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JUDICIAL RESPONSES TO CIVIL DISOBEDIENCE: A COMPARATIVE APPROACH

ABSTRACT. In this paper, I compare the extent of Anglo-American judicial engagement in response to civil disobedience with that of the French judiciary. I begin by examining what the civil disobedient can realistically expect to achieve in a court of law. I shall argue that his priority should be to require the judge, acting as a mouthpiece for the law, to respond to his complaints. To do this, the civil disobedient must be able to deny liability for the offence he has allegedly committed by urging a different interpretation of the law on the basis of an alternative – but plausible – reading of constitutional or human rights. If the civil disobedient can do this, he can claim a victory of sorts, even if his claims are ultimately unsuccessful. But legal culture can present a further barrier. Judges have different roles in different jurisdictions and therein lie further difficulties for the French civil disobedient.

KEY WORDS: civil disobedience, constitutional rights, Cour de cassation, human rights, interpretation

In this paper, I explore what the civil disobedient should expect to achieve in court. This might strike some as surprising. If it is part of the definition of civil disobedience that the disobedient knows that he is breaking the law, then surely he also knows what to expect if he is summoned to appear in court – viz. conviction and punishment, if he has committed a criminal offence. Moreover, that would not necessarily concern him, since his aim might be to make a political point in the strongest way possible (the decapitation of the statue of Margaret Thatcher springs to mind here).

Many a civil disobedient would actually welcome an appearance in court; indeed to become the subject of prosecution might even have been his primary objective, for he may perceive her trial as a suitable platform for the expression of his moral or political views. The judge and jury will be required to listen to him, and he may also hope that the media will attend his trial and report her views to the public at large. But, in this respect, he may be seriously disillusioned. The judge and jury will not be required to listen to everything he has to say. If his views are irrelevant to the legal question of whether he has committed an offence, he will not be permitted to express them and, in any event, the jury will be told

to dismiss them. Perhaps his views will, or should be, relevant to the mitigation of his sentence upon conviction,¹ but he would hardly have looked forward to having his day in court merely to plead for mercy.

In this article, I shall dissect the notion of civil disobedience. Only the disobedient whose action is motivated by a plausible interpretation of human rights which, if correct, would have justified his act (or would at least have required the state to refrain from prosecuting him) can expect to be allowed to express his views in court. Even this, perhaps modest, conclusion is contingent upon the prevailing legal culture.² The disobedient is likely to be heard in court – whether or not he is ultimately successful – in England or America; but in the positivist French courts his arguments will not be openly entertained at all.

THE RELEVANCE OF HUMAN RIGHTS FOR CIVIL DISOBEDIENCE

I am not here arguing for a radical interpretation of civil disobedience. I agree with those who define civil disobedience as an act performed deliberately, in knowing violation of the law, because the actor has a different moral or political view of what the law should be, or of the policy objectives that politicians should be pursuing. Further, the act is done publicly (that is, the actor does not seek to hide what she has done). It is typically not violent³ and it is done accepting the possibility of punishment, but in the hope that the disobedient can persuade others that the objectionable law or policy should be changed. I agree too that civil disobedience can be either direct or indirect. It is direct when the actor violates the very law with which she disagrees: e.g. she may smoke cannabis because she disagrees with its criminalisation. It is indirect when the target of the disobedient’s protest is something other than the