BETWEEN SUBVERSIVE AND CONSTRUCTIVE TERRAINS OF POLITICAL ACTION: CIVIL DISOBEDIENCE AND THE PROBLEM OF VIOLENCE AND PUNISHMENT

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ABSTRACT

The transforming conceptualization of political obligation and the changing perspectives on the rights of the citizens against state authority entails the reconsideration of civil disobedience as a subversive and constructive political action. The definitional and justificatory aspects of civil disobedience provide a fertile field of theoretical analysis to contribute to the conceptual upgrading of the phenomenon in contemporary age of political philosophy. This thesis particularly focuses on the question of violence and punishment as one of the most controversial issues within the literature. My effort to construe these problems thoroughly relies on the comparative examination of the foremost illustrative approaches to the idiosyncrasies of civil disobedience. On the basis of the puzzles that I inferred from the existing patterns of argumentation, I elaborate on violence and punishment from the angel of fair play account that I consider as a useful and plausible means likely to contribute to the ongoing debates. Hereby, I am arguing that nonviolence and avoiding punishment are preferable not due to the conventional explanations that are weak in the face of claims in the opposite direction, but due to the *prima facie* duty of fair play, according to which use of violence and refusing penalty would be unfair to the fellow cooperators who are subject to the rule of law in the polity.

Keywords: civil disobedience, law, democracy, violence, punishment, fair play

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TABLE OF CONTENTS

> The government assures the people that they are in danger from the invasion of another nation, or from foes in their midst, and that the only way to escape this danger is by the slavish obedience of the people to their government. This fact is seen most prominently during revolutions, but it exists always and everywhere that the power of government exists.
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> Leo Tolstoy, *Writings on Civil Disobedience and Nonviolence*

INTRODUCTION

Political systems produce outcomes that are not favorable for all members of the society for a number of reasons. Among the sources of problematic outcomes may lie asymmetric relations of power, unjust distribution of the resources, material inequalities, implementation of unfair laws and policies, official mechanisms of pressure, societal norms ostracizing minority/alternative practices and many other means or processes that could take pages to count. The generation of such outcomes brings the question of resistance and the potency of subordinated agencies to encounter the prevalence of the injustice occurred.

Actually, there are various ways in which dissident groups can involve in the act of resistance. These might be revolutionary and system-oriented, or limited in scope and methods as regards to the ultimate goal and the target of resistance. In the latter case, the concept of *civil disobedience* appears to be one of the most relevant as well as powerful political actions of resistance that can be taken by the dissenter citizens in their opposition to particular practices of the state. For a political scientist who is interested in the ways of struggle against state actions, therefore, the study of civil disobedience has primary significance in its relation to the notions such as political obligation, state authority and legitimacy, democratic participation, collective action and civil society.

Academic discussions on the subject matter predominantly reside to the disciplinary area of political philosophy within which there are various issues and questions concerning the conceptual framework of civil disobedience that merit close scrutiny. My thesis particularly focuses on the problems of violence and punishment in civil disobedience practices. These are the two aspects of the phenomenon upon which the literature displays

considerably divergent patterns of reflection. As I started to deepen my due attention on them, I realized that there are some theoretical puzzles that need clarification as well as likely contribution of further perspectives. In this respect, I came up with a couple of questions to be addressed for a thorough elaboration of the relationship between violence and punishment, and civil disobedience. For instance, in what sense abstention from the use of violence and acceptance of punishment are compatible with the definitional, justificatory and functional elements of civil disobedience? Under which circumstances could permissible means of violence and avoidance of penalties be unproblematic for a justifiable disobedience? What is the moral basis, if there exists one, which makes nonviolence and accepting punishment more preferable? And finally, what would be the significance of such morality in terms of the definition and justification of civil disobedience?

In my effort to plausibly respond to these questions, I will employ the following methodological strategy. Since the consideration of violence and punishment requires a conceptual background on which the analysis will rely on, I will portray the decisive characteristics of civil disobedience as a peculiar form of political action, and delineate the ways in which it is vindicated against the supervision of judicio-political authorities. For my own purposes, I will not choose a particular school of thought or a single philosophical approach as a reference of discussion. Instead, I will constitute a comparative examination of the most common questions from different viewpoints. Hereby, I will attain a comprehensive picture of the possible patterns of thinking about the controversial issues of civil disobedience. Moreover, I will also be able to see what is missing or problematic in those lines of arguments, and thus to contemplate alternative paths of conceptualization.

In light of these cautious concerns, I have two main argumentative purposes to be substantiated in the thesis. What I want to call the *general* purpose refers to the rethinking of civil disobedience in broader lines of politico-philosophical discussion. Accordingly, I want

to indicate that civil disobedience is not an outdated phenomenon pertinent to the socio-political context of the 1960s and 1970s, but still a critical question warranting reconsideration together with the changing perceptions of the relationship between state and its subjects. In particular, it would be misleading to claim that the definition and justification of civil disobedience are already settled down, and that there is no need to construe them in contemporary political debates. On the contrary, an in-depth elaboration of these domains gives evidence to the existence of several question marks on the idiosyncrasies as well as the justifiability conditions of civil disobedience.

The *specific* purpose of the thesis, on the other hand, is to argue that the use of violence to a permissible extent, and avoidance of punishment are not only unproblematic for the definition and justification of civil disobedience, but they are also not absolutely necessary tools to define and justify this form of protest. However, they seem to be problematic from another perspective, the fair play account. From this point of view, one's appeal to violence and refusal to be punished would be unfair to the fellow citizens, assuming that they are the members of the same cooperative venture of social scheme. Such a perspective proposes a moral basis for nonviolence and accepting punishment, which is different from and in my opinion, stronger than the conventional ones. This exposition does not attempt to present fair play account as the best way to articulate moral duties of citizens that they owe to each other. Instead, it tries to show a useful and plausible applicability of fair play perspective in the considerations of civil disobedience.

It is also worth mentioning certain limitations of the thesis. Although the circumscription of the subject in question might have some advantages due to a focused basis of discussion, it might also lack potential advantages that are likely to emanate from wider conceptions. For instance, the thesis does not cover nor benefit from theories of political violence or from various theories of criminology that could deepen the level of analysis.

Thereby, first it could have been revealed to what extent political and psychological roots of violence can be reconciled with civil disobedience, and second it could have been interrogated in what ways criminological perspectives of punishment can overlap with politico-moral motivations of civil disobedience. Furthermore, it is remarkable that fair play account is also far from being unproblematic. Some of its premises are powerfully criticized and deconstructed in a number of ways. Therefore, its application to civil disobedience is also open to legitimate criticisms as well.

Being aware of these restrictions, I will structure the skeleton of the thesis in the following way. The first chapter will concentrate on the definitional properties of civil disobedience. There I will first talk about similar forms of resistant political action that are confusable but not same as civil disobedience. I will proceed with the features intrinsic to the concept that will be followed by its various forms at the level of practice. The second chapter will more get closer to the heart of the discussion by delineating the justificatory and functional composition of civil disobedience. In a nutshell, the first two chapters will not only provide a preparatory step to the examination of violence and punishment, but they will also serve to the accomplishment of the first aim of the thesis that I mentioned above. The final chapter will be dedicated to an extensive problematization of violence and punishment in relation to civil disobedience, relying on the conceptual tools supplied in the previous chapters. The introductory synopsis of fair play account will initiate an alternative angel of morality that I will seek to employ for my approximation to the subjects under scrutiny.

The literary introduction of the term is usually attributed to Henry David Thoreau primarily due to his rejection of poll tax opposing the Mexican-American War in the mid 19th century. However, it is possible to date back the practical implications of civil disobedience until the times of Socrates when he accepted the punishment for the crime that he did not accept. In one sense, even though the neologism of the concept is relatively recent, the idea of

civil disobedience does not seem to be so new. As Tolstoy (1987) phrased it remarkably in one of his essays, as long as there will be governmental power in one form or another the question of civil disobedience will continue to exist as not only a subversive but also constructive challenger of its authority.

CHAPTER 1: AXIS OF DEFINITION: AN OUTDATED PROBLEM?

An in-depth theoretical analysis of the notion of civil disobedience entails the discussion of the definitional aspects of this peculiar type of political action. In terms of the ways in which civil disobedience is delimited conceptually, there are two kinds of propensity within the literature on disobedient conduct. The first trend displays a rather reluctant attitude to the definition of the term and is inclined to frame it in a 'minimal' sense (Hall 1971). Apologists of this tradition accentuate the contextual or 'paradigmatic' dimension of civil disobedience whereby the notion's justification outweighs its definition on the basis of significance (Brownlee 2004). The second trend, on the other hand is likely to give emphasis on the idiosyncrasies of the concept, and seeks to deploy a specified definition. Generally speaking, the descriptive ramification of civil disobedience is attempted both by explicating the features of the notion, and by uncovering what makes it different from other similar sorts of political action.

The centrality of the definitional aspects of civil disobedience as regards to violence and punishment as the foci of the thesis lies in the fact that without understanding what is peculiar to the concept, it is very difficult to argue for or against the use of violence and the condition of punishment thoroughly. The main questions that will be addressed in this chapter are as follows: what kind of a political action is civil disobedience? Why do citizens appeal to it? For what purposes do they choose to civilly disobey the rules of the state? Are there some limitations to its scope? What kind of strategies and tactics can they develop? Actually, there are no single answers to these questions. As I will try to argue, although they have their own strength in some respects the varieties of qualification of civil disobedience are open to further questions and entail rethinking of the concept according to the changing perspectives of political obligation. At any rate, I am disposed to admit that it would be better to have a solid rather than an ambiguous basis of definition in order to evaluate the act and those who

engaged in it, legally and judicially. But at the same time, I would also note that if the descriptive elements of the concept is over-specified or excessively multiplied, one would face the austerity to identify any particular practice as civil disobedience.

For my own purposes, I will structure the chapter in the following way. First, I will begin with the preclusion of various instances of encountering state authority that are similar in some respects but essentially different from civil disobedience. Then, I will proceed by delineating what I want to call as the narrow versus comprehensive perspectives on civil disobedience. Basically, the first one refers to the elaboration of the term in a limited sense whereas the second one approaches it extensively. The final section will be dedicated to the different types of civil disobedience. There I will elaborate the notion according to the varying objectives, motivations and tactics in challenging the sanctions of the state.

1.1 Exclusive Definition: What is not civil disobedience?

Before trying to understand what is so special about civil disobedience, it is plausible first to conceive what it is not. In fact, most of the arguments on certain aspects of civil disobedience are related to the manner whereby the phenomenon is separated from other types of resistant challenge of laws and policies. It is another way to define or describe civil disobedience by accentuating what cannot be regarded as a representative of this peculiar practice. Actually, there is a common bias within the literature to highlight the fact that not every episode of subversive action that is aimed at a singular application of state policy, exercise of a law or implementation of governmental measure can be labeled as an example of civil disobedience.

A typical differentiation is established between civil disobedience and several forms of protest, sit-ins, freedom rides, demonstrations, boycott in public spaces or rent strikes. It follows that such resistant actions also target at a particular law, policy or sanctions of the governments, however they cannot be considered as stigmas of civil disobedience, instead

they could only be subsumed into the general category of freedom of expression (Taylor 1969, 100-101). In other words, such cases belong to broader groups of political communication but cannot be labeled as examples of disobedient challenge, either because of the absence of alternatives that the dissidents could make choices among, or because of the inappropriate expansion of the freedom of speech argument (Cohen 1969, 167-175). Therefore, in order to characterize an insurgent political action as civil disobedience, there should be a violation of law in the first place. Namely, it does not matter "however vehement, radical, or extraordinary is one's protest, if he does not break the law he has not been disobedient" (Cohen 1971, 4).

The idiom of breaching the laws raises another distinction, one that separates civil disobedience from simple criminal activity. First of all, although the term contains features of crime due to the violation of a law, it is necessary to underline that "there is no such crime as civil disobedience itself" (Brown 1961, 671). Secondly, whereas criminal activities are typified according to the unfair advantage expected from or aimed by the very involvement in the act, a civilly disobedient does not motivated by such concerns but he possesses some moral reasons for breaking the laws. According to Mark Francis, civil disobedience is a matter of conscience and a personal concordance with morality. He goes further by saying that the person does not necessarily have to have political motives, but is substantially inclined by "a moral sense; an inner voice; or in the words of Hannah Arendt, men having intercourse with themselves" (Francis 1981, 18-21).

