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## **The Role of Disorder in Order: Civil Disobedience and the Rule of Law**

From anti-war protestors burning their draft cards in the 1960s to 'Tank Man' standing in Tiananmen Square in 1989, civil disobedience has played a key role throughout history in creating a sense of discomfort to enact change. Civil disobedience is the purposeful defiance of the law to peacefully protest. When more palatable and legal methods have been exhausted, civil disobedience calls attention to the issue at hand, and orders a reassessment of justice in the law<sup>1</sup>. Henry David Thoreau introduced this concept in his essay 'On the Duty of Civil Disobedience', in which he wrote "let every man make known what kind of government would command his respect, and that will be one step toward obtaining it."<sup>2</sup> With regards to the rule of law, civil disobedience presents a complication. The rule of law is fundamental in democratic societies, despite differences in interpretation and application. At its most basic, the Rule of Law protects order and mandates objectivity in the legal system. The Supreme Court of Canada described the Rule of Law as conveying "a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority."<sup>3</sup> There are 4 key principles: the government enacts law transparently, the law is clear and applied equally, the law governs the actions of government and private persons and their relationship, and the courts apply the law independently of political or outside influence. Thus, the Rule of Law and its principles protects the rights of citizens to equality and justice.<sup>4</sup> The relationship between civil disobedience and the Rule of Law, both historically crucial to the development and maintenance of democracy, is worth exploration.

There are a variety of perspectives to be offered and questions to be assessed on this matter. In the interest of preserving long-term democracy, civil disobedience and the rule of law must be viewed as fundamental and connected.

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<sup>1</sup> Kimberley Brownlee, "Civil Disobedience," Stanford Encyclopedia of Philosophy (Stanford University, December 20, 2013), <https://plato.stanford.edu/entries/civil-disobedience/>.

<sup>2</sup> Henry David Thoreau, *Civil Disobedience* (Boston: Houghton Mifflin, 1906), <https://xroads.virginia.edu/~Hyper2/thoreau/civil.html>.

<sup>3</sup> Joseph Magnet, "Rule of Law," Constitutional Law of Canada, 2013, [http://www.constitutional-law.net/index.php?option=com\\_content&view=article&id=23&Itemid=37](http://www.constitutional-law.net/index.php?option=com_content&view=article&id=23&Itemid=37).

<sup>4</sup> "What Is the Rule of Law - and Why Does It Matter?," Provincial Court of British Columbia, April 11, 2020, <https://www.provincialcourt.bc.ca/enews/enews-04-11-2020>.

The Rule of Law outlines that no individual is above the objective law. This raises an interesting philosophical debate: to what extent should people follow the law? Thomas Hobbes introduced the Social Contract Theory, which is the “mutual transferring of right,”<sup>5</sup> noting that we release our ‘right to everything’ in exchange for protection from the state. This transfer, thus, is consent to the laws of the state. One relinquishes their political obligation when, and only when, the state either threatens or stops protecting its citizens’ right to life. Later theories of the social contract are not absolutist. John Locke, for example, prioritizes the protection of natural rights to “life, liberty, and property”<sup>6</sup> by the state, and thus, political obligation is dependent on whether or not these rights are preserved. Locke has been highly influential in the adoption of constitutions in various democratic states, including Canada. Interestingly, section 52(1) of the Constitution Act 1982 declares that Canada’s constitution is the supreme law of Canada.<sup>7</sup> This means that any law that is ‘unconstitutional’ is “of no force or effect.”<sup>8</sup> Here, civil disobedience can prompt an evaluation of the constitutionality of a particular law. Direct civil disobedience - the purposeful breaking of the law that the perpetrator wants changed - can be especially influential. One example of where this notion of unconstitutionality was successfully applied was in the R. v. S.A case in Alberta in 2011. A young person was deemed to be trespassing on public transportation on multiple occasions, because of a previous ban on her use of the Edmonton Public Transport system. In this case, the court found that banning people from public property that generally the public has open access to is in violation of the right to liberty defined under s.7 of the Charter.<sup>9</sup> This example is one in which civil disobedience protected the rights and freedoms of our democracy. Here, and in many other cases of civil disobedience, the rule of law was strengthened by adapting a law deemed unjust and unconstitutional, and thus not commanding

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<sup>5</sup> Thomas Hobbes, *Leviathan*, ed. David Johnston (New York, NY: W. W. Norton & Company, Inc., 2021).

<sup>6</sup> John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

<sup>7</sup> “Section 52(1) – The Supremacy Clause,” Charterpedia (Government of Canada Department of Justice, June 17, 2019), <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/check/art521.html>.

<sup>8</sup> Charterpedia, “Section 52(1) – The Supremacy Clause.”

<sup>9</sup> R. v. S.A., 2011 ABPC 269.

the respect of the society in which it is meant to serve. Civil disobedience contests laws that no longer suit the needs of the public, thus allowing for the maintenance of a respected legal system and rule of law. This opportunity for progress in the legal system concurrent with social evolution is a key aspect of democracy that has allowed it to survive.

