



COMMENT

Global climate change: interests of foreigners in civil disobedience

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This paper is a reflection on the article by John Lemons and Donald A. Brown: *Global climate change and non-violent civil disobedience* (Lemons & Brown 2011, this issue). The authors suggest that 'a new approach to bring about action [on global climate change] might be required': namely, non-violent civil disobedience (NVCD). For this purpose, they proposed that their arguments and lines of discussion should be a 'conversation starter' because the idea of civil disobedience 'has not been dealt with in the scientific or environmental peer-reviewed literature and because, [...] it warrants discussion.' (Lemons & Brown 2011, p. 3).

For the most part, non-violent civil disobedience is preoccupied with the idea of political obligation. Generated from 'special bonds' that people may have in a community — whether by consent, by being a member of a political group or benefiting from it — it is claimed that individuals have an obligation towards the state and to each other. On the other hand, the legitimate authority in the prescriptive sense entails a moral right to command and, the right to be obeyed (Wolff 1970). The demand of the state to be obeyed logically correlates to the citizen's political obligations (Simmons 1999) and is defined 'to be obligations of obedience and support owed to one particular government or community (our own), above all others' (Simmons 1996, p. 250). In standard terminology, according to Thomas Nagel, this is an associative obligation when 'justice is something we owe through our shared institutions only to those with whom we stand in a strong political relation' (Nagel 2005, p. 121). Furthermore, when it concerns one's duty owed to each other irrespective of institutional affiliations, these associative obligations or special ties among co-citizenries are not necessarily in contradiction with those of cosmopolitan

requirements for 'individualism, universality and generality' (Pogge 1992, p. 48–49). Besides the climate adaptation fund which is sponsored by developed nations, for example, new and additional financing of climate change for developing nations 'refers to the idea that financial resources raised for one objective, such as climate change, should not substitute or divert funding from other important objectives, in particular economic and social development' (Moncel et al. 2009, p. 5). However, these guiding principles in transnational political duty are in order to support each other, and they 'ought to be formulated and applied through a collective political authority. Otherwise, however well-intended, these [...] claims will always result unilaterally and consequently fail to be binding' (Ypi 2010, p. 178). Similarly, 'these principles should be those that one would choose for one's own political society. This is something like Rawls's original position' (Miller 2010, p. 1785).

Following such internally¹ demanding requirements, when a duty to support co-citizenries is stronger compared with foreigners, I shall first address civil disobe-

¹It is important to note that political obligation (1) arises in the public domain, and (2) exists between the governed and state. These 2 characteristics are valid across different interpretations of the sources of, and grounds for, political obligations — be they utilitarian, intuitivist and contractual or natural rights-based theories. Combined, these obligations are associative and particularized (Simmons 1996). This leads to a difference between the obligations towards fellow citizens and obligations towards non-citizens (foreigners). Compatible with this distinction, John Simmons maintains that 'More general moral duties with possible political content, such as duties to promote justice, equality, or utility, cannot explain (or justify, or be) our political obligations, for such duties do not necessarily tie us either to one particular community or to our own community' (Simmons 1996, p. 250)

dience independently from the context of global climate change. My interest here is to consider 'whether non-violent civil disobedience should be used as a means to promote action on global climate change' (Lemons & Brown 2011, p. 3), as a result of one's obligation towards the members of one's own political community. In the second part, the interests of non-governed persons are considered within the scope of political obligation, including the authors' appeal to Gandhi's movement and autonomy to protect the interests of foreigners in conjunction with civil disobedience. In other words, let us consider whether the interests of Mongolian nomads, who did not consent to be harmed by climate change, could provide justification to resort to civil disobedience in the USA.