However, it is terminologically not sufficient to highlight the virtue of morality in one's opposition to state authority. There might be other occasions where an individual is stimulated by some sort of an adherence to morality, objects to existing laws but still cannot be identified as a civilly disobedient. One example of such instances would be the phenomenon of 'conscientious objection/refusal'. It is usually referred to the rejection of

compulsory military service which was first introduced after the French Revolution in 1798, but the debates on its refusal became popular especially after the First World War pioneered by the War Resisters' International WRI established in 1921 (Speck & Friedrich 2008, 153-154). For the sake of the discussion, it is salient to emphasize that conscientious objection does not necessarily problematize the very law of conscription, but it is primarily a personal demand to be held exempt from the execution of this or another law (Lefkowitz 2007). Though, some may also argue that the refusal of military service should not be limited to a personal appeal but has to be considered for all who are subject to that law (Parla 2008, 96).

In *A Theory of Justice* Rawls (1983) stresses another point of difference between civil disobedience and conscientious objection. He notes that whereas conscientious refusal does not have to rely on a political motivation or to invoke issues of social justice, disobedient subversion should be inclined by a political rationality whose main concern has to be the constitution of a 'commonly shared conception of justice' among the members of society. But most importantly, conscientious objection can be recognized as a legal right of the citizens, as it has already been in some countries, whereby the objector would not break any law but act totally 'within a legal framework' (Cohen 1971, Hall 1971). In that sense, since "the refusal of groups of men to become state servants, officials or soldiers, does not prevent the state from carrying out its policies" it can easily "tolerate refusals of 'personal service' without permitting or opening the way to general nullification" (Walzer 1970, 136-137).

A final disanalogy is referred to what is called as revolutionary upheavals, rebellions or militant action. Setting aside the fact that these terms might not connote to the same and identical type of political resistance, they are usually performed to more extensively oppose to the legal order by way of violently obliterating its terms of operation (Rawls 1983, 365-369). Such acts primarily seek to radically alter the structure of the state, unlimited to a set of laws or policies; while civil disobedience is an appeal to the reformation or replacement of

particular laws of the state (Lefkowitz 2007, 204-205). In other words, revolutionary movements aim to eradicate the entire body of governmental authority on the grounds that the insurgent groups do not recognize its legitimacy at all.

> The essential difference between the two lies in this: the civil disobedient does, while the revolutionary does not, accept the general legitimacy of the established authorities. While the civil disobedient may vigorously condemn some law or policy those authorities institute, and may even refuse to comply with it, he does not by any means intend to reject the larger system of laws of which that one is a very small part (Cohen 1971, 44-45).

Taking certain cases in history into account, this final distinction is very significant in terms of the definition of civil disobedience. It is a common tendency in the literature of civil disobedience to demonstrate Henry David Thoreau, Mohandas K. Gandhi and Martin Luther King, Jr. as the typical examples of civilly disobedient resisters. Rethinking the last disjuncture, however, it is quite questionable whether their stance is suitable for the taxonomy of civil disobedience. In his illuminative article on these three cases, David Lyons (1998) argues that none of them can be regarded as civil disobedience notwithstanding the disobedient character of their conducts. Thoreau's subversion to chattel slavery, Gandhi's opposition to the colonial rule, and King's problem with the Jim Crow system of racial segregation and white supremacy, Lyons claims, was about the necessity of a fundamental change at the systemic level. In this sense, "it would not have been reasonable for Thoreau, Gandhi, or King to have regarded the prevailing system as sufficiently just to support political obligation" (Lyons 1998, 40). In other words, it is hard to believe that they did recognize the general legitimacy of the political system to which they were subject. Therefore, their political resistance extends the limits of civil disobedience that presumptively acknowledge the entire mechanism of rules as legitimate.

These endeavors clearly help one not to confuse civil disobedience with its conceptual relatives. But at the same time, it is worth mentioning that the terminological demarcation lines may become permeable in some situations. An instance of civil disobedience might generate a widespread sense of indignation throughout the society, which might seize a

revolutionary character at the end. Similarly, a case of conscientious refusal might attract resentments of wider range of citizens that could turn into an episode of civil disobedience. In the final analysis, however, such distinctions contribute to a methodological vantage, whereby not only the philosophical justification of civil disobedience but also its empirical projections in real life situations could be treated by more appropriate analytical tools. Now, having precluded what civil disobedience is not, it is time to consider the inclusive elements of the concept.

1.2 Inclusive Definition: What is civil disobedience exactly?

The answer of this question entails rethinking of the concept of political obligation. In very broad terms, it assumes a binding relationship between the rules of the state and individuals who are subject to them. It is beyond the purpose and limits of this study to excavate the ways in which a general duty of citizens to comply with the laws of the state is postulated thoroughly, although there are many accounts of political obligation that come up with different perspectives. However, as the term implies the refusal of obedience civilly it is necessary to interrogate in what ways the political duty of obligation is overridden. Indeed, it is relevant to ask whether there is also a 'duty' of civil disobedience (Thoreau 1962) or whether people are 'obliged' to disobey the laws in certain occasions (Walzer 1967). To that direction, I think that Sidney Hook (1971) proposes one of the most remarkable suggestions. According to his strikingly skeptical view, "not only are we under no moral obligation always to obey unjust laws, we are under no moral obligation always to obey a just law. One can put it more strongly: sometimes it may be necessary in the interests of the greater good to violate a just or sensible law" (Hook 1971, 55).

As a matter of fact, it is important to underscore the bifurcated nature of the concept in question. In Rex Martin's words, what is at stake is not merely disobedience but civil disobedience, which is more than breaking the laws in 'non-revolutionary and justifiable'

terms (Martin 1970, 123-125). Hence, while mentioning about the obligation not to obey the laws, if it exists, one has to specify what kind of disobedience is under scrutiny. One axis of this contemplation refers to the peculiarities of the civilly disobedient conduct, whereas the other axis is related to the conditions under which an act of civil disobedience can be justified. The latter will be construed in the second chapter. At this point, I will pay attention to the initial axis with a particular aim of circumscribing what makes a subversive practice civilly disobedient.

1.2.1 Narrow Account

One way of drawing the boundaries of civil disobedience is to minimize the conceptual ingredients of the phenomenon. As the representative of the minimalist account of civil disobedience I take Robert T. Hall's (1971) definition of the term. Accordingly, the configuration of the civil disobedience contains two key elements. This idiosyncratic subversion of state authority must be illegal in the first place. In this respect, a particular law has to be violated in one way or another in such a way that the person who engages in civil disobedience breaks that law due to a certain motivation in mind. One might rightly ask the question by what kind of motivation he/she has to be inclined in order to identify the person as a civilly disobedient. Hall's response would raise the second element of the definition. Presumably, the disobedient person must have a moral justification for the violation of the law (Hall 1971, 15). Unless the dissenter individual has a moral reasoning for breaking the law, Hall argues, his/her conduct will be featured as a criminal act, which implies some sort of an immoral ingredient making it unlikely to be justified.

As I mentioned earlier, the problem of justification will be touched in the second chapter, and thus what he would have meant by moral justification is put aside at this part of the thesis. However, it would be a further step to investigate this first trend of definition. There might be some reasons as to why it is better to narrow the definition of civil

disobedience. Basically, Hall offers two rationales for not adding other properties to the definition. In the first place, he says, further qualifications such as being public or nonviolent would undermine the moral justification of disobedient practice in the sense that acts such as Thoreau's refusal to pay the poll tax on moral grounds could not be recognized as civil disobedience just because of the over-specification of publicity element. At the end of the day, it would lead to an impasse situation where it would be almost impossible to identify any action as civil disobedience. In the second place, further restrictions "on the concept produces linguistic difficulties" (Hart 1971, 17). For each and every action that due to some respect cannot be considered as civil disobedience, it would be necessary to introduce another category. This would lead to a terminological inflation whereby a superfluous confusion would be created.

In a recent article seeking to build up a paradigmatic approach to the notion of civil disobedience, Kimberley Brownlee (2004) holds a similar but a slightly different attitude. She refuses to give a comprehensive definition of the term with rigid implications of what civil disobedience is and what it is not.

> Since, however, people undertake political dissent for a variety of reasons and their dissent takes a variety of forms, it is not possible to draw sharp lines between civil disobedience and other types of dissent such as conscientious objection, terrorism and revolutionary action (Brownlee 2004, 339).

By no means, she wants to say that one cannot distinguish civil disobedience from other exemplars of political grievance. Nonetheless, she employs a different methodology to label a particular case as an epitome of the phenomenon. She proposes to focus on each case and explore them according to certain criteria. Whether or not the case counts as civil disobedience or not, will depend on the component of 'conscientiousness' and 'communication', whereby the dissident individual demonstrates his/her protest against a law with an ultimate aim to persuade the responsible authorities to amend or remove that law (Brownlee 2004, 338). Conscientiousness refers to a psychological condition within which the

dissenters are ‘sincere’ and ‘serious’ adducing to their commitment to the reasons for disobedience and willingness to breach the laws. Communication, on the other hand, indicates to the dialogue that the civilly disobedient constitutes addressing the state, the public and to a certain extent the international community (Brownlee 2004, 346). In a nutshell, Brownlee claims that this kind of a ‘paradigmatic’ approach could better reveal the civilly disobedient character of a case by avoiding generalizations and rather excavating its particularities.

I admit that the duplication of the definitional aspects of civil disobedience might culminate in a nodal point that would make it almost impossible to analyze certain cases as examples of it. However, it is also highly probable to imagine some cases, which meet the minimal qualifications of civil disobedience but are far from being its epitomes. For instance, one can suppose a typical situation where a person involves in a series of theft stealing private property from a number of residents in order to distribute them to impoverished dwellers. Thereby, the person violates the laws protecting property rights. But he can defend himself by appealing to morality and social justice. It is quite legitimate to say that he is conscientious and communicates with various social and political actors by raising problems of redistribution in the society. Now, the question is whether he is a civilly disobedient. Although it suffices to accord with the narrow account, it is hard to say that he is one. Before arguing more on this controversy, let me continue with the comprehensive account of the concept, which might satisfy to rejoin this question.

1.2.2 Comprehensive Account

It is also possible to respond to the question what civil disobedience is, in a more encompassing manner. It can be argued that in order to attain a precise definition of civil disobedience, it is better to expand the borders of the concept. In this sense, Carl Cohen prefers to add other components to a minimalist definition of civil disobedience.

Accordingly, he admits that acts of civil disobedience should contain the element of protest indicating a significant degree of inconvenience and sacrifice on the part of the disobedient individual, who is supposed to break the law willingly and knowingly against some form of injustice. He also admits that the person should be conscientious in the sense that he/she honestly believes in the rightness of his/her act to such extent that it is worth breaking the law. However, Cohen also argues that the violation of the law has to be deliberately public since it is not private gain but public good, which "requires that his unlawful act be widely known". Hence, the person is "very unlikely to hide what he is doing" (Cohen 1971, 16-17). This qualification adds a significant aspect that lacks in the imaginary example of the conscientious thief above. But more important than that, it is the very objective of the illegal act, which signifies civil disobedience. Notwithstanding Cohen's claim that the objective of civil disobedience does not have to be necessarily a particular law, but also a governmental policy or other organizations such as 'profit-making corporations', it is not breaking a law as such but disobeying that law or a legal sanction imposed on citizens that makes one's act civilly disobedient.

There are also other issues that are mentioned in the realm of definition. Especially, the discussion becomes quite controversial when it comes to the problem of violence and punishment. Although, both matters will be discussed in the third chapter in detail, it is worth giving some preliminary remarks about them. Basically, the literature is divided into two strands with respect to these concepts. As regards to violence, some argue that it is a prerequisite for civil disobedience to be non-violent (Pech 1969, Prosch 1965, Rucker 1966), whereas some others deny this presumption and argue for the permissibility of violence to a certain extent (Hall 1971, Morreall 1991, Raz 1991). A similar division is observable about punishment. A number of theorists hold a strict position by claiming that civil disobedience is an intolerable act, which should be punished by the state and which the person should accept

inescapably (Cohen 1969, Greenawalt 1991, Woozley 1976), while it is also claimed that punishing the person and accepting it is not a necessary condition for civil disobedience (Farrell 1977, Zinn 1997). These diversifications, I think, make it clear that an in-depth reevaluation of violence and punishment in relation to civil disobedience is an almost necessary attitude in order to contribute to the literature of the phenomenon.

