

ON CIVIL DISOBEDIENCE AND CIVIL GOVERNMENT IN SOUTH AFRICA

Paper 2

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CIVIL DISOBEDIENCE

in its modern form - what we may provisionally describe as non-violent, illegal political resistance by the masses - started in South Africa, at the beginning of the century, during Gandhi's clashes with Jan Smuts and the South African government. This first instance in history of mass civil disobedience on a significant scale was aimed against the country's racial policies of the time. Civil disobedience would subsequently play a major role in the struggle for liberation in South Africa.

After Gandhi's successful campaigns of Satyagraha had led to the passing of the Indians Relief Act of 1914, 'passive action' was inscribed in the first constitution of the African National Congress in 1919 as a legitimate method of advancing the African cause (Chapter IV). It was used extensively by the Natal Indian Congress in 1946 and by most so-called 'non-white' political groupings involved in the Defiance Campaign of 1952. (For a full discussion of these events from a legal historical perspective, see Heyns 1992, 87ff.)

It was a campaign of civil disobedience, aimed primarily against the pass laws, led by the Pan Africanist Congress in 1960, which resulted in the massacre at Sharpeville, which changed the history of the country irrevocably. The main liberation parties were proscribed and the underground struggle turned violent. Civil disobedience was again used extensively in the 1980's, before the liberation movements were unbanned and the present negotiations started. There could be little doubt that civil disobedience was one of the primary causes of the eventual collapse of apartheid.

Civil disobedience also played a crucial role in the fate of some of the other most controversial ideologies of our time. Gandhi's successes with civil disobedience in South Africa and especially later in India gave a strong impetus to what would become a worldwide struggle against colonialism around the middle of the century. Gandhi has been described as the true liquidator of colonialism: He was the first brown-skinned person to stand up against a European power - and achieve such a significant victory.

More recently ordinary citizens in the former communist countries took to the streets in their millions - weighing down the system until it collapsed. As the century is drawing to a close, it could therefore be said that civil disobedience has become an integral part not only of the political processes of the land of its origin, South Africa, but indeed of the world.

There is a certain dialectical logic in the fact that South Africa, which produced one of the most repressive and offensive systems of government to emerge during this century, also presented the world with one of the most powerful tools of political resistance of modern times. The thesis of apartheid gave rise to the antithesis of civil disobedience; a singularly vicious form of repression spawned a uniquely effective form of resistance.

It should also not come as a complete surprise that civil disobedience only emerged during this century as the preferred tool of resistance of the masses worldwide. Civil disobedience

relies heavily for its efficacy on what may be termed its indirect working. Civil disobedience defies their direct opponent, the government, in a way which, it is hoped, will solicit international support. Where this strategy is effective the international community then exerts pressure on the direct opponent to change its Behaviour. The organised international community is a creature of the twentieth century and engaging in civil disobedience was therefore considerably less attractive in earlier times. Before the emergence of the 'global village' or, perhaps more accurately, the 'Global Federation' in which we now live, the likelihood of success of campaigns of civil disobedience was too small and the probability of bloody suppression of the resistance was too high to make it a viable option for all but a small number of heroic individuals. Mass civil disobedience is therefore a typically twentieth century phenomenon.

In spite of the almost impeccable credentials of civil disobedience outlined above, it should be noted that today it is being used for a wide variety of often very controversial and sometimes even contradictory goals. In South Africa it is used by those to the left and right of government, respectively to demand quicker change or a return to apartheid, or, more often these days, to demand secession in one form or another. In many countries of the world this form of resistance is being used by anti- and pro-abortion lobbies, anti- and pro-gay protesters and to pursue anti-nuclear and pro-environment causes. Clearly, engaging in civil disobedience cannot be justified, or at least not equally justified, in all these instances.

In 1939 Smuts called Gandhi's strategy of Satyagraha a 'novel [method of] political warfare' which was 'deserving of careful study' (Smuts 1939, 3). This year, which marks the centenary celebration of Gandhi's arrival in South Africa, seems a particularly appropriate time to take up Smuts's challenge, especially in view of the relatively scant intellectual reflection the subject has solicited thus far in its country of origin.