NVCD IN THE CURRENT US POLITICAL SITUATION

Unlike the authors, I have little insight into the actual views of those that are meant to be the targets of civil disobedience. The authors' references to the United Nations Framework Convention on Climate Change negotiation processes in Bangkok, Berlin and Copenhagen are explicit in indicating that the target is the US government. From the following quotation, however, one may conclude that the addressees are not US official institutions or other formal public structures per se but represent part of its society — in particular, those with 'other' views on US climate legislation (i.e. opposed to those of the authors). Based on the 2010 elections in the USA, Lemons & Brown (2011, p. 6) described the current US political situation as follows:

The recent elections in the USA on 2 November 2010 gave Republicans control of the House of Representatives, and reduced the majority of Democrats in the Senate [...] to 51%. Republican opposition to enacting GCC legislation is high and virtually unanimous, and supporters of GCC legislation in the Senate would need at least 60 votes to move a bill through the Senate.

The implication is that, under the current US political situation, the extent to which one can resort to civil disobedience, if at all, and the form of disobedience to be taken are contingent on the actual position of those with 'other' views.

According to Peter Singer (Singer 2002), public disobedience for the purposes of publicity or in order to test the strength of feelings of the majority is justified in cases when the majority is simply apathetic or indifferent towards the views of minorities. This is due to the fact that in a democratic system the intensity with which the views of minorities are held does not count. In these circumstances, the justification for civil disobedience does not arise from the apathetic or indifferent position of the majority; the key point is that the

minority does not impose its views. In the case of the current US political situation when 'the prospect for ratification by the United States' Senate of any treaty is dim for the simple reason that ratification requires the approval of 67 senators' (Lemons & Brown 2011, p. 6), the consequence is that if 'the majority is not willing to reconsider [its position], however, this sort of disobedience [for publicity] must be abandoned' (Singer 2002, p. 122).

Except for the above situation and the cases of revolutionary², conscientious³ and legal⁴ disobedience, this concept often presupposes diverse judgments of value. This diversity is not simply due to moral pluralism, nor does the absence of moral authority or relativism mean there is an absence of objective truth. The key issue is whether to passively obey the US government's policy or follow the will of the majority contrary to one's own view. Here, we can consider the compatibility between one's autonomy, self rule and public authority, and majority rule. These may in fact help a society to maintain political pluralism. For the purpose of this paper, it is assumed that 'others' under the current US political situation have opposing positions towards those in favor of the climate bill. Imposing one's view is perhaps one of the central elements of civil disobedience and ultimately requires a justification. This is in part, because of the implications of reciprocity for co-citizens; further, 'it does not appeal to the principles of personal morality or to religious doctrines

²For John Rawls, civil disobedience attributes to a 'just or nearly just society' only, whose basic institutional structure is well-ordered according to the general principles of justice (Rawls 2005, p. 363). In a contrary society, any form of dissent can be regarded as non-civil

³This form of disobedience is not necessarily political, e.g. pacifists

⁴Rawls rightly argued that civil disobedience 'falls between legal protest and the raising of a test case on the one side, and conscientious refusal [...] on the other side' (Rawls 2005, p. 367), and in the cases of civil disobedience one does not need to 'breach the same law that is being protested' (p. 364). This indirect form of civil disobedience allows us to avoid harsh punishment; for example, in protest against tax law one may consider breaching the traffic rules. Other examples are the cases of foreign or defense affairs when it is impossible to breach objected policies directly. Otherwise, distinctions between the direct and indirect forms are of little importance for civil disobedience. By contrast, a legal form of disobedience or test cases before the courts raise the issue of unconstitutionality of particular acts and policies of the legislative or executive branches. Termed as judicial review, it rests on a notion that no laws should violate or contradict the constitution; whereas civil disobedience is based on political principles and addressed to the sense of justice of the ruling majority. Therefore, in the current US political situation one cannot commit a legal and thereby direct form of civil disobedience, above all, due to the absence of alleged law and policy.

[... and] cannot be grounded solely on group or self-interest' (Rawls 2005, p. 365) but on a principled dissent which is addressed to the sense of justice of the ruling majority.