A further question concerning the scope of civil disobedience interrogates the very agents who disobey the laws of the state. So far, I tried to encapsulate the methodological aspects of civil disobedience and to cover what might be the object of that subversive practice. Nevertheless, it is also relevant for the discussion to turn the gaze to the postulation of the dissident actors. One consideration that is visible in the literature goes around the exhaustion of the legal remedies of the injustice occurred. This raises the problem of the 'civil disobedience as a last resort' as to whether those who did not try to express their grievance through existing legal channels can justifiably resort to civil disobedience or not. As Hook formulates it clearly, "resort to civil disobedience is never morally legitimate where other methods of remedying the evil complained of are available" (Hook 1971, 58). But it is also possible to argue in the opposite direction. The legal system might provide certain ways to voice citizens' resentment. However, they may also fall short of effectiveness that could encourage people to display their opposition by means of disobedience (Raz 1991, 161-162). The second exposition seems to be more convincing than the first one. Among other things, not every legal framework grants the same quality of systemic resolution, and even if it is a perfect one in that sense, the urgency and deepness of the evil might require skipping intra-legal steps to air the dissent. Hence it is hard to acquiesce in the assumption that civil disobedience has to be an appeal of the last resort.

The other consideration posits the question whether it is only the victims of particular statutes, who are supposed to engage in civil disobedience. Burton Zwiebach (1975) responds

to this question in a negative way. He basically argues that if there is an unjust law in operation it does not only render a problematic situation for a particular segment of the society but for the whole population at the end of the day. “A law”, he says, “which is non-binding is not binding on anyone” (Zwiebach 1975, 156). He goes further by claiming that a non-victim who does not directly suffer from repression “has more than a right to disobey repressive laws: in appropriate circumstances, he may have an obligation to do so” (Zwiebach 1975, 158).

Finally in this section, I want to briefly talk about the socio-political conditions under which civil disobedience takes place. Indeed, some writers refer to the role of social and political context that precede the occurrence of civil disobedience. For instance, Rawls suggests that the submission to this kind of political action can only be conceptualized within the boundaries of a ‘nearly just’ society which, he says, is a democratic entity by definition (Rawls 1983, 364). Endorsing a similar account, Andrew Sabl (2001) characterizes the social geography where civil disobedience makes sense as ‘piecewise just’.

> A piecewise just society is one in which justice is prevalent – indeed, it may in the limit case be practiced perfectly or almost perfectly – in relations within a powerful ‘in’ group, but is practiced to a very small degree, if at all, in dealings with an excluded or oppressed group. In order for civil disobedience to make sense, the society in which it is practiced must be at least piecewise just (Sabl 2001, 311-312).

The notions ‘nearly just’ or ‘piecewise just’ are actually formulated to negate the embodiment of civil disobedience under tyrannical and despotic rules. For such regimes are systemically problematic and it would be opaque to challenge one aspect of the rule while recognizing its total legitimacy by means of disobedience. Another implication of these notions is that just systems of rule are also potent to produce unjust consequences. Hence, the threshold of a certain degree of justice operates as to put a minimum requirement for civil disobedience to take place.

In a similar direction, Bertrand Russell (1969) prefers to use the term democratic rather than just, to highlight the likeliness of democracies to yield grievances among their

citizens. He notes that democratic states may not succeed in exercising democratic principles that makes it quite reasonable to disobey undemocratic policies of democratic governments for the sake of enhancing liberties and higher values of democracy. For instance, Russell exemplifies, such governments may not inform their citizens about issues such as nuclear armament. In such situations, a disobedient initiative would be very helpful in uncovering the hidden intentions that are unavailable to the public (Russell 1969, 155-157). At any rate, the relationship between democracy and civil disobedience will be construed more in detail in the next chapter.

Joseph Raz (1991) takes a different approach to the sort of political regime. Basically he makes a distinction between rightful disobedience and the right not to obey the laws. It is reminiscent of the conventional debate on having the right and being right. In virtue of the fact that people could have legitimate reasons to break the laws, Raz admits that civil disobedience is justifiable under circumstances, which are not defendable from the perspective of morality or justice. However, being justifiable is not equal to, in his eyes, having the right to break the laws. To put it in another way, Raz wants to distinguish liberal state from an illiberal one that fails to guarantee people's legal rights such as political participation; whereas under the supervision of a liberal state such rights are firmly protected by law. Therefore, he says, individuals of an illiberal state have the moral right to disobey the laws, while there is no such right as to break the laws in liberal state although doing so can be right and justified. "The case is" according to Raz, "reversed in a liberal state. Here there can be no right to civil disobedience, which derives from a general right to political participation. One's right to political activity is, by hypothesis, adequately protected by law. It can never justify breaking it" (Raz 1991, 166).

As a response to Raz's argument, Lefkowitz interrogates the protection of the right to political participation in a liberal state. He claims that the recognition of the citizens'

participation encapsulates not only minimum democratic procedures such as voting, but it also entails the amalgamation of disagreements that he calls 'suitably constrained civil disobedience', both of which are basic moral rights of the state's subjects. However, he says, Raz's liberal state compels one to make a choice between obeying the laws and breaking them, of which the latter is not recognized as a right (Lefkowitz 2007, 212-213).

The functionality of civil disobedience and its contribution to the expansion of substantive democracy will be discussed together with the issue of justification in the next chapter. At the moment, though, it is worth mentioning that the moral right to and justification of civil disobedience are highly related questions. In this respect, it is necessary to distinguish having the moral right to and being right in disobedience from each other. The former does not necessarily precede the latter. However, if sufficient conditions for the latter are met in a liberal society, it is not clear why Raz insists on the assumption that still there will not be a moral right to disobey there.

The discussions above indicate the fact that it is not an easy task to depict the definitional features of civil disobedience. The variety of views on its characteristics as well as on its preconditions designates the significance of rethinking the peculiarities of civil disobedience in contemporary societies. As a final step in this chapter, I want to speak about the taxonomies of civil disobedience and elaborate on the adequateness of the distinctions offered.

1.3 Forms of Civil Disobedience

As mentioned earlier, the descriptive dimension of civil disobedience also encapsulates varieties of the practice that are not the same in terms of their objectives, motivation and tactics. On the basis of objectives, civil disobedience can be *direct* or *indirect*, on the basis of motivation it can be *moral* or *political*, and on the basis of tactics it can be *provisional* or *ultimate*. These are the most commonly proposed classifications that I observed

in the literature. In what follows, I will briefly frame what these distinctions refer to, and evaluate to what extent they are adequate.

Direct civil disobedience refers to the situation where "the law deliberately broken is itself the object of the protest" (Cohen 1971, 52). The dissident citizen problematizes the law on accounts of a moral reason or injustice, and refuses to obey its sanctions. Thereby, he/she directly violates that law in question, since "the agent considers the law he violates, or the application of that law (if it is a case of legal injustice) to be itself immoral" (Hall 1971, 31). On the other hand, indirect civil disobedience refers to the situation in which the law broken stands in an instrumental position concerning the object of the protest. In other words, the law or policy, against which the individual shows disobedient resistance, is different from the law that is violated. But it does not necessarily mean that there should be two unrelated laws. In the case of what Zwiebach calls as 'interdictive' disobedience, the violated law might not be in itself objectionable, but it is also likely "that the law is in fact being used in such a way that it supports or advances a forbidden deprivation of rights" (Zwiebach 1975, 181). The most plausible reason behind this variation is that some laws or policies such as those on nuclear armament cannot be violated directly and the opposition to which requires – within the framework of civil disobedience – violation of another law such as those regulating procedures of legal protest.

To come to a second variation, moral disobedience is about the individual's personal confrontation with the sanctions of the law. He/she has some ethical concerns that come in conflict with the compliance with the content of the law. Therefore, the rejection of obeying the law does not necessarily propose an amendment in or removal of that law. It may or may not highlight public interests. On the other hand, political disobedience is "specifically addressed to the members of the community at large and intended to influence their subsequent conduct" (Cohen 1971, 58). It aims to achieve certain political consequences such

as the abandonment of the law in question. It considers issues of justice and public interest and goes beyond the personal confrontation with political authority merely on ethical grounds. This distinction seems to be problematic in the sense that it is not clear in what ways moral disobedience is different from conscientious objection. Indeed, if the person does not necessarily demand a change in or removal of the law, he behaves as a conscientious objector who does not necessarily request the non-application of the law for other citizens as well. Hence, I think, the moral and political aspects of civil disobedience are so much intermingled with each other that it is not reasonable to separate them as to refer to two distinct forms.

A further distinction is suggested between provisional and ultimate disobedience. Basically, the distinction refers to the aforementioned discussion of civil disobedience as a last resort. Robert T. Hall (1971) argues that in certain cases there might be a possibility of a constitutional vindication of the issue that is objected by the dissident citizens. Disobedience in such situations is provisional or immediate. On the other hand, where there is no such expectation or even a possibility of a legal remedy the disobedience is ultimate. At this point, it would be legitimate to ask to what extent one can be sure of the fact that there is no chance of remedying the injustice through legal channels. This distinction, I think, has to be less related to a factual situation than a tactic-wise preference. Depending on their perception of the injustice, the citizens might choose to testify or else to ignore the availability of legal channels no matter whether the legal framework provides them the necessary means to show their dissent, or whether they are informed about these means or not.

Different forms of civil disobedience indicate multiple ways of civilly disobeying the statutes of the state. These are not very clear-cut distinctions, instead they adduce to the changing motivations, objectives and tactics that can be intermingled in certain occasions. The point is to emphasize that civil disobedience is a conscientious attempt to subvert political authority on the basis of a politico-moral motivation, which can be achieved by

directly violating or indirectly but illicitly reacting against its authorizations, as an initial or a last resort.

So far, I delineated the conceptual boundaries of civil disobedience by raising the foremost common discussions in that initial stage. Obviously, there is no singular pattern in philosophically framing the idiosyncrasies of this type of political action. One can keep the definition at a minimum level and concentrate on other issues related to the phenomenon, or one can also specify its descriptive terms to highlight what is so special about it. It was by no means my intention to settle down the issue on the ways in which civil disobedience can be defined. On the contrary, the debates I tried to cover show that even in terms of its definition it is jejune to argue that civil disobedience is an outdated philosophical problem. At any rate, such debates still warrant a cautious approximation together with the transforming perceptions of political obligation. At the final analysis, having clear lines that distinguish civil disobedience from other kinds of resistance, I think, is more useful both theoretically and practically. In terms of the thesis' subject, indeed, it is necessary understand what is peculiar to civil disobedience in the first place, in order to excavate the problem of violence and punishment that are at the center of the ongoing discussions.

Before getting deep into the analysis of the relationship between civil disobedience and violence and punishment, however, it will be a further step to talk about a second issue, which is also central to the subject matter: the problem of justification and functionality. Having a picture of the reasons and the ways in which civil disobedience can be justified, and grasping in what sense it can contribute to the social and political maps of the polity is crucial in widening one's comprehension of how civil disobedience *works*. The next chapter is dedicated to a thorough elaboration of these considerations.

CHAPTER 2: AXIS OF JUSTIFICATION AND FUNCTIONALITY

It is one of the main concerns of the theories of political obligation to justify the duty of the citizen to comply with the rules of the state and the state's right to restrict the actions of its subjects. The fundamental question is: if there is a *prima facie* obligation to obey the laws of the state, what is the philosophical justification behind it? A theory of civil disobedience, which concedes the right and even the obligation not to obey particular laws of the state, warrants the same question from the reverse angel. If people have the duty of civil disobedience under certain circumstances, in what ways can it be justified? As a matter of fact, this question is built upon two main tenets. The first one is related to the manner which insurgent citizens *justify* their disobedient act. The other one refers to the conditions under which civil disobedience is *justifiable*.

The problem of justification is also closely linked to the functionality of civil disobedience. Indeed, the justifiability of the concept goes beyond a personal matter because the appeal is *civil*, what is problematic in a particular law or policy cannot only affect an individual citizen. The whole population is under the supervision of the same set of rules and policies. "The civil disobedient" in Hannah Arendt's words, "acts in the name and for the sake of a group". The person refuses to obey "not because he as an individual wishes to make an exception for himself and to get away with it" (Arendt 1972, 76). Therefore, it is also necessary to see in what ways civil disobedience contributes to the social and political universe of the polity.

Justification and functionality are two variables that are vital to the problem of violence and punishment. Unless it is thoroughly examined how and under what conditions civil disobedience is justified, and in what terms it is politically significant; it would be cursory to rejoin the question of permissibility of violence and the inescapability of punishment. However, this realm of discussion is by no means far from deep controversies.

Especially, arguments on justifiability seem to repeat themselves around circular ideas. In this respect, the chapter will also serve to uncover these expositional austerities.

The chapter will proceed in the following way: first, I will talk about the sources of appeal that the disobedient citizens subscribe themselves in order to justify their act. This section will be followed by the interrogation of the conditions that would make civil disobedience as a justifiable practice. Thirdly, I will touch on the issue of the function of the concept as a communicative apparatus for the dialogical relationship not only between the insurgent citizens and the political authorities, but also between those citizens and the other members of the society. This part will also elaborate on the mutuality of democracy and civil disobedience, whereby the chapter will be finalized.

2.1 Methods of Justification

The illegality of civil disobedience compels the protester to offer legitimate reasons for breaching the law. In this sense, the justification of disobedient conduct is a form of 'defense' since the person acts "against the background presumption that illegal conduct is normally morally wrong" (Simmons 2005, 55). Actually, there are many ways to justify civil disobedience as a rightful act. In the literature of political obligation and disobedience, two main traditions lay in the foreground of this debate. The first one is related to the philosophical approaches in general, which expose etiological grounds for civil disobedience. The other tradition is likely to explicate the legitimate sources that the insurgent citizens ascribe to when they disobey particular statutes of the state.

2.1.1 Philosophical Approaches

In my effort to cover the etiological rationales for civil disobedience, I take Ernest van den Haag (1972) as the reference point. Haag comes up with the evaluation of three types of argumentation in favor of disobedience. According to the *anarchist* argument, there is no general moral duty to obey laws because they are seen as "unnecessary and likely to intensify

the very evils – coercion, inefficiency, conflict, oppression, injustice and suffering – they are to reduce" (Haag 1972, 15). Instead of recognizing the authority, the anarchist claim prefers the appraisal of autonomy allowing individuals to make their own moral choices. Nevertheless, as Haag objects, this line of argument is quite problematic in terms of its assumptions about human nature that cannot be substantiated or refuted evidentially. Moreover, compliance with at least certain laws might not diminish but help to expand individual and social autonomy in the long run. Bearing in mind the definition of civil disobedience, I think, the argument is also awkward since the aggregate negation of the duty to obey the law is at odds with the particularistic nature of civil disobedience mentioned in the first chapter.

The second line of argumentation Haag describes is the so-called *legitimist* approach. This way of thinking acknowledges the moral obligation to obey the laws, but this recognition is conditional. In other words, one is bounded to the rules of the government as long as it is legitimate. If the government forfeits its legitimacy in one way or another, or if "the citizens have no legitimate ways to freely elect or oust the government by majority vote, i.e., to participate in the lawmaking process", then the binding obligation will be obliterated by the right to civil disobedience (Haag 1972, 20).

Stretching a problem with the legitimist view, Haag introduces the third wave of argument that he calls as *the argument for limitation of all legitimate authority* (Haag 1972, 21). Actually, this demeanor is reminiscent of the discussion of the Rawlsian 'nearly just' society in the previous chapter. The point is that even if the government is totally legitimate as regards to the democratic processes through which it came to power; and even if the courts proclaim a particular law enacted by this government as constitutional, it does not rule out the justifiability of civil disobedience as a means of showing dissent and call for remedy. At any

rate, legitimacy is not sufficient for unconditionally surrendering one's rights to political obligation

In a nutshell, Haag argues, civil disobedience arises as a question that emanates from the 'perennial conflict' between one's own moral judgments and the orders of the state. Hereby, two principal duties come into conflict: "the moral duty to follow one's conscience, even if disobeying authority, at least in some cases, or, the moral duty to obey authority, even if disobeying one's conscience, in most but not in all cases" (Haag 1972, 23). At this point, the central question to be addressed is related to the circumstances under which the former overrides the latter. In my view, there is a simple and a complicated way of answering this question. The simple answer puts forward the sources of legitimacy one person could make use of in his justification of civil disobedience. As it will be clarified below, such a response contains serious ambiguities and might not be satisfactory at all. The complicated answer, on the other hand, interrogates when civilly disobeying laws could be justifiable. First, I will pay attention to the simple formulation.

2.1.2 Sources of Ascription

The starting point of the discussions about the justification of civil disobedience introduces the question whether there could be a *legal basis* to justify this peculiar form of political action. The most common argument reminds us the very definition of civil disobedience that accentuates the illegality of the phenomenon. Accordingly, within the framework of the rule of law legal justification and unlawfulness are two oxymoron conceptions. Hence one cannot justify an illegal act by legal means. No matter how justifiable civil disobedience in a particular context is due to the adherence to moral reasons or justice, there could *not* be a legal justification of it (Cohen 1971, 94). Yet, the answer would change due to a different interpretation of legality. Does the fact that civil disobedience is an illegal act, rule out legal justification completely? I would hesitate to say yes immediately. In some

sense, civil disobedience does not have to be seen as an external act to law. As I will mention it in the discussion of justifiability conditions in the next section, fidelity to lawfulness could make it quite possible to have a legal justification of it. Or else, disobedience can be 'intra-legal' in essence (Turenne 2004). From that perspective, the irrevocability of punishment of civil disobedience becomes also a controversial matter, which will be elaborated in the next chapter. Setting aside the argument at the moment, I want to continue with other sources of justification.

The narrow definition proposed by Robert T. Hall included the aspect of *moral justification*, which should primarily motivate the disobedient individual in his/her breaking the law. In the broadest sense of the word, moral justification refers to morally legitimate reasons that the person has in mind in engaging civil disobedience. According to Carl Cohen (1971), such reasons might either refer to a *higher law* or *authority*, or *utilitarian* motives. Now I will briefly elaborate what is meant by these terms.

Ascription to higher law or authority can be employed in two different ways. One can recall the statements of the positive law or the articles of a higher legal institution that are allegedly violated by some governmental enactment or by an order whose hierarchical status is lower. At this point, one could raise the presumptions of a supreme authority such as constitutional principles to justify civil disobedience. It could be done in such a way that the law or policy in question can be alleged to be in conflict with those principles, and thus the obedience to that law does not have morally legitimate ground anymore (Cohen 1971, 105).

The other way of doing it follows a more abstract and even a theological path. For instance Hall raises 'the doctrine of natural rights' as an amalgamation of the leading principles for an acceptable life. Adherence to this doctrine, he argues, "for the purpose of criticizing the government has been one of its perennial features throughout its long and complex carrier" (Hall 1971, 56). The appraisal of universal principles of justice, or of the

orders of God on a religious basis also constitutes a similar source of moral inspiration. However, compared to the first pattern, this would be more ambiguous due to the lack of a solid basis on which the moral justification could take place. In other words, although many would agree on the existence of at least some universal principles of justice, it would be difficult to recall them in an occasion where they are violated by the present laws.

> (a) It appears impossible to reach any objective and reliable judgment about what the higher laws command or forbid (if there be any higher laws at all); and (b) It appears impossible to reach any objective and reliable judgment about how these laws (supposing their content known) apply to concrete cases, without resort to some established judicial authority (Cohen 1971, 114).

It is possible to conceptualize the principled pattern of justification in similar terms such as 'humanism', 'idealism' and miscellaneous other views that accentuate ideals such as "justice, equality, or liberty, not because they are considered to be natural rights or because they are ordained by God, but simply because of the individual's vision of what society would be like if these ideals were more fully recognized" (Hall 1971, 61). On accounts of the practical austerity to give evidence for such principles, it seems quite uneasy for a disobedient person to justify his practice on these grounds. This raises the need to search for more concrete rationales for the justification of civil disobedience.

A civilly disobedient person might also appeal to some reasons that could be considered as utilitarian for the members of the community. By utilitarian, it is meant that according to the dissident individual not compliance with the law in question would generate better conditions for the society than in the case of obedience. In one sense, it is a rational choice for the person not to comply with the law in question since his/her disobedience would "lead in the long run to a better or more just society than would his compliance" (Cohen 1971, 120). To put it clearly, civil disobedience is said to stimulate the occurrence of a chain of events as regards to the reactions of the state authorities. This process will take the attention of the public in a way that the fellow citizens will recognize the problematic nature of the governmental practice. At the end of the day, civil disobedience will contribute to the

improvement of the social conditions of life. In any case, however, the burden of proof of the fact that the payoff of non-compliance would be greater than that of compliance is on the shoulders of the disobedient person. It is not an easy task for him/her to put forward the idea of public good in a consequentialist fashion. Indeed, governmental authorities would encounter with their own perception of public good that practically complicates the task to override it by one's own appeals to it.

These considerations touch only one side of the coin in terms of the justification of civil disobedience. They uncover the politico-philosophical tools and moral-rational sources available to the insurgent citizen undertaking his resistant action. The problem of 'what makes it justifiable' as the other side of the coin, merits also thorough scrutiny in order to supplement the whole analysis of justification. In what follows I will excavate some possible expositions encountering the justifiability conditions of civil disobedience.

2.2 Conditions of Justifiability

The distinction between *being right* and *having the right* poses a critical philosophical dilemma as to what extent the semantic difference makes sense in practical consideration. Talking about Raz's negation of the moral right to disobedience in liberal societies, I have touched upon this discussion very briefly in the previous chapter, and argued that in the context of civil disobedience being right in non-compliance and having right to do so signify two different meanings. For the sake of the problem of justification, it is worth to recall and open the debate more deeply.

In his effort to show civil disobedience as a fundamental right of the people in the polity, Zwiebach (1975) challenges the counter-argument underscoring the idea of lawfulness. It follows that civil disobedience cannot be a justifiable act since it violates the very faculty of lawfulness by undermining the authoritative character. In this sense, one cannot by his/her own initiative decide what particular law to obey and which one to disobey. However, he

argues, the idea of lawfulness also entails making of the laws not to be arbitrary. It is exactly the purpose of civil disobedience "to introduce and reintroduce" the principles ignored by political authorities "and thus to strengthen rather than weaken lawfulness" (Zwiebach 1975, 149). It is the moral duty of the responsible citizens, he goes on to claim, to 'pick and choose among laws' and decide to comply or not to comply with them.

> Indeed, on the question of picking and choosing, I would go further and suggest that, with appropriate standards, a citizen cannot avoid picking and choosing which laws to obey without abrogating his claim to being a morally responsible person and thus depriving even his obedience of moral or civic significance (Zwiebach 1975, 150).

Thereby, he recognizes civil disobedience as a *right*, which comes into existence in the lack of forceful reasons that would de-legitimize the refusal of the duty to obey. In some sense, it is a right to assert certain rights such as equal treatment or freedom of expression. However, the question remains as how to decide when having this right turns into being right or a *justifiable* act of disobedience. To Zwiebach, the mere fact that a law is not supportable or immoral does not suffice to justify one's claim to disobey that law. Accordingly, the law in question has to fall short of being ultimately obligatory, against which the person will claim his right to raise the limits of the political authority and the obligation to be bounded by its rules. "The lack of obligation to obey a state", he says, "is thus a function of its passing non-obligatory laws" (Zwiebach 1975, 151).

Nonetheless, his account does not seem to give a satisfactory answer although he posits the essential question that Sophie Turenne (2004) also formulates in her recent article. Indeed, it is not obvious "on what basis can the disobedient argue that the law is wrong?" (Turenne 2004, 381). Introducing the concept of 'intra-legal disobedience', Turenne points out that notwithstanding the unlawfulness of the act committed, the disobedient person opposes against the traditional interpretation of the law with his/her belief that this interpretation is wrong. This would render his/her appeal lawful or *intra-legal* at the final analysis. But in order to ratify or to assure that the application of the law on the basis of the

conventional reading is wrong, she notes, "the disobedient must be able to point to some principle or principles which, in his view, override the law as currently applied and which open that law to more than one interpretation" (Turenne 2004, 382). As a matter of fact, those principles pertain to the ideals underpinning certain 'constitutional and/or human rights'. The point that she is trying to make is that such rights are open to new interpretations, which would make possible to end up with variations also in the implementation of those rights in empirical situations. In this sense, civil disobedience of the sort that she describes will benefit from the 'fuzzy nature' of human rights.

I admit that the very notion of 'fuzzy' is a problematic term. In Turenne's view, the fuzziness of human rights does not imply that any interpretation of them by means of civil disobedience would justify that particular challenge. She suggests that a person who argues for the rightness of his/her interpretation has the burden of proof to show that this interpretation is a *plausible* one. The plausibility condition should then;

> require only that a minority of members of the legal community – academics, judges and practitioners – agree that the interpretation pursued by the disobedient is plausible. That will entail that the line of argument presented by the disobedient has not already been confronted and rejected by the courts and that the interpretation is not obviously at odds with the law of all civilized nations" (Turenne 2004, 387).

Underlying her perspective of human rights and their openness to different but necessarily plausible interpretations is her indication of the conditions under which the disobedient citizens could empower themselves in their defense of breaching the law on a justifiable basis. As long as they can succeed to adduce to the plausibility of the non-compliance their hard case will attain the opportunity in front of the judges to be considered as a justifiable situation.

Zwiebach's and Turenne's endeavors to take a forward step with a cautious effort of explicating what would eliminate the binding property of particular laws, and what would legitimize one's disobedience to such laws have their own vantage point, but they could hardly avoid the impasse formulated by Harry Prosch (1965) in earlier days of the discussion.

The quintessential austerity in determining the rightness of the disobedient act stems from the fact that "even if we are sure that we have our fingers on the really right ones, our opponents are also sure they have their fingers on the really right ones, too" (Prosch 1965, 109). Although he acquiesces in some possible ways to designate certain laws as unjust such as 'the argumentative forms of moral persuasion' and 'the operation of commonly accepted political processes', they can never work out as to prove the unjustness of those laws. However effective such methods are to convince the responsible political authorities in the rightness of disobeying laws that are alleged to be unjust, no person can philosophically guarantee that his/her belief is right *vis a vis* the logical content of the law in question. As Darnell Rucker (1966) puts it quite clearly, "no man ever *knows* that any moral judgment is right" (Rucker 1966, 144). What a person can do is to follow his/her own moral judgments as a product of lifelong experiences intertwined with the instructions of the intelligence. At the end of the day, he says, being *rational* is the foremost wisdom of the human society. It is this rationality, which empowers human beings with the right to hold a particular law unjust and to disobey its sanctions. Hence, a resolution to the 'perennial conflict' in the form of civil disobedience would come from one's decision to follow his/her own judgments on when he not only has the right but also is right to disobey particular laws. Still, the justifiability of civil disobedience remains as a question.

From what has been reviewed so far, it is hard to overcome the dilemma or the perennial conflict between having right to and being right in civil disobedience. It is far from being evident in what ways the first one transforms into the second. To make an analogy, to say the one has the inalienable right to freedom of speech is not the same as to acknowledge what he/she says by using this right as right. The same is true for justifiability conditions of civil disobedience. Although it is at the very heart of the discussions on civil disobedience, the question of justifiability is inconvenient to make generalizations about its proper

conditions. Indeed, there is no generic litmus test to strictly distinguish obligatory laws from non-obligatory ones, just as justifiable disobedience from non-justifiable one.

The entering of violence and punishment into the picture would also not simplify the preponderance of this difficulty. A number of theoreticians seek to juxtapose them as preconditions for a justifiable civil disobedience in the sense that in the absence non-violence and accepting penalties disobedient non-compliance could not be considered as justifiable (Brown 1961, Hook 1971). However, I would object, it would be a logical fallacy to equalize a definitional paradigm of a concept with its justifiability that are, by definition, two different things. In other words, it is one thing to signify a condition as the necessary element of the definition of civil disobedience, but it is another thing to identify the conditions that would justify an act of civil disobedience, which *a priori* meets the requirements of the definition. Therefore, the whole discussion on the justifiability conditions of civil disobedience turns around a tautological axis, where being right or justifiable is already implied in having right to the defiance of the laws of the state in that peculiar way.

In broadest sense of the word, I think, there are two possible ways to deal with this ideational tautology. Actually, neither of them is likely to propose an ultimate resolution to it. Instead, their contribution would be to shift the focus of the question to a slightly different direction. The first one carries the interrogation to an empirical level of analysis. This line of thought supposes "what may prove justifiable, or unjustifiable, after careful analysis, is not civil disobedience *überhaupt*, but this or that act of civil disobedience in a given and well understood social context" (Cohen 1971, 93). From such a perspective, it is necessary to excavate a variety of parameters such as the very content of the law, the ways in which it is enacted, its perpetual impact on the population, the depth and scale of the injustices it caused, the very tactics and methods used by the recalcitrant citizens and so forth. The analysis of these multiple variables in a particular case could expedite the process through which it will

be easier to decide to what extent the act is justifiable. Nevertheless, it is beyond the limits of this thesis to concentrate on this strategy.

A second way to assuage the tautological problem still remains at the level of abstraction, but it turns the gaze to the wisdom and virtues of civil disobedience in terms of the public good. By emphasizing the functionality of the phenomenon, this pattern of contemplation could help to uncover why civil disobedience will enhance the societal benefits although this does not exactly say when precisely it is justifiable. It will also contribute to the discussion of violence and punishment by way of solidifying the basis on which civil disobedience can be related to violence and entail punishment. In what follows, I will delineate the positive effects of civil disobedience for the socio-political agenda of the polity.

2.3 Functionality of Disobedience

On the basis of its various aspects that have been discussed so far, it is clear that civil disobedience proposes an *alternative* way to encounter political authorities. It is subversive in terms of the illegality of the action but also due to a radical stance against the state order. At the same time however, civil disobedience is constructive since it admonishes political elites for the injustice that they are primarily responsible for, with a particular aim to improve the conditions of societal life. But in what ways could civil disobedience serve to the betterment of the socio-political geographies of the polity? In order to better understand the virtue of civil disobedience, it is necessary to address this question above all.

2.3.1 Deconstruction and Reconstruction

As a political appeal, the foremost important interlocutors of civil disobedience are the political elites. Indicating the injustice produced by the political system, disobedient resistance enters into a communication with political elites in a number of ways. According to Paul F. Power (1972), the dissenters send a striking message to the ‘conventional oppositions’ in the first place. These refer to “politically oriented interest groups, and other specialized

political structures that can with legal protection object to the administrative behavior, statutes, policies or even the existence of the regime" (Power 1972, 44). Civilly disobedient conduct can help them to realize the seriousness of the problematized situation, to organize internally and react collectively in order to strengthen the opposition to the power groups. By doing so, Powel argues, civil disobedience communicates with the center of the regime and reminds it about the abuse of power. Thereby, it does not only contribute to the correction of the wrongdoing amenable to the representatives of the regime, but it may also "indirectly help the regime to maintain its authority" (Power 1972, 48).

Power also talks about other 'communities' for which civil disobedience could be beneficial. Within the political system in general, disobedient conduct can facilitate enhancing of the *rule of law* by highlighting the fact that respect for law does not only mean respect for authority, but also reverence to the higher values of humanity. In this sense, civil disobedience operates as a tool of 'reeducating' those "who reject it as a mythological device propagated by lawyers and their clients to defend entrenched privilege and oligarchical power" (Power 1972, 49). As a powerful challenge to the indifference of political elites, he concludes, civil disobedience encourages participant political culture against the elitism of power-holders, which alienates citizens to the political system they are subject to.

Besides these positive impacts on the political map of the society, civil disobedience also creates a loosening effect in terms of the increasing resentment among members of the society. Encountering conservative views that condemn civil disobedience for provoking members of the community to engage in rebellious and anarchic activities, Zwiebach (1975) argues that if there is an ongoing conflict or 'social tension' in a society, civil disobedience will loosen these tensions and hinder more harsh and violent ways of contestation. From this perspective, the proscription of disobedient conducts "is not to contain social tension but to encourage it turn to something which is, from conservative point of view, worse" (Zwiebach

1975, 152). At this point, it would be legitimate to ask what if each and every person starts to disobey the laws. Zwiebach develops a twofold answer to this question. First, there is no evidence to the fact that disobedience encourages a widening stream of disobedience in the polity, nor disobedience to law in general. Secondly, by reformulating the question as "what if everyone always obeyed?" he warns us about the authoritarian tendencies of the regime (Zwiebach 1975, 205). It is not civil disobedience but a blind obedience of people to the laws, which could generate instability in the long run. Above all, one cannot deny his logic in disobeying the law by assuming that if others act identically the results will be undesirable, since the justifiability of one's disobedience "cannot depend, among other things, upon the probable conduct of others" (Wasserstrom 1969, 262).

A final remark on the functionality of civil disobedience relies on Rawlsian conception of justice. Accordingly, the intrinsic value of civil disobedience lies in its appeal to justice. To recall Rawls' exposition, disobedience has a significant role in a society, which is 'well-ordered' and democratic in rule, and most crucially which has a 'shared conception of justice' (Rawls 1983, 365). In this sense, the role of disobedient conduct is to invoke this shared conception of justice whenever the governments fail to fulfill its requirements.

> It is assumed that in a reasonably just democratic regime there is a public conception of justice by reference to which citizens regulate their political affairs and interpret the constitution. The persistent and deliberate violation of the basic principles of this conception over any extended period of time, especially the infringement of fundamental equal liberties, invites either submission or resistance (Rawls 1983, 365-366).

Furthering Rawlsian account of civil disobedience, Andrew Sabl (2001) introduces the concept of 'forward looking' perspective. He notes that it is not the primary concern or expectation of a civilly disobedient to foster a current change in the attitude of power-holders to act upon the injustice. Rather, it is a *forward-looking* plea for justice indicating "their capacity to do so in the future" (Sabl 2001, 312). In other words, its indication of injustices targets at the generation of just cooperation in future.

In these respects, civil disobedience serves to the de-memorization of the taboos that are associated with the state order. It puts a big question mark to the very idea of state authority as well as to the omnipotence of political obligation, by showing that their sanctification through obedience does not necessarily improve social conditions of life for its subjects. But what else is civil disobedience is beneficial for? A final consideration will be the excavation of the democratic wisdom of civil disobedience. It is likely to invoke interesting questions not only on disobedience but also on democracy itself.

2.3.2 Democracy of Civil Disobedience

The relationship between civil disobedience and democracy warrants thorough attention not only in terms of the democratic wisdom of civil disobedience, but also in terms of the very meaning of democracy as well. Transcending procedural connotations of democracy, it is worth analyzing in what ways civilly disobeying particular laws of the state could contribute to the substantive configurations of democracy. A query on the symbiosis of the two concepts is potent to unravel the idiosyncrasies of their coexistence.

In a recent article, William Smith (2004) juxtaposes three basic principles of deliberative democracy. According to his explanation, an adequate constitution of public deliberation entails the inclusion of all the members of the political community, in the first place. He suggests that not only those who are directly governed by the government, but also those who are significantly affected by its decisions should count as members of the community. Secondly, public deliberation has to rely on the articulation of genuine reasons in figuring out certain laws and policies. At this point, Smith gives emphasis on the notion of *persuasion* instead of coercion or preference aggregation. Persuasion will focus on the general or common interests, which will make it easier to reach agreements at the end. Moreover, he adds, in order to acquire fair and egalitarian conditions for deliberations, inequalities stemming from power relations have to be reduced and minimized because “public

deliberation is conceived as a process of unforced dialogue in which citizens are able to advance their views free from coercion or intimidation" (Smith 2004, 359). The third principle is about the availability of necessary information and knowledge to the participants. This will strengthen the ground on which they can articulate their views, and also facilitate the determination of what can be grasped as general or public interest (Smith 2004, 356-362).

In this framework, Smith introduces civil disobedience as a sort of 'deliberate contestation' implying both a contribution and challenge to the existing political structure. This deliberate strategy, he argues, has a twofold function. On the one hand, it seeks to convince state agencies through communicative means that he calls "vertical dimension'; on the other hand it raises public attention among the members of civil society, which he names as 'horizontal dimension' (Smith 2004, 363).

A parallel claim is put forward by David Spitz (1954) who attributes democratic state the duty of recognizing the dissenters in terms of their disagreements on certain traits of the enacted laws. In light of the ideals promoting substantive democracy, the upholding of a state together with an internalized solidarity in the social order depends less on its laws than on the values that hold its people together. In fact, these values emanate from the common interests of the citizens and from the recognition of the differences among them (Spitz 1954, 399).

In the sense that democratic state is defined as more than the amalgamation of democratic laws, it is more than obvious that civil disobedience could effectively contribute to the expansion of public deliberation especially due to the expression of disagreements. Less clear is the coherence of this contribution with the democratic participation. Indeed, civil disobedience's entrance to the public sphere as 'extra-legal support' as G. Pyrcz (1981) puts it, poses a question whether by doing so a civilly disobedient person would undermine the democratic faculty of the participatory processes, even if a government might enact unjust

laws. In this respect, Peter Singer's remarks are quite illustrative for the sake of deepening the discussion.

In his book *Democracy and Disobedience* Peter Singer (1973) makes a distinction between participation and non-participation as regards to the justifiability of civil disobedience. He basically asserts that participation creates a special obligation to the ultimate decisions one has given his/her consent by virtue of having partaken in the procedure. Singer introduces the concept of 'quasi-consent' to refer occasions in which one does fail to express non-consent but it is a necessary and sufficient condition for making clear that he/she refuses the final decision, since otherwise it would mean that one is going to voluntarily accept it (Singer 1973, 49-50).

> In practical terms, this means that it may sometimes be wrong to disobey a law, which has arisen from a decision-procedure in which one has voluntarily participated, in circumstances in which one would be justified in disobeying the same law if one had not participated in the system. This is a reason for obedience which is much more likely to apply in democratic societies than under other forms of government (Singer 1973, 59).

Singer constitutes a necessary link between non-participation and civil disobedience. Accordingly, civil disobedience would not be justifiable unless the person refuses to show quasi-consent to the decision, which is supposed to be held democratically. However, it is also a considerable question under what conditions citizens participate in the political decision-making. In the absence of relevant information, as Menachem Marc Kellner (1975) argues, participation might become insignificant. Indeed, some facts might be unavailable to the public, the access to which would otherwise change their decisions (Kellner 1975, 902). Therefore, it is unlikely that civil disobedience will emasculate the democratic notion of participation.

There are also other platforms on which civil disobedience could help to ameliorate the deficiencies within democratic regimes. For instance, it is not evidently true that every democratically enacted law represents the will of all or even of the majority, and that it serves the common good (Bay 1967, 165). Democracies' wisdom of taking the dissenters into

consideration and employing dialogical methods of problem solving might be ignored in many occasions. In fact, there are several measures taken against the requisites of fair hearing of the recalcitrant members of the society, as well as enactments of many anti-democratic laws, in those states that declare themselves democratic (Bay 1967; Kellner 1975). Under such circumstances civil disobedience becomes a powerful strategy not only to draw attention but also to correct internal problems of democracies.

Therefore, if one is to promote a democratic regime, his/her reason to sustain it should not rely on the mere fact the regime appoints publicly elected governments in the name of popular sovereignty, but on the very ideals and goals that makes democracy superior to other forms of government. From this vantage point, it is far from being anti-democratic to break laws that are incompatible with these ideals.

Besides its aforementioned contribution to the maintenance of democratic principles, civil disobedience is loaded with other roles that are related to democracy as well. One of the most striking among them is what Peter Singer refers to the protection of minorities against the hegemony of the majority. Actually, it is usually argued that democracy; particularly pluralistic democracy provides the best feasible political apparatuses to prevent majority's suppression of the minorities. In this respect, Singer claims that in its effort to pursue and satisfy its own interests a majority might become blind to the needs and demands of the minorities. Presumably, this attitude emanates from the majority's tendency to mirror its interests as the interests of the entire society. Civil disobedience, therefore, "may make the majority realize that what is for it a matter of indifference is a great importance to others" (Singer 1973, 84). In such a way, minorities can present their sensitivity to certain political matters of which they have feelings of resentment and dissidence, to the majority's consideration.

> By civil disobedience the minority can demonstrate the intensity of its feelings to the majority. If the majority did in fact make its decision through shortsightedness, and not because the

> hardship to the minority is an unavoidable evil, justified by a far greater good on the whole, it will have the opportunity of altering its decision (Singer 1973, 85).

In his critical article on liberalism and disobedience Marshall Cohen (1972) introduces a similar account on the role of civil disobedience in democracies. Basically, he claims that this form of political action exceeds the borders of what he calls as 'normal politics' that the liberal tradition could not achieve to perceive. Beyond the realm of normal politics within which the majority claims its supremacy on the basis of consent, civil disobedience comes into the democratic scene when "actions have been taken to which consent should not be given" (Cohen 1972, 314). More than the embodiment of conscience and morality, he posits, civil disobedience is a *political* protest against the violation of the legitimate government in the hands of the democratic majority.

Presumably, it is not only minorities or those who are the victims of state and majority oppression whose rights might be violated. Democracies can also violate certain fundamental rights of human beings such as freedom of speech. Singer argues that the violation of the freedom of speech by means of what he calls as 'selective restriction' generates a legitimate reason for overriding the obligation to obey. By 'selective restriction', he refers to a sort of double standard "which picks out certain views, and says that no one may speak or write in favor of these views, although other views are not proscribed" (Singer 1973, 65). Such an unfair involvement is incompatible with democratic principles and incurs justified disobedience of all who are affected by the violation of inalienable rights of citizens.

The subversive and constructive properties of civil disobedience and its contributions to the substantiation of democracy plays a crucial role in changing the social perceptions of political authority, obligation and the very ideals of democracy. For the purposes of the thesis, they are also illuminative for the analysis of the arguments for and against the use of violence and the inescapability of punishment. Together with the dimension of justification, albeit

noticeable puzzles in it, they will help us to understand the problematic aspects in the association and/or dissociation of violence and punishment with civil disobedience.

This chapter was dedicated to accentuate the centrality of the justification as the most striking but at the same time controversial debate on civil disobedience. Less problematic was the manner in which dissident people develop arguments for and ascribe to moral, philosophical or rational reasons in order to justify their disobedient defiance of the laws. When it comes to the justifiability conditions, however, the picture became blurred. What I observed in the literature specifically focusing on that matter were two lines of thought both of which I find problematic. A set of arguments takes certain aspects of civil disobedience that are already given in its definition, as the measure of its justifiability. Another set of arguments emphasize civil disobedience as a right against the non-obligatory laws of the state, but it is far from being clear how this right evolves into the rightness or justifiability of the disobedient act, since it is also not clear how to decide on the non-obligatoriness of the laws except some references to conscience and rationality. That's why I suggested shifting the focus on the functionality of the concept that might help to dismiss this tautological circulation of arguments, and highlight the wisdom of civil disobedience as a subversive and constructive type of political action.

From this point on, I think, it is fair to proceed with the in-depth analysis of violence and punishment in their relation to civil disobedience. So far, I wanted to give the necessary conceptual tools to understand this provocative relationship by first framing the multifaceted feature of the definition, and then by revealing the difficult patterns of its justification and functionality. The next chapter will be no less complicated in terms of the subject matter. It will be an attempt to introduce a new dimension to the discussion of violence and punishment from the perspective of fair play. Hereby, I will attempt to encounter the arguments in favor

of the use of violence to a certain degree, and in disfavor of punishment through the conceptualization of fair play account, while using the definitional, justificatory and functional aspects of civil disobedience to show the weakness of the pro-nonviolence and pro-punishment lines of arguments.

CHAPTER 3: THE PROBLEM: A FAIR PLAY APPROACH TO VIOLENCE AND PUNISHMENT

The question on the permissibility of the use of violence and the issue of punishment constitute one of the main realms of diversification within the literature of civil disobedience. Violence poses a significant puzzle in terms of the definitional as well as justificatory domains of the concept. A reflection on the problem of punishment, on the other hand, is necessary for the practical implications of the aforementioned perennial conflict as regards to the judicial consequences of civil disobedience. The bifurcation of the literature into two camps of thought concerning these two paradigms marks an ideational opportunity to contribute to the existing approximations.

It is my inclination to argue for non-violence as well as for the acceptance of penalties as idiosyncratic features of this peculiar type of political action. However, I will not structure my position in the same way that the conventional explanations are likely to employ. Relying on the conceptual background portrayed in the previous chapters, I will try to stress the weaknesses of the conventional advocacy of non-violence and punishment in the face of the counter-arguments in favor of the permissibility of violence, and of the avoidance of penalty. For my own purposes, I will introduce the perspective of the fair play account as an analytical tool, which is uncommon in the literature of civil disobedience but likely to contribute to one's understanding of the question. Hereby I will argue that abstention from the use of violence, and the disobedient's acceptance of punishment is not necessary due to the conventional way of approaching them, but it is a function of fair play principles of obligation that one owes to the fellow members of societal venture.

The chapter will start with a brief description of the fair play account of political obligation to display its prospective effectiveness for the analysis. This section will be followed by a focused discussion of violence and punishment respectively. Prior to my effort to construe these two subjects from the viewpoint of fair play, I will separately delineate the

most common patterns of conceptualizing the adequacy of violent means and accepting penalty in the very motives and practices of civil disobedience. They will give evidence to the philosophical deadlock concerning the problem under scrutiny and to the requirement for the revision of the question that I hope to achieve by my appeal to the fair play perspective.

3.1 The Principle of Fair Play

The starting assumption of fair play perspective of political obligation is that people owe the duty to obey the laws of the state due to the cooperating members of the society. Presumably, this duty connotes to a moral responsibility to the fellow citizens under the supervision of the same legal structure. In his essay on the question of natural rights, H. L. A. Hart introduced the prototypical definition of political obligation based on the conceptual tools of fair play in the following way:

> When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. […] The moral obligation to obey the rules in such circumstances is *due* to the cooperating members of the society, and they have the correlative moral right to obedience (Hart 1955, 185).

The key concept in the quotation is 'joint enterprise', which I consider as the first presumption of the fair play account. This notion is paraphrased and furthered by Rawls as 'mutually beneficial and just scheme of social cooperation' (Rawls 1999, 122), and by Klosko as 'the existence of a joint venture or cooperative scheme' (Klosko 2004, 34). It is a legitimate question to what extent it is possible to consider contemporary political societies as cooperative associations due to their large-scale constitution (Simmons 1979). This might pose an applicability problem for fair play account in terms of the everyday practices of citizens. However, it would not be outrageous to claim that many realms of social life that are provided with public goods by governmental institutions seem to be commensurate for the application of fair play principle to real life situations.

Basically, the cooperative enterprise is supposed to produce certain benefits collectively. The generation of the benefits is dependent on the active participation of the

members to the process of 'cooperation' guided by certain rules. However, this second presumption could be realized only through various restrictions or sacrifices on the part of the cooperators in contributive amounts and that is the third presumption of fair play. In order to create benefits and advantages as the outcome of cooperation, most or nearly all members are expected to comply with the scheme. Hence, it follows that at the end of the day the generated benefits could also be received by those who did not cooperate in the course of the task, which makes the benefits free to acquire up to a certain level (Rawls 1999, Klosko 2004).

At this point, the type of goods and benefits generated through the cooperation of the members resides to a significant terrain within the framework of fair play. Indeed, the extent to which people could be supposed to behave in accordance with fair play principle is also a function of whether the good is 'excludable' or 'non-excludable' as well as whether it is 'presumptively beneficial' or 'discretionary' (Klosko 1987). At any rate, non-excludable and at the same time presumptively beneficial goods are more relevant to the thesis' subject matter because the rule of law, which meets both qualifications of public goods, is one of the most central concepts within the discussions of civil disobedience.

Under these circumstances, one can say that the conditions of fair play are provided. But the next question is whether or how the conditions *for* a fair play could be met. In other words, what are the criteria that are necessary to measure the 'fairness' of the conditions? In *A Theory of Justice* Rawls juxtaposes two additional qualifications that assure the obligation of the individual members to discharge their moral duty to the cooperative scheme. Accordingly, it is required that "first, the institution is just, that is it satisfies the two principles of justice; and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests (Rawls 1983, 112). Addressing the same questions in a slightly different manner, Klosko also initiates three extra conditions to ensure the fairness of the cooperative venture and its distributional layout. To him, in case when a

member of the social scheme seems to benefit from the cooperation without compliance and sacrifice, then fairness could be reconstituted "(1) if things can be arranged so that A does not receive the benefits in question, (2) if the other members of *X* can also be freed from the burdens of cooperation, (3) if A comes to bear burdens similar to those of *X*-ites" (Klosko 2004, 35).

In a nutshell, the underlying reason behind the duty of obedience to laws is not the mere existence of the legal structure as an unquestionable amalgamation of rules, but the fact that it would be unfair not to comply with the laws while the fellow citizens discharge their duty to do so. Given that the conditions for fair play are met, the permissibility not to comply with the regulations of political institutions in the form of civil disobedience is not ruled out. As it is mentioned before, just schemes of political organizations as well as democratic institutions of the polity are also likely to produce unjust and undemocratic outcomes to such extent that the moral duty to comply with particular laws becomes nullified under certain circumstances. In such situations engaging in civil disobedience would not be at odds with the principles of fair play. However, when it comes to the use of violence and acceptance of punishment a fair play perspective could posit reasonable grounds as to why civil disobedience has to be nonviolent and the person ready to be punished albeit in consideration of the exceptional nature of breaching the law in this peculiar way.

3.2 First Approximation: Violence

The rejection of violent methods of resistance is a typical attitude, which is commonly associated with the practice of civil disobedience. Although in the first chapter I mentioned that it is by definition problematic to consider their challenge as stigmas of civil disobedience, the most well known figures of disobedient struggle such as Gandhi and King are usually referred as the victorious actors of nonviolence in the literature (Woozley 1976, 325). Nevertheless, the disentanglement of violence from civil disobedience is not an easy task as it

seems to be, and thus, it is open to various counter-arguments that would object to a strict commitment to nonviolence. In effect, it is possible to argue for the permissibility of violent measures in this form of political action, albeit in a limited and non-arbitrary manner. In what follows, I will cover possible ways to argue for and against the permissibility of violence, and then articulate the perspective of fair play into the discussion.

3.2.1 Dialectics of Permissibility

A philosophical adherence to nonviolence could rely on several grounds. One of the concepts that is used to argue against violence is 'persuasion' (Barker 1992, Prosch 1965, Woozley 1976). Accordingly, civil disobedience is a concern about convincing the members of society in the rightness of the non-compliance with the law in question. The very consideration of public good by way of taking other people's attention to the wrongness and unjustness of a particular law's implementation is reflected on the dissenter's propensity to publicly breach that law, and his/her denial of acting out of self-interest. In virtue of his/her affiliation with principles of a higher law, universal justice, constitutionality, human rights and so on, the person attempts to persuade public authorities as well as other citizens through communication. It follows that this sort of a persuasive dialog would contradict with the means of violence since the latter does not try to convince but to 'coerce' people to acquiesce in the background reasons in a forceful manner.

This line of argument does not fall short of consistency but is underpinned by an oversimplified reading of violence. First of all, the notion of violence has a wide range of connotations that make it unreasonable to equalize one form of its usage with its other objectifications. In this respect, it could be asserted that unlimited conceptions of violence would mislead to one to completely reject any violent method, which otherwise could be influential for the achievement of disobedient practice. It is remarkable to note that violence is not only a way of harming the bodily integrity of a person, but it can be also directed to the

autonomy of people to take individual decisions as well as to control their means of property and 'products of labor'. In other words, if one opposes to the justifiability of a physical harm from the perspective of *prima facie* rights, then "the rights one has to autonomy and to *control* over his property must also be respected". This would mean, however, that almost all sorts of so-called nonviolent disobedience should be ruled out as well (Morreall 1991, 131-135). Secondly, violence can be persuasive as well. In his discussion of the potentialities of violence for the expansion of equality, Ted Honderich (1989) initiates a definition of what he calls 'coercion of persuasion'. It refers to a state of mind in which one's decision to act in a certain way is not enforced by an external agent, but it is shaped by a specific configuration of the context which renders it more plausible to act in that way (Honderich 1989, 163). This interactive determination of behavior is also consistent with democratic principles of decision-making that I will mention more in detail below. At the moment, it is sufficient to say that some violence could work out as this sort of persuasion.

A second way to sanctify nonviolence is instrumental in the sense that the use of violence would be strategically wrong for the disobedient in vindication of his violation of law. No matter how deep the injustice caused by law that the dissenter seeks to resist against, his/her appeal to the use of violence would diminish the rightness of the disobedient practice in the public eye (Cohen 1971). Hereby, the enlightening message or the reeducative function that civil disobedience is loaded with would be jeopardized on account of the violent measures, which the public is less likely to welcome.

It is more than evident that there is some missing point in the exposition above. Under certain conditions, especially when the injustice is deeply problematic, sticking to a kind of passive resistance by way of nonviolent civil disobedience might not be strategically correct at all. From a consequentialist point of view, use of violence that is non-arbitrary, non-destructive and restricted could generate a stronger opposition to the political authorities

evoking them about their responsibilities for the undesirable outcome (Hall 1971, 90). Hence, it is not inadequate to tailor the 'rationality' that Honderich attributes to particular forms of political violence to civil disobedience (Honderich 1989, 27-33).

A final pattern in the advocacy of nonviolence emanates from the *civil* feature of disobedience in essence, which outweighs the permissibility of violence in its practice (Power 1972, Sabl 2001). Accordingly, the idea of civility corresponds to the opposite of what pertains to the adjective of military that is intrinsically violent by definition. In this sense, use of violence in civil disobedience cases would not only offend the idea of civility in disobedience but also contradict with the principles of higher law, justice or democracy that the person appeals for the justification of his/her practice, and that are closely related with the conception of civility.

The anticipation of nonviolence in this manner seems to be the strongest way to favor it against the permissibility of violence. At any rate, a limited use of violence that Morreall describes would not significantly distort the ideals for which the laws are civilly disobeyed. But more important than this is the fact that the idea of lawfulness for which the disobedient individual shows his/her respect through challenging the state authority, could also become a source of violence in some respects. It is not uncommon among some legal theorists to argue that it is intrinsic to law to produce, legitimize and inspire violence in an institutional discourse. Occasionally, laws might sustain socio-economic inequalities and induce the prevalence of violence (Hay 1995); they might encourage personal motives for disorder and provoke criminal aspirations to violence (Weisberg 1995), or else they might become subordinated to violence by making it the constitutive part of law-making (Sarat and Kearns 1995). From this alternative point of view, encountering laws with a permissible degree of violence by civil disobedience could be seen as a self-defense of the dissenter against the law's violence that he/she is subject to. As regards to democracy, furthermore, a permissible

usage of violence could supplement civil disobedience's contribution to the substantiation of democracy through its "attempt to secure *equality* of influence" for all citizens within the territories of democratic practice. 'Democratic violence', to use Honderich's vocabulary, would not undermine but help to strengthen the very realization of the systemic improvement of democracy (Honderich 1989, 166).

The conventional posture negating the permissibility of violence in civil disobedience cases, thus, has a considerable weakness from several perspectives that methodologically, strategically and principally indicate the plausibility of a limited form of violence as an acceptable means. Taking the definitional and justificatory aspects of civil disobedience, indeed, I do not see a deep controversy between a restricted permissibility of violence and the concept itself. In terms of the axis of definition, though there might be some puzzles as I tried to highlight, violence would neither alienate civil disobedience to its exclusive features separating it from other types of resistance, nor would it distract the particularities of the concept which make it a peculiar form of political action. To come to the axis of justification and functionality, it is more than explicit that the inclusion of violence will complicate the justifiability of disobedience as compared to a case where its use is refrained. But it is also worth mentioning that since the justification of civil disobedience also depends on a number of factors such as the deepness of the injustice, the sort of rights violated and so on, it might not necessarily follow that violence is totally at odds with the conditions of justifiability. In terms of the functionality, the ambiguity is less problematic since, albeit depending on the very context of the protest, violence could buttress rather than impede the effect of the disobedient resistance due to a variety of reasons mentioned above. However, there can be other grounds adducing to the problem of using violence in civil disobedience. In what follows, I will try to propose a different explanation for the supremacy of nonviolence based on the principle of fair play.

3.2.2 Nonviolence for Fair Play

The fundamental principles of fair play provide a further ground for the commitment to nonviolence, which I concede stronger than the conventional approaches discussed above. In light of the Rawlsian definition of political obligation as a *prima facie* duty of fair play, I want to introduce one's moral duty of abstaining violence in civil disobedience practices as a *prima facie* duty of fair play. The logic is similar, but needs clarification as to why a dissenter's use of violence would be 'unfair' to the fellow citizens rather than problematic on the grounds of definition and justification.

The conditions for fair play and those for civil disobedience are almost the same. Both require the existence of a generally just scheme of political institutions in the first place. The application of fair play entails a further condition that is the cooperative enterprise of individuals generating certain benefits for its members. Bearing in mind that a civil disobedient acts not for the sake of personal interest but in the name of societal well being, the second condition for fair play does not seem to ostracize the motivation of the dissident non-complier. At first glance, he might seem to betray the cooperative faculty of the social association by disobeying the rules regulating this venture. However, in case of a permanent oppression sustained by particular laws, the duty to comply with these laws on the basis of fair play terminates, especially for those who are subject to this oppression (Rawls 1999, 126). It is also possible to go further and say; in a similar way Zwiebach referred to the non-victims mentioned in the first chapter, that this duty is invalidated in *general* whereby one's civil disobedience would not contradict with the principles of fair play.

In effect, the fact that particular laws are part of a set of a regulatory system, which is supposed to be 'nearly' or generally just, and that the provision of the benefits relying on people's cooperation and compliance is maintained by the system, still holds the beneficiary position of the dissenter notwithstanding his/her disobedience. Together with this, on account

of the moral basis for noncompliance as well as the level of injustice caused by the law or policy in question, engaging in civil disobedience merely is not sufficient enough to argue for an unfair advantage taken over other people's compliance. Instead, it is a radical attempt to evoke people about the very unfairness that they are subject due to the implemented law. The situation would change, on the contrary, if it were involved in the use of violence in the course of civil disobedient practice.

Irrespective of the justifiable reasons beyond the act of civil disobedience, use of violence would generate *harm* in one way or another, the remedy of which is *fait accompli* imposed on the members of the polity. In other words, notwithstanding the presumptive benefit that is alleged to emerge as a consequence of the disobedient act in the long run, violence's harm would put a coerced burden on the shoulders of others who are also subject to unjust outcomes of the objected rule. Creating such a burden will be unfair to the fellow citizens. One might argue that the consequential harm could be ignorable in terms of its negative effects. To reply, I am disposed to develop a twofold answer to this question. In this effort, I want to recall the typical traffic example given for the fair play account. Accordingly, one's driving a car on the emergency line would not generate significant harm on those who drive on regular lines. But, there the problem was being unfair to them first by taking advantage from their compliance with traffic rules, and second by causing a hypothetical harm to obstruct the regular functioning of a public service in a very probable situation where the emergency line should be used by its vehicle. The same is true, I think, for violence in civil disobedience.

At the final analysis, I consider abstaining violence as a *prima facie* duty of fair play. Just as the political obligation as a function of fair play can be overridden under certain circumstances, commitment to nonviolence in civil disobedience on the same basis can also be overridden contextually. At any rate, it is not strongly due to the reasons defended by

conventional approximations, but due to the duty of fair play that the permissibility of violence is problematic in cases of civil disobedience.

3.3 Second Approximation: Punishment

The divergent conceptualization of the acceptance of punishment follows a similar path as in the issue of violence. It is more widespread in the literature to argue for the requirement on the part of the disobedient person to acquiesce in the penalty corresponding to the illegal conduct. Nevertheless, this dominant way of thinking is also encountered by a number of theorists who display a rather skeptical attitude to the subject. Indeed, their interrogation of why a civil disobedient is supposed to accept to be punished for his/her act, appears to be a strong exposition in the face of the first line of arguments. Before bringing the perspective of fair play into the discussion, again I will first frame prevalent ways of contemplation in order to stress the weakness of the claims that acknowledge accepting punishment as a necessary condition for civil disobedience.

3.3.1 The Pendulum of Genuineness

Proponents of the acceptance of punishment tend to substantiate their stance on the basis of two central concepts, which I think is closely related to each other: *genuineness* and *fidelity to the rule of law.* Basically, the first notion pertains to the idea that accepting punishment beforehand comes from the dissident person's commitment to the ideals for which he/she disobeys the law, and to the rightness of acting in this way. It follows that in order for a civil disobedient to be convincing about his/her struggle in the public eye, he/she has to endorse the very likeliness to be punished for breaching the law (Greenawalt 1991). In other words, it is out of moral as well as logical consistency that the person should surrender him/herself to the judicial authorities showing total respect to the punitive decisions as the most probable outcome. Otherwise, the avoidance of punishment would mean betrayal of the politico-moral reasons as the primary motivation for civil disobedience.

> A willingness to accept public punishment for a deliberate public violation strongly reinforces the general belief in that commitment. But the effort to have the illegal conduct excuse because it is a protest sharply reduces its effectiveness as a protest. If, after having disobeyed the law to make a dramatic self-sacrifice, one then seeks to avoid the penalty, which makes it a sacrifice, the depth and completeness of one's commitment is likely to be questioned (Cohen 1969, 177).

In this sense, 'awaiting punishment' is seen as an induction of a principle of *ought* that is immanent to the *sui generis* act of civil disobedience. It follows that the protester does not have the moral right to complain about the punitive consequence of his/her act (Woozley 1976, 331). Whether this or that civil disobedience is justifiable or not will make a difference in terms of the ways in which the case is dealt in the courts. However, it will not change one's duty to be morally bounded by the legal consequences of the illicit act.

Encountering these claims, there is also another way of interpreting genuineness that reads the term to argue in the opposite direction. Accordingly, one can legitimately ask the following question: if one rejects to obey a particular law because he/she thinks that it is unjust, then why to expect that he/she has to ratify the execution of the punishment for having broken it? Avoidance of punishment for an act that the person believes just could also be interpreted as consistent with the commitment to the rightness of the disobedient act and the strong belief that the law in question is immoral or unjust. Taking disobedient protest as a process into account, "if the social function of protest is to change the unjust conditions of the society, then that protest cannot stop with a court decision or a jail sentence" (Zinn 2002, 30). Instead of indicating a betrayal, such an attitude could reveal the extent to which one carries out a genuine protest. It is not contradictory but morally complementary then, to refuse punishment in civil disobedience practices.

The other concept used in defense of the moral responsibility to accept punishment refers to the supreme idea of rule of law. As it is mentioned in the first chapter, one of the decisive characteristics of civil disobedience was the recognition of law as a whole legitimate system. It is this respect and fidelity to the rule of law through which the concept was

separable from revolutionary movements. In this sense, it is commonly argued, one's acceptance of the penalization is due to this respect of the laws in general (Rawls 1983, Rucker 1966). Therefore, despite the fact that the disobedient person challenges the injustice created by a particular law, it does not mean that he/she negates the supervision of other laws in terms of their legitimate right to sanction illegal acts of the citizens.

The above interpretation of fidelity to law, however, looks like a cursory configuration of the concept. Although "willingness to accept the legal consequences of one's conduct is a means of expressing fidelity to the law, we need not agree that this is the only means of expressing fidelity" (Buttle 1985, 650). First of all, it is obvious that one can give evidence to his/her respect to the law as such in a number of ways such as deliberate undertakings or compliance with many other legal orders. Hence, avoiding punishment merely would not constitute a sufficient ground for the disobedient person's disrespect to the rule of law. Secondly, it is remarkable to remember that "while I am ordinarily morally bound to obey the law if I choose to live within a legal system, and to enforce the law as well when this falls to me, I am not *always* morally bound to do so, all things considered" (Farrell 1977, 169). In this respect, as civil disobedience stigmatizes the invalidity of the claim that laws of the state are always abiding, it is superfluous to assume a necessary duty for the civil disobedient to ineluctably accept punishment. If it is acknowledged that by refusing punishment one acts in contrast with the fidelity to law, the same could be said about the very act of civil disobedience, which would outweigh the justifiability of each and every case of it.

These considerations demonstrate the high level of sophistication as regards to the moderation *vis a vis* recalcitrance of the civil disobedient person in his/her attitude to punishment. It is possible to argue in both directions, but certainly the arguments for the moral necessity to accept penalties are quite vulnerable to the skeptical points of view arguing in the opposite direction. At any rate, avoiding punishment does not seem to pose a cardinal

question either in the definitional or justificatory and functional properties of civil disobedience. Whereas the former is about the form and content of this sort of political action, the latter pertains to its politico-moral motivation and contributory role in societal advancement as regards to rights, liberties and justice. Avoidance of punishment is not likely to foster a subversive threat to these related axes of civil disobedience. But it might be problematic on another basis. In this sense, a fair play perspective could open a new dimension for the discussion, which, I think, is potent to rejuvenate the first type of posture in the face of those skeptical approaches.

3.3.2 A 'Fair' Anticipation of Punishment

One of the conditions for fair play as described by Rawls was the voluntary acceptance of the benefits generated by the social scheme of cooperation. In this respect, one can plausibly assume that since a civil disobedient citizen, unlike a revolutionarily motivated person, recognizes the general legitimacy of the regime and the rule of law in particular, he/she also accepts the benefits provided by the system of laws that is sustained by the cooperative efforts of the fellow citizens. Engaging in civil disobedience nevertheless emplaces the person in an exceptional position under these circumstances. As opposed to an anarchic attitude, dissident individual maintains his/her cooperation with the systemic framework except one particular law or policy, which is a component of that framework. Although his/her defiance of compliance at this particular point is carried out on a morally justifiable basis, civil disobedience thus far occurs whilst other members of the cooperative scheme continue to comply with the law in question. I think that there is a puzzle in such situations from a fair play point of view.

Obviously, civil disobedient people do not seek private gain by their noncompliance. As it is seen in the previous chapters, their moral motivation is supplemented by an implied concern about public benefit to be attained through the removal or the remedy of the injustice

occurred. But it does not change the fact that those who comply with the allegedly unjust law or policy continue carry the burdens and give sacrifices that are necessitated for the consequential benefit underlying their compliance. Those who civilly disobey, on the other hand, refuse to pay these burdens in virtue of the injustice but they are still the beneficiaries of the system that they recognize as legitimate in general. No matter to what extent a particular episode of civil disobedience is justifiable, and irrespective of the deepness of injustice caused by the challenged state regulation, there seems to be a problematic situation in terms of fair play principles. At this point, it is relevant to remember Klosko's suggestions about situations in which receiving benefits in the absence of compliance or sacrifice entails the reconstitution of fair play conditions. In cases of civil disobedience, the reconstitution corresponds to the compensation of the unpaid sacrifice on the part of the dissident citizen. I think that this requires the disobedient's willingness to accept punishment in order to reconstitute or not to subvert the conditions of fair play.

It is worth giving emphasis on the notion of 'willingness' since it resides to a central place in one's decision to engage in civil disobedience. As a matter of fact, whether and how the state *should* punish an act of civil disobedience is an open question, which is beyond my consideration here. The answer will depend on the justifiability of the conduct, the content of the law, the behavioral attitude of the protester and on a number of other contextual parameters. In this sense, the penalty might be quite symbolic, or relatively more serious. The courts could even decide not to punish. All in all, judicial authorities cannot disregard the exceptionality of civil disobedience. At the final analysis, I consider it as civil disobedients' *prima facie* duty to accept punishment, not due to the aforementioned reasons, but on account of the reconcilability of the act with the principles of fair play.

The questions on the permissibility of violence and the acceptance of punishment are one of the most interesting yet controversial topics within the philosophical discussions on civil disobedience. It is possible to argue in one way or another depending on the point of emphasis. The diversity of patterns of conceptualization indicates that the same notion, principle or idea can be interpreted quite differently ending up with dissimilar conclusions. Deploying the most common directions of arguments, I had two related aims in mind. First, I wanted to show the weakness of the propositions in favor of nonviolence and accepting punishment in cases of civil disobedience. The grounds that such approximations are based on can also be used to constitute opposite articulations. Second and more important for the thesis' subject, I wanted to suggest that use of permissible violence and avoidance of punishment are not only unproblematic for the definitional and justificatory aspects of civil disobedience, but they might also be unnecessary to supplement the completion of these aspects in the broadest sense of the word.

What I wanted to accentuate, on the other hand, was the possibility to elaborate violence and punishment from another perspective, that of fair play. The abstention from violence and accepting punishment is preferable not because not doing so will contradict with the intrinsic features and virtues of civil disobedience, but because use of violence and avoiding penalties would contradict with the principle of fair play. It was by no means my intention to present fair play account as the most plausible theory of political obligation. Instead, it is my inclination to claim that its principles are applicable and useful for an analytical discussion of civil disobedience, on violence and punishment in particular.

CONCLUSION

Taking the transforming conceptions about the limits of political obligation and of the supervisory authority of governmental power into account, the notion of civil disobedience appears as one of the most striking issues in contemporary political philosophy. The fact that political regimes produce unjust outcomes does not only entail to develop a skeptical attitude to state authority, but it also necessitates to consider various forms of resistance against the implementation of undesirable laws, policies and regulations that bind individuals to act in certain ways. As one of the most influential strategy of political resistance, civil disobedience also merits close attention in terms of its empirical implications. Hence the concentration of the academic debates on civil disobedience predominantly in 1960s and 1970s due to the agitative atmosphere of the era should not lead one to assume that it is an outdated problem useless to think about anymore. Indeed, there are several issues and questions within the literature that provide a fertile area of scrutiny depending on the point of emphasis and the interest of the individual political theorist.

In this thesis, I paid particular attention to the dimensions of violence and punishment in the theoretical discussions of civil disobedience. The conventional questions interrogating the extent to which the use of violence is permissible, and whether the protester should accept to be penalized constituted the starting point of the analysis that I wanted to carry out. The presence of the diversity with respect to the reflections on these questions stimulated my interest in the alternative ways in which it is possible to contribute to the literature from different perspectives.

As preliminary stages to excavate certain puzzles within the subject matter, it was necessary to comprehend what is so special about civil disobedience as a political action *per se,* and to conceive the politico-moral motivations behind the justification *and* justifiability of the phenomenon. In this realm of discussion, I observed that there exist divergent answers to

the same questions on definitional and justificatory aspects of civil disobedience. It was my disposition to conclude that whilst narrow definitions of the term do not seem to suffice to depict its peculiar characteristics, the multiplication of its descriptive elements might also lead to an over-specification of the definition that could make it difficult to identify any political action as an example of civil disobedience. Yet, bearing the judicial hard case feature of the concept in mind, I accentuated the necessity and usefulness to have decisive, yet not very rigid boundaries of definition. In terms of its justification, the discussion became more complicated with increasing number of questions in mind. The variety of politico-moral motivations behind civil disobedience was an indicator of the multitude of justification strategies that were not so much controversial. The conditions for justifiability, on the other hand, posed significant questions that related to the so-called 'perennial conflict' between one's own morality and the morality of laws. At any rate, these considerations explicated the first and general purpose of the thesis to show the openendedness of the discussions on the idiosyncrasies and justification of civil disobedience.

Having constructed a conceptual background with necessary tools for further analysis, I construed the problem of violence and punishment in particular. On the basis of my inferences from the first two chapters, I observed that favoring or disfavoring the use of permissible violence or acceptance of punishment does not seem to be absolutely necessary in terms of the definitional and justificatory aspects of civil disobedience. Taking one step further, I tried to indicate the weakness of arguments for nonviolence and accepting penalties in the face certain counter-arguments that develop plausible claims in the opposite direction. As a proponent of the first type of claims, however, I introduced fair play principles on the moral duty of citizens that they owe to each other, as a contributory perspective according to which use of violence and avoiding punishment seems to be problematic due to reasons that

are different from those offered by conventional explanations. Hereby, I attempted to accomplish the specific purpose of the thesis.

Defiance of laws will be in political agendas in present day as well as future societies as long as there is a legal framework and governmental power having supervisory authority over citizens. The cardinal question that is to be addressed should interrogate strategies of disobedience, and ways of justification and conditions for justifiability of noncompliance in the form of civil disobedience. Use of violence could be among these strategies to strengthen the impact of the protest. Similarly, insistence on avoiding punishment could also be a plausible tactic adducing to the commitment to the motivation behind noncompliance with particular laws. However, given that civil disobedient people rely on moral ground in one way or another, it is reasonable to expect that they consider being fair to their fellow citizens. Therefore, nonviolence and accepting punishment out of a *prima facie* duty of fair play appear to be morally more legitimate strategies in practices of civil disobedience.

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