encourage others to also break the law” and, because she is a lawyer, “had a responsibility to obey his order [i.e., the injunction she violated] and to persuade others to do so.”³

While other protesters at the same event were fined \$500 for their breach of the injunction, the sentencing judge said May’s punishment “had to be greater than it was for others who do not hold positions of authority. He ordered her to pay a \$1,500 fine.”⁴

That May violated the injunction as a matter of conscience did not help her one little bit.

Other cases involving civil disobedience have highlighted different factors that may be considered in sentencing. For example, in another case out of British Columbia, a woman named “Betty Krawczyk, a well-known environmental protestor” received a sentence of “10 months imprisonment for three incidents of criminal contempt.”

Several aggravating factors were considered. This was Krawczyk’s fifth conviction for criminal contempt, she had breached the injunction “with planning and deliberation” in order to “obtain publicity for her cause,” she had encouraged others to breach the order, she had “no insight into and no concern about the harm” she had caused, and she was found “likely to reoffend” ... On the mitigating side, the court noted Ms. Krawczyk’s age (78 years old at the time), her contributions to society, and the non-violent nature of her protest ...⁵

It looks again as if the fact that Krawczyk’s law-breaking was motivated by conscience did little to mitigate her sentence.

The courts deal with civil disobedience only after the law-breaking in question has taken place and people have been charged, and they are of course bound to apply the law as it is enacted by legislative bodies. But the police, if they become involved during the planning stages of civil disobedience, may be able to influence how events unfold and thus help to ensure that civil disobedient actions stay on the less legally serious end of the spectrum. Overreaction by police can of course make matters worse for all sides, but there are examples where police have achieved the opposite.

A good Canadian example concerns the protests against the 2002 G8 meetings held in and near Calgary. The Calgary Police Service (CPS) had given a lot of thought as to how its officers should respond to these protests. Some CPS members had been in Genoa, Italy, the year before where protests against the Group of Seven (the G8 minus Russia) turned violent, hundreds of protesters were arrested, many sustained

injuries and one was shot dead by an Italian policeman.

The CPS was determined the same would not happen in Calgary. It took the approach that maximum room should be given for freedom of expression and that a few delays at city intersections, for example, was worth the avoidance of police-protester confrontations that could get out of hand:

For months before the G8 meeting they [the Calgary police] met with representatives of various groups and listened to their complaints about police harassment. They also made it clear that they knew protesters had certain rights and they would respect them.

... The police kept the peace on bicycles and could be seen joking with the protesters, even offering them bottles of water. Dozens of heavily armed riot police were close at hand but always out of sight.

The protesters – everyone from the Council of Canadians to the Anti-Capitalist Collective to the Canadian Auto Workers to the Pagan Cluster – were remarkably disciplined.

When a few masked agitators started rocking and climbing a fence around the Stampede complex where G8 leaders were having a cocktail party, protest leaders turned the crowd around. They effectively isolated the fence rockers who were quickly surrounded by police and sent on their way.

One morning, black-clad thugs began a shoving match against officers in a bike unit. After about 10 minutes, a heavily armed tactical team arrived on the scene and the guys in black simply ran away. Again no one was arrested.⁶

Civil disobedience and environmental issues

Civil disobedience has the potential to contribute a great deal to improving the human condition. The injustices targeted by it in one era are replaced over time by others, as some problems are resolved – for example, women finally achieve the right to vote – and others arise or become more acute – such as the environmental crisis. In recent decades, increasing numbers of Canadians have come to believe that environmental issues, and in particular, the threat of

climate change, are so severe they are prepared to break the law to prevent further degradation, for example, by obstructing the construction of pipelines. For increasing numbers of people, saving the environment has become a matter of conscience.

Conscience, civil disobedience and the rule of law

Some would argue that if you respect the rule of law then you cannot in good conscience deliberately break the law. But this confuses “the law” with “the rule of law.”

The rule of law is a concept that addresses the role that law should play in society. It requires that law functions to curb – ideally to prevent – abuse of power,* for example, by government officials who would act corruptly, criminally inclined people who would prey on others, parents who would abuse children, businesses that would defraud customers or degrade the environment without paying the costs entailed by that degradation, and so on.

It is clear that a country can have laws without having the rule of law. For example, many of the worst atrocities of the Nazi regime were sanctioned by law. But the Nazi government was not one that abided by the rule of law: law functioned under the Nazis so very often not to protect people from abuse but to do exactly the opposite – to sanction murder, torture and other acts of the most barbaric kind.

Where problems in our system of law and government are serious, it is right – not wrong – to take a stand against them. A conscientious citizen should not abide by a law or policy that is profoundly unjust, and civil disobedience can strengthen the rule of law by leading to the correction of injustice before disrespect for the system as a whole has a chance to take hold. •

Endnote

* *One of the best contemporary thinkers on the rule of law is Australian academic Martin Krygier for whom the main question always is: What do we want the rule of law for? What is*

its essential purpose? For an example of his thinking, see https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1218982

References

1. “Green Leader Elizabeth May gets \$1,500 fine in pipeline arrest,” May 28, 2018: <https://www.ctvnews.ca/politics/green-leader-elizabeth-may-gets-1-500-fine-in-pipeline-arrest-1.3948638>
2. These quotes are taken from a presentation by Roberta Lexier entitled “What is civil disobedience?” made at a 2012 event on civil disobedience organized by the Sheldon Chumir Foundation for Ethics in Leadership, then based in Calgary, Alberta. Roberta Lexier teaches at Mt. Royal University in Calgary. See: <https://theconversation.com/profiles/roberta-lexier-597424>
3. <https://www.ctvnews.ca/politics/green-leader-elizabeth-may-gets-1-500-fine-in-pipeline-arrest-1.3948638>
4. Ibid.
5. <https://ablawg.ca/2012/02/27/i-fought-the-law-civil-disobedience-and-the-law-in-canada/> This is a blog by University of Calgary law professor Jennifer Koshan who presented some of this material at the Chumir Foundation event on civil disobedience already noted.
6. The quoted excerpt is from an article by Calgary journalist Gillian Steward in the Toronto Star: https://www.thestar.com/opinion/editorialopinion/2010/07/06/steward_a_summit_when_police_were_praised.html

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