Many questions merit discussion. How and under what conditions does civil disobedience work? What are the spiritual, sociological, political and historical roots of this form of resistance? What different types of civil disobedience could be distinguished? We have no space to discuss these questions here. Instead, an attempt will merely be made to address the question of the justification - or absence thereof - of acts of civil disobedience.

The aim of this brief study is to suggest the outlines of a conceptual framework in terms of which the relative acceptability of different acts of civil disobedience can be evaluated. The focus will be on the South African situation, but it is hoped that the application will be more universal.

In order to address the justification of acts of civil disobedience, two preliminary issues need to be addressed. The first relates to the definition of civil disobedience. Without attempting to address this subject in any detail, it is merely proposed that acts of civil disobedience are (i) illegal (ii) non-violent (iii) open (iv) acts of political resistance (v) based on conviction and (vi) engaged in by the masses. (For a fuller discussion, see Heyns 1992, 10ff.)

THE REQUIREMENT THAT CIVIL OBEDIENCE IS 'ILLEGAL' (OR AT LEAST PRIMA FACIE ILLEGAL) NEEDS FURTHER CLARIFICATION

since the term could be given a wide or a narrow interpretation, I intend giving it a wide meaning. In societies where the rule of law obtains, it needs only be required that acts of civil disobedience are illegal, in the narrow, technical sense of the word. In these societies the

wrath of the state is unleashed only when it has been proven in court that someone committed a crime. In other societies the situation is different. In the late 1980's, for example, South Africans could be detained without trial for non-violent acts of public protest under the State of Emergency, even though they did not break any law. It is submitted that the actions of such protesters could also constitute acts of civil disobedience, although they do not technically speaking act illegally. Any conduct which is likely to provoke the state into taking punitive measures against the protesters is therefore to be regarded as 'illegal' for the purposes of the definition of civil disobedience.

The appeal made through acts of civil disobedience could also be either intra-legal or extra-legal. It is intra-legal when the conduct is prima facie illegal, but the validity of the law in question is being challenged on legal grounds, e.g. on the basis that it is unconstitutional. It is extra-legal when a valid law is violated because the law is considered illegitimate on the basis of an appeal to what is regarded as a higher norm, such as the dictates of justice or conscience or morality, or the demands of natural or divine law. In both instances we are dealing with behaviour that could be considered 'illegal' for the purposes of the definition of civil disobedience. The term 'illegal' in the above definition should consequently be given a wide interpretation, to include all behaviour that could unleash the wrath of the state.

The second preliminary aspect to be addressed is the perspective from which acts of civil disobedience should be evaluated. This is an important issue since it directly affects one's eventual view on when civil disobedience is justified.

South Africa's history abounds with examples of people and institutions whose views on resistance were direct functions of their own interest in the matter. Especially in the case of the Christian churches this phenomenon was evident. Those churches which identified with the status quo interpreted the Bible to grant Christians a very restricted right of resistance; while those which identified with the liberation struggle deduced a much more extensive right of resistance from the same source.

Clearly one's self-interest in the matter should not determine one's views if one wants to arrive at a relatively objective and intellectually honest assessment of the conditions of legitimate resistance. It is a truism of the legal systems of the world that no one should be the judge in his or her own case. The logical conclusion of basing one's judgement on one's self-interest is an acceptance that 'right is right'.

It is submitted instead that John Rawls's device of the 'original position' provides a proper starting point in this context. (See Rawls 1971, 118ff.) We should ask ourselves which principles on how civil disobedience should be treated would we accept if our own interest in the matter was shrouded behind a 'veil of ignorance'. That is, we must ask ourselves what approach we would have taken if we had to devise rules on how to deal with resistance in a hypothetical future society in which we did not know whether we will be the resisters or the resisted; the rulers or the ruled.