On the other hand, some believe that civil disobedience is a disrespect to the rule of law. As citizens of a system which upholds liberty, there is an expectation to respect and not seek to undermine the very laws that allow for the rights of citizens. The rule of law, in indicating that the law is above all individuals, prevents people from releasing themselves from their obligation to obedience. By defying the law through civil disobedience, one is placing their own moral compass and normative ideas above the law, which is a disrespect to the rule of law.<sup>10</sup> However, if a law is morally questionable, why should one follow it? Many believe, in fact, that laws which conflict with morality are not to be followed at all. In the *R. v. Drainville* case, the defendant was charged with mischief for participating in a protest/blockade. He did not deny that he disobeyed the law, but used a colour of right defence to argue that he believed in his moral right to his criminal acts according to the superior laws of God.<sup>11</sup> Justice Fournier denied the applicability of this defence, and noted that in conflicts “between our ‘legal’ rules and our ‘moral’ rules, courts invariably have ruled in favour of... the rule of law.”<sup>12</sup> The position that civil disobedience disrespects the rule of law is not exactly correct, however, because civil disobedience is purposeful, perpetrators understand the legality - or lack thereof - of their actions, and that they could be punished by the court as a result. Civil disobedience is not revolution: rather than denying the legitimacy of law in general, the civil disobedient accepts the system of laws and

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<sup>10</sup>Morris I. Leibman, “Civil Disobedience: A Threat to Our Society Under Law,” FEE (Foundation for Economic Education, July 1, 1992), <https://fee.org/articles/civil-disobedience-a-threat-to-our-society-under-law/>.

<sup>11</sup>John Helis (2011),

[https://curve.carleton.ca/system/files/etd/27b06d80-1ab9-42a6-aabe-15a5b3e9ddab/etd\\_pdf/f815621b08e8ae0db40f4fa87215f25f/helis-godandtheconstitutionthesignificanceofthe.pdf](https://curve.carleton.ca/system/files/etd/27b06d80-1ab9-42a6-aabe-15a5b3e9ddab/etd_pdf/f815621b08e8ae0db40f4fa87215f25f/helis-godandtheconstitutionthesignificanceofthe.pdf).

<sup>12</sup>*R. v. Drainville*, [1991] OJ No 340, [1992] 3 CNLR 44, 5 CR (4th) 38, 12 WCB (2d) 59 (The Ontario Court of Justice).

their authority, but seeks to change one specific rule. They act within the frame of legal authority and the rule of law, whereas the revolutionary neglects that frame.<sup>13</sup>

Justice Fournier's conclusion in the *R. v. Drainville* case raises further philosophical questions about the role of morality in the law. There are two rival views on this: natural law theory and legal positivism. Natural law operates off of the assumption that humans hold natural rights. Supporters of natural law believe that legal systems have a purpose of justice. Laws that do not adhere to this purpose of justice are not in fact laws, and are rather corruptions of the law. This view largely advocates for the use of morality in law. Of course, there are laws that are strictly practical, such as jaywalking laws. A natural law theorist notes that these laws are to be followed, as long as they respect justice and the inherent rights of people. If not, there is no moral or legal obligation to obey.<sup>14</sup> However, this system would raise complexity about which ethical view would be acceptable for the legal system - consequentialism, deontology, or religious rules? On the opposing side, legal positivism supports the separation of legality and morality. For something to be a valid law, it must be imposed by a certain authority, follow a specific procedure, and be enforced in society.<sup>15</sup> HLA Hart highlights the 'separation thesis', which dictates that legal validity/right/justification is not defined by moral validity/right/justification and vice versa<sup>16</sup>. The more widely accepted legal position, particularly when discussing the rule of law, is Lon Fuller's view on natural law. He accepts that a legal system can be formally just, but still have specific laws that are not. This society would be one with a rule of law: similar cases must be treated as similar, there is no punishment without crime, and there is no crime without pre-existing and public law.<sup>17</sup>

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<sup>13</sup> Carl Cohen, "DEFENDING CIVIL DISOBEDIENCE," *The Monist* 54, no. 4 (October, 1970): 469-487. <https://www.jstor.org/stable/27902193>

<sup>14</sup> "LEGAL POSITIVISM vs. NATURAL LAW THEORY," n.d.

<sup>15</sup> Andrei Marmor and Alexander Sarch, "The Nature of Law," *Stanford Encyclopedia of Philosophy* (Stanford University, August 22, 2019), <https://plato.stanford.edu/entries/lawphil-nature/>.

<sup>16</sup> Hart, H. L. A. "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71, no. 4 (1958): 593-629. doi:10.2307/1338225.

<sup>17</sup> Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1978).

At one point, residential schools were written into Canadian law under the Indian Act. At one point, Japanese internment was written into Canadian law under the War Measures Act. Both of these unjust laws had no place in a democracy, and were removed. Civil disobedience, a method of protest for unjust laws such as these, is beneficial for a healthy democracy. It ensures that the law advances with society, orders the re-evaluation of unjust law after legal methods have been exhausted, and ensures that the society in which we live is one that maintains our rights and freedoms - including the rule of law. Civil disobedience and the rule of law are not mutually exclusive: civil disobedience aids in the establishment and maintenance of the rule of law, and the rule of law ensures that these cases and reassessments of the law are treated equally and fairly. Both the rule of law and civil disobedience have been, and will continue to be, fundamental to our democratic society.

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