To compensate for the lack of insight on the views of the opposing side, this paper will follow consent-(implied) and fair play-based directions in which the prima facie duty to obey the law was traditionally considered to be justifiable. For either direction, it is presumed that obedience to the law requires no justification, but civil disobedience does. This presumption, in favour of political obligation, a duty to obey the law, derives from the justification of the state and from its legitimacy as well. Therefore, it is necessary to distinguish the spheres of political justification from one of political legitimacy as this distinction is of practical and conceptual importance. Furthermore, there are different and often incompatible political conceptions and moral views in the promotion of what is 'good life'. Given these incompatible views, and keeping in mind the demands of justice and political equality, this distinction allows for greater account to be taken of comparative moral objections than of non-comparative or permissible ones⁵.

The question is, rephrasing the earlier quote of Peter Singer: How strong does the intensity of minority views have to be in order to override the rule of the majority? Or should society have, as David Gauthier put it, morality by agreement? The answer to these questions is contingent on the type of political regime and different theories of political obligation; so is the concept of civil disobedience. Nevertheless, given that the views in society are different and often incompatible, there are 2 scenarios with regard to civil disobedience: one that regards civil disobedience as an independent concept which is less contingent on acceptance from the rest of the society than on the moral correctness of the claimed value itself and another which may suggest that civil disobedience is a dependent concept which is more detached from the debates on climate change and its ethical aspects but primarily subject to the requirements of political equal-

ity. The difficulty in addressing civil disobedience is in appraising the relationship between these 2 conditions—(1) implications for the public domain along with its requirements of equality, and (2) the justificatory normative aspects. These 2 conditions could be viewed from a global perspective. The first condition is perhaps more in favor of the 'moral conceptions' of egalitarianism based on certain principles of ethics, whereas the requirements of collective political authority may be less defensible. The second condition rather emphasizes the accounts of reciprocity and institutional arrangements with a focus on certain conceptions of justice and fairness rather than interactions between the individuals.

In addressing the above 2 conditions, let me start with the idea of entitlement to civil disobedience and thereby to highlight certain features of this concept. In society with a lack of democratic conception, according to John Rawls, people 'can plead their cause but they cannot disobey should their appeal be denied' (Rawls 2005, p. 383), whereas civil disobedience is 'only for the special case of a nearly just society, one that is well-ordered for the most part' (Rawls 2005, p. 363). For Joseph Raz, however, only those in a non-liberal state are entitled to NVCD. Otherwise, he wrote, 'in a liberal state the second argument [entitlement to perform civil disobedience] is not available in defense of civil disobedience' (Raz 1979, p. 274). For both scholars, a political regime appears to be divisive in the case of a non-liberal society. The following discussion runs counter to Joseph Raz for 'granting' an entitlement to civil disobedience in a non-liberal society. I shall argue that in such a society there is no distinction between means and ends.

The modern history of Mongolia has witnessed several mass riots, when people raised objections to public policy and law. However, only a few of them comprised a form of NVCD. It was a 'revolutionary disobedience' (Raz 1979, p. 265), dated back to the 1990s, which led to a legal recognition of private property, adoption of the new Constitution of Mongolia, and the first ever parliamentary election based on a direct, universal, and equivalent free voting procedures. Another example of protest was a civil movement led mass demonstration held at the central square of Ulaanbaatar in 2004. Although it was aimed at protesting against corruption, it led to liberalization of a Mongolian law concerning the procedures of assembly and demonstration, whereas a sanction-based system was outlawed by a prior notification. The first incident took place when the right to political participation was restricted and political pluralism in the society was not allowed to flourish. As for the second case, though the motivation for action can be questioned on the grounds that regardless of this demon-

⁵In this paper, the term 'comparative moral objections' is used interchangeably with *ceteris paribus* or 'other things being equal'. The former term is to distinguish morality as a non-comparative and 1-dimensional concept from the concept of justice, which is a comparative dimension of conflicting moral demands (Ypi 2010). The latter term is understood as 'wrong unless justified by one's thereby fulfilling some moral consideration of equal or greater weight' (Smith 1996, p. 458). This should be contrasted with John Simmons' 'non-maximizing moral theories', that is, 'all acts or institutions which avoid breaching applicable moral rules are justified, even if some are in different respects preferable to others' (Simmons 1999, p. 741)

stration corruption is illegal under the criminal law of Mongolia, it is one of those situations where the validity of action is independent of its justificatory objectives. This position rests on the idea of the human rights to 'freedom of peaceful assembly and association' (The Universal Declaration of Human Rights, Article 20(1); available at www.un.org/en/documents/udhr/index.shtml) which was restricted by the public authorities of Mongolia.

Both examples were righteous actions as manifestations of basic human rights: a circumstance, wherein a *ceteris paribus* (or other things being equal) clause is irrelevant when human rights are distinguished from those of citizens. Here, the *contra* argument may come from an objection to distinguishing between human rights, i.e. classifying them into basic and derivative human rights. Thus, both dissents do qualify as NVCD, or dissenters were entitled to resort to NVCD. A necessity for justification as opposed to mere entitlement can be ascribed from the nature of the relationship—civil disobedience opposes political obligation. This arises in the sphere of public domain (*Ius publicum*). Roman civil law was a prototype of this domain ruled by the principle '*Ius publicum privatorum pactis mutari non potest*'. The Laws have their effect, which is independent of the will of particular persons, whereas some people, due to their particular relationship to the matters of civil law are regarded as citizens (Domat 1850). This a clear distinction between the private and public domains of law. As a consequence, a duty to obey the law 'arose out of special relationships between human beings, not out of the character of the action to be done or its effects' (Hart 1955, p. 179), i.e. a relationship between the citizens and state (subject and sovereign) bounded by a political document – a constitution.

It is presumed that a public authority represents the interests and views that dominate or prevail in that society; so do its policies and laws. The majority may assert an indifferent or opposing position towards the views of minorities. Therefore, dissent of a minority group using civil disobedience, though addressed to the public authority, is an appeal to convince the majority that, for reasons of justice and fairness, their views have equal or greater weight than those of the majority. The minority, following the clause *ceteris paribus*, has the burden of justifying their resort to civil disobedience by appealing to those principles and values that were established in the constitution. In this sense, civil disobedience is aimed to 'correct the defect' of the (nonetheless legitimate) democratic regime which is in favor of the majority.

On the contrary, the 2 Mongolian cases of dissent described above did not address the rest of the society but were aimed to oppose an illegitimate state as it had no justification in making and imposing rules. They

also exposed a deficiency in political obligation, that is, absence of any correlating reasons (except a fear from severe punishment) or moral duties to comply on the part of those upon whom those rules and laws are imposed. In this light, I subscribe to Rawls' attribution of NVCD as 'only for the special case of a nearly just society, one that is well-ordered for the most part' (Rawls 2005, p. 103). In a nearly or reasonably just society any consideration in support of civil disobedience, unlike the Mongolian cases, has to overcome further conditions. For example, there are reasonable grounds to question the appropriateness of civil disobedience when a right to political participation is granted and lawful channels for civil objections are open to all; then a condition of the last resort must be met. Rather convincing arguments for the appropriateness as a qualifying criterion are concerned with the matter of tactics. This is due to the fact that civil disobedience is a form of public action, and thus, factors like when to protest or the proportionality of undesirable outcomes are amongst the validating criteria.

In essence, civil disobedience opposes the 'legally established democratic authority' (Rawls 2005, p. 176) and those policies and laws that were agreed or accepted upon the direct or indirect consent by the ruling majority. If they were well accepted, we can consider those policies and laws to be desirable and fair, other things being equal. According to the *ceteris paribus* clause, the burden to justify the rightness of its underlying claim rests on the dissenters. Furthermore, civil disobedience should not impose its claims, but rest upon a voluntary acceptance by the rest of society. Otherwise, and when 'there are no moral authorities who can judge whether the disobedience is justified or not' (Raz 1979, p. 270), or in the absence of a rational criteria of justice, provided that pure procedural justice exists, there is a duty to obey the law. From this point of view, it is reasonable to claim that an unjust law or policy may not be a sufficient reason to justify disobedience. Similarly, one may have a righteous reason yet civil disobedience is not justified given the fact that 'there is also an upper bound on the ability of the public forum to handle such forms of dissent' (Rawls 2005, p. 374), when mutually exclusive dissent actions are in place, for example. Therefore, civil disobedience is 'exceptional in being one beyond the bounds of tolerance, beyond the general right to political action' (Raz 1979, p. 275).

IUS PUBLICUM AND THE INTERESTS OF THE NON-GOVERNED

The concepts of citizenship and sovereignty do not apply to Mongolian nomads, who can be described as

'non-governed' persons. In other words, it should meet internally demanding requirements of justice and equality on the part of the US. However, given the fact that civil disobedience is political action by nature, and a phenomenon which arises in the public sphere of the relationship between the sovereign and governed, it is improper to justify NVCD by appealing to the US citizen's sense of sympathy, love and charity or generosity. Whatever the motives behind them, these 'first moral principles' are deficient in offering the justification for civil disobedience or the provision of the normative grounds to resort to protest.

Morality with its capacity to extend across borders has played a crucial role in global poverty alleviation. Even taking a monist view by assuming that the requirements of justice and morality are the same, there is no obligation to assist others unless people are in absolute deprivation. Otherwise, by imposing a personal moral commitment upon fellow citizens, one will violate the boundary of civil-political union as a form of unilateral action. According to the principle of equity the only 'arbiter on appropriate course of action remains the individual and the normatively relevant relation is in this case the one entertained with oneself' (Ypi 2010, p. 176). On this basis, the statement that civil disobedience 'can occur when a citizen disobeys a law that he or she believes to be immoral, or when a citizen disobeys a law because he or she believes a moral right to someone has been denied, or when a person believes that morally wrong public policies or laws need to be changed' (Lemons & Brown 2011, p. 3) is contestable. This definition rather corresponds to 'conscious disobedience' which is characterized as a personal moral commitment. Importantly, issues like fairness, justice or equity are indifferent for the 'first principles' of morality (Murphy 1998, Nagel 2005, Ypi 2010).

Owing to the nature of civil disobedience, it is coherent to address this issue from the perspective of constitutional arrangements. The point is that this issue of 'domestication' means that the interests of Mongolian nomads and those of citizens of the USA are indifferent to each other. It is a challenge to the concept of sovereignty, as any reference to morality has to respect *ius publicum*. In multilateral environmental treaties, there is a growing recognition of values that extend beyond the identity of a specific community or nationality. Concepts like community of interests⁶ or common her-

itage of humanity⁷ are impartial by nature as they do not recognize any identities and related privileges but recognize values. Values that create an obligation of *erga omnes* (Latin equivalent of 'towards everyone and all') specify obligations that are owed to the international community as a whole (Rai et al. 2010). The latter concept is particularly relevant—being one of few arrangements that are set to balance sovereign and global interests—and universal in part for its normative content due to its impartiality as opposed to the doctrine of common concern which has been embodied in the UNFCCC.

However, none of these principles are absolute if we consider them from a legal positivist view, wherein 'consent' remains the ultimate criteria of legitimacy. The magnitude of the 'consent' is best described by the legal maxim *par in parem non habet (iurisdictionem)*—an equal has no power over an equal; this principle, in the first place, postulates that sovereign states are equal. This would suggest that, if the USA has made this decision, then there are no grounds to blame it for being outside of the Kyoto Protocol. Similarly, the Democratic People's Republic of Korea cannot be 'blamed' for violating the non-proliferation agreement, since the country is not a party to the Treaty on the Non-Proliferation of Nuclear Weapons. However, the difference between these two is that US policy reflects the will of its people endorsed by its legitimate majority as shown by the current US political situation. The resort to civil disobedience on the grounds that the USA has a duty to ratify the Kyoto Protocol is not totally convincing, provided that the current US political situation remains valid.

The Gandhian movement and the concept of *Satyagraha*⁸, quoted by Lemons & Brown (2011), is equally relevant to the justification of civil disobedience, as well as the issue of sovereignty. Based on requirements imposed by consent as the manifestation of a state's sovereignty and their equity (discussed above)—simi-

⁶This principle was recognized and endorsed in 2 major normative documents on shared waters, the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the UN Convention on the Law of the Non-navigational Uses of International Watercourses (see Liu et al. 2011)

⁷This concept offers a tool that enables a global approach to the protection of nature and the environment across the state borders and has been recognized in several international treaties including the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967), Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), the Agreement on Governing the Activities of State on the Moon and Other Celestial Bodies (1979), and the UN Convention on the Law of the Sea (1982) (see Rai et al. 2010)

⁸Central to Gandhi's movement was the concept of 'Satyagraha,' which commonly translated means to 'hold firmly to the truth' and also provided that to be binding all state laws and policies had to be truthful and, as well, all untruthful laws and policies had to be resisted even if by NVCD means' (Lemons & Brown 2011, p. 8)

larly, people's autonomy and equity—it is worth looking at the relationship between consent and Satyagraha (to hold onto the truth). The difficulty is whether to emphasize consent—and thereby respect for autonomy, self-determination and sovereignty,—or to focus on the truthfulness of the danger of climate change. For the advocates of liberalism and self-determination, with its pluralist and diverse values and viewpoints, the threat lies not in the error or misguidance in judgment but in intolerance. Truth then, as opposed to its epistemological characteristics, is the 'first casualty of the pluralist agenda' (McGrath 1994, p. 3). The same conclusion, however, from the standpoint of impartiality would be that 'a limit somehow be drawn to appeals to the truth in political argument' (Nagel 1987, p. 227).

There is a parallel between the first scenario of valuing consent and respecting autonomy, and the 2 Mongolian cases of dissent: both are exempt from justification, but on different grounds. There is no requirement for the integrity of action and its justificatory objectives. We are reminded of the protest against corruption in Mongolia discussed earlier. Perhaps if we assume that one is entitled to civil disobedience, because of pluralism, then there is no difference between civil disobedience and freedom of expression or demonstration. Otherwise, the threat of climate change as an argument in support of change or adoption of relevant policy is not counted, since pluralism is independent of the content of views. Indeed, freedom of expression is not contingent on one's factual knowledge or on the accuracy of data. In the case of the current US political situation, therefore, the maximum one may expect of the dissident is to disassociate their position from the current US public policy in a public manner and to tolerate in the meantime the views of others as other autonomous people that are equally entitled to pursue their own visions. This argument is equally applicable to climate activists; if adopted, then a status quo in the current US political situation ought to be preserved, since 'it is alright for the majority to use political power in the service of their opinion' (Nagel 1987, p. 231).

The political legitimacy of the public authority in general or its actions in particular are often questioned. Is it a sufficient or necessary condition to obey the law? Arguments in this regard stem from both political and legal scholars. Some, such as Joseph Raz (Raz 1986), deny the incompatibility of legitimate authority with one's personal autonomy and reasoning. Other requirements, then, to validate political obligation and thereby, the prima facie duty to obey the law, are focused on substantive content. Whether utilitarian, contractual or natural rights-based, theories of political obligation support certain transcending ideals or conceptions of the 'good life' and comprise 'those which discover a possible convergence of rational support for

certain institutions from the separate motivational standpoints of distinct individuals; and those which seek a common standpoint that everyone can occupy, which guarantees agreement on what is acceptable' (Nagel 1987, p. 218).

Partiality to certain ideals of the 'good life' or principles like consent has been criticized from the position of traditional liberalism and liberal neutrality. It is unacceptable for a public authority, given the controversial nature of the contested issue (the debate on climate change), to take sides, and thereby pressure one group in society to comply with values that the other group rejects in principle. Here, the idea of political legitimacy can be recast within the context of neutrality and non-arbitrariness. Its demanding claims for political obligation are somehow different from those of contract-, reciprocity-, utility- or consequence-based arguments.

Neutrality and non-arbitrariness are not due to tolerance, relativism or plurality, but due to demanding claims of imposed coercion which claims normativity in their coercive act (Ypi 2010)

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