The present position in South Africa is particularly conducive to the acceptance of this viewpoint. Those in government today know they are likely to be the resisters of the future, and vice versa. Everybody knows that there is going to be a transition, but no one knows exactly when this is going to be and how much resistance might still be involved in the process. One is almost forced by circumstances to take the perspective of the Original Position, and in what follows that perspective will be adopted.

What must be asked, then, is when could we agree that people have a 'right of resistance' through civil disobedience, in the sense that this right also places a corresponding duty on the authorities to treat the resistance with tolerance or leniency. This type of right has been called a 'strong right' of resistance. A 'weak right' of resistance does not place a duty of leniency on the state, even though it could elicit some sympathy or understanding. (See Dworkin 1984, 188ff.)

Official leniency or tolerance of acts of civil disobedience, or recognition of a strong right of resistance, can, of course, take many forms. The police can decide not to arrest offenders; the public prosecutor may decide not to prosecute; the presiding officer in a criminal trial could find a way to acquit the accused; a light sentence could be imposed; a judge may express sympathy with the accused or, in extreme cases, a moral judge in an immoral system could lie about the law or even decide to resign. All these alternatives manifested themselves in one way or another in recent years in South Africa. (See Heyns 1992, 681ff.) In practical terms, the question addressed in this paper is when is following one of these alternatives called for? Clearly the overall level of tolerance that could be shown for acts of civil disobedience in any particular society would depend on the circumstances of that society - including the question how great the danger of anarchy in the specific situation is. It is therefore impossible to state as a universal rule that certain acts of civil disobedience should always, or never, be tolerated. At most one could try to establish certain guide-lines in terms of which it could be said that some acts of disobedience are less or more acceptable than others, and consequently deserving of less or more of the tolerance for resistance that could be showed in that society.

The main inquiry of this paper could consequently be formulated as follows: Seen from the perspective of the Original Position, when should tolerance be shown for acts of civil disobedience? (See Heyns 1992, 643ff.) It is submitted that two grounds for tolerance of acts of civil disobedience could be distinguished, namely cause-neutral and cause-sensitive arguments. Cause-neutral arguments call for a certain degree of tolerance for all acts of civil disobedience, irrespective of the merits of the objectives pursued through such resistance. Cause-sensitive arguments, on the other hand, proceed from the premise that certain acts of resistance are more deserving of tolerance than others because they are employed in the pursuit of more worthy goals and, conversely, other acts of resistance demand less tolerance because their goals are less meritorious. These two types of arguments will now be considered in turn.

Cause-neutral arguments for some tolerance of all acts of civil disobedience, or, to put it differently, general tolerance for civil disobedience, are mostly developments of the basic case for allowing freedom of expression. It is typically argued that truth can only be found in the rough-and-tumble interaction of rule and resistance, thesis and antithesis, construction and deconstruction. Social progress is not possible when a single Truth is being imposed from above, but rather when different truths are allowed freely to compete for acceptance. In this dynamic interchange of the orthodox and the unorthodox, the traditional confines of legality should not be regarded as immutable. As Copernicus showed us, what is illegal today could be orthodox tomorrow.

Allowing some room for illegal, non-violent resistance, it is argued, also serves the purpose of creating a safety valve, in the sense that it allows people to express themselves in a forceful way without having to resort to violence. As was pointed out by John F Kennedy: 'Those who make peaceful revolution impossible make violent revolution inevitable.'

At the same time, tolerance for civil disobedience equips society with an important alarm signal. It provides a relatively harmless avenue whereby those in power can evaluate their own legitimacy, and assess when they will have either to accommodate the dissenters, or entrench themselves. These arguments for general tolerance - the need to allow free speech, safety valves and alarm signals - are normally not affected by the question whether one agrees with the resisters or not. Especially from the perspective of the Original Position, where one does not know what one's eventual persuasions will be, this open approach should be attractive.

Some would say that general tolerance for politically inspired resistance is indeed an integral part of the Western tradition, where the values expressed above are part of the culture, but argue that it is foreign to the African tradition. In the South African case this is obviously an issue of particular relevance.

Fascinating studies by lawyer and anthropologist Max Gluckman in traditional African societies deal with precisely this question. In a number of these societies Gluckman and others identified what he termed 'rituals of rebellion'. At the end of a particular season women would put on men's clothes and taunt the men in the group, and chase them out to work in the lands - the traditional task of women. The women would sing songs of hatred and direct their abuse even at the chief.

These rituals lasted a couple of days, after which everything returned to 'normal'. The rituals were accepted by all concerned as an integral and integrative part of the life of the group. In the terms employed earlier, they facilitated free speech (albeit in a constricted environment) and served the role of safety valve and alarm signal. (See Gluckman 1954, 3ff and Gluckman 1963, 18ff.)

In addition to the above, Gluckman's research revealed that in many traditional African societies, if a prince led a rebellion he and his followers could be killed in the ensuing battle, but if he failed to topple the chief, his underlings could not afterwards be tried with treason (Gluckman 1963, 22ff and Gluckman 1965, 53ff).

Not charging someone for treason under such circumstances must surely be one of the most extreme instances of official tolerance of resistance. How could this remarkable fact be explained? It is submitted that the collective wisdom of these societies, as reflected in their legal systems, allowed for the fact that there should be channels open for resistance as ultimate safeguards against misuses of power. Some room was therefore provided for the assertion of privately perceived truths against the imposition of the Truth by a tyrannical and vengeful chief.

It could be concluded, therefore, that cause-neutral arguments for a measure of tolerance for even illegal acts of resistance, in one form or another, are not foreign to Western and African cultures alike. It is therefore submitted that we should accept a rebuttable presumption in favour of such general tolerance for civil disobedience.

The cause-neutral approach was given much support in the recent report of Philip Heymann and others to the Goldstone Commission of Inquiry regarding the Prevention of Public Violence and Intimidation, where it was argued that instead of hampering public protest, whatever the cause may be, as the South African tradition was for a long time, the police should facilitate it. Even when the resistance is unlawful, the police should not clamp down

on it except under very closely circumscribed circumstances which have nothing to do with the cause being pursued. (See Heymann 1992, 2 and the Regulation of Gatherings Bill, 1993.)

It is submitted that the general tolerance demanded by the cause-neutral arguments could either be added to, or subtracted from in specific instances, on the basis of the additional cause-sensitive appraisal of the resistance. That is, depending on the merits of the particular cause pursued through the resistance, more or less leniency might be appropriate in specific instances. Clearly, anti-Hitler protesters in Germany and pro-Hitler protesters in the United States in 1940 could not be deserving of the same degree of tolerance.

How, then, could the relative merits or demerits of the causes of particular acts of resistance be evaluated, in order to assess the appropriate level of tolerance? Some causes, such as Nazism, are easy to evaluate, but others are more complicated.

It is submitted that the key to answering this question lies in the growing global consensus that individuals have certain inalienable rights. To say that people have 'inalienable' rights does not imply that these rights will not or cannot be violated. That happens all the time. What it does imply is that if these rights are infringed upon, this is not only morally wrong, but the person concerned is also entitled to redress. This could be done either through legal mechanisms such as the courts, or, if that is not possible, through self-help which, if there are no legal avenues open, could be illegal. Whether self-help should be non-violent or could be violent depends on what is reasonable under the circumstances. Illegal resistance, it is therefore submitted, is justified to the extent to which taking such actions are the only reasonable way to counter violations of basic human rights.

A right of resistance is therefore seen as the flipside of the coin of the recognition of basic human rights. One's views on the conditions of legitimate resistance will depend on one's perception of what basic human rights are; conversely, one's views on whether basic human rights are being violated will depend on whether it is believed that actions complained of could constitute good grounds for resistance.

The link between the recognition of basic human rights and a right of resistance runs as a sometimes implicit but often explicit theme through the human rights documents of the world. In the first edition of the Magna Carta of 1215, it was stated that, if the King violated 'the peace and liberties' granted in that forerunner of all human rights constitutions, an elected group of Barons had the right to 'distress and harass [the King] by all the ways in which they are able'. (Chapter 61, omitted from reissues because of its revolutionary implications). John Locke, in his defence of the Glorious Revolution of 1688, maintained that people had a right to take the law into their own hands when their natural or inalienable rights were being violated (Locke 1960, para 2.7.90). The Allied participation in the Second World War is perceived by many to be the most extensive defence yet of human rights. To a large extent that war jumpstarted the present international emphasis on the protection of human rights - also in South Africa. (See the 1943 document 'African Claims in South Africa' in Karis & Carter 1973, 209ff.)

The Universal Declaration of Human Rights of 1948 in its preamble explicitly links the violation of human rights with a right of resistance: '[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights be protected by the rule of law.'

The Freedom Charter of 1955, the foundational human rights document in South Africa, outlines the basic rights of all citizens and concludes: 'These freedoms we will fight for, side

by side, throughout our lives, until we have won our liberty.' The very first document to be called a 'Bill of Rights' in South Africa, in fact, was a list of the reasons why Gandhi led a campaign of civil disobedience against Smuts in 1912. (See Heyns 1992, 116.)

The connection between human rights and resistance also goes a long way towards explaining the emphasis of groups trying to promote observance of human rights in areas where human rights are often violated on the need for the people on the ground to know what their rights are. It is believed that if people know what their rights are, they will not allow these rights to be violated.

It is submitted that the emerging global consensus on the idea that certain rights are inalienable, and the rough agreement on the contents of these rights, reflects the closest approximation available of what those in the Original Position would have regarded as the grounds for legitimate resistance. The present human rights ethos is the result of many centuries of political struggle, in the process of which the rulers and the ruled often traded places, in many instances after bloody revolutions. In a very real sense the human rights documents of the world are an index of the interests which, if not protected by the state, could eventually justify self-help by the citizen.

If history has taught us anything, it is that revolution can only be averted if certain fundamental human interests are protected. Our world bears witness to the validity of the adage 'If you want peace, work for justice', with 'justice' in the jargon of our time meaning the protection of basic human rights.

The inter-relatedness of the recognition of human rights and the right of resistance under certain circumstances are also evident from the parallel historical development of these two concepts.

If one wants to study the origins of the idea that a certain interest is protected as a basic human right, this could be done indirectly, and fairly accurately, by tracing the history of the claim that violations of that interest justifies resistance. Two examples will have to suffice to illustrate the point. Firstly: The right to conscience and freedom of religion is widely regarded as the first human right that was recognised as such. At the same time the right of resistance was initially confined, in accordance with what is sometimes termed the Stoic-Christian approach to political obligation, to protection of conscience or religious convictions. In typical fashion the repressive state was equated with bad weather that simply had to be endured, as long as conscience was not implicated. (See e.g. Grotius 1925, para 1.4.1.3.) If conscience was implicated, as in the case of Daniel and his friends in the Old Testament, resistance was justified.

Secondly: During the past two centuries the advent of the recognition of socio-economic rights coincided with the emphasis of Marx and others on the right of the proletariat to revolt because of their social and economic deprivation. (See Marx & Engels 1951, 61.) Human misery in almost all its forms has become something intensely political and non-contingent. From this perspective, the distribution of social benefits is never to be regarded as 'natural or necessary', like the weather. Someone who insists that socio-economic deprivation could justify resistance, in effect argues that these are basic rights, and vice versa.

If recognition of a right to resistance is premised on the violation of human rights, it is not difficult to justify resistance where the right to vote is not given effect. There is wide

consensus that the right of political participation should be included in any Bill of Rights. But what about the situation where citizens do have the vote? Is every citizen not bound by the decisions take by the majority? If that is the case, there would be no room for civil disobedience in a majoritarian system.

I do not believe the principles of democracy support such a conclusion, if democracy is seen as having two basic components, namely political participation and the protection of basic human rights. Only to the extent that both elements are present in the same society, are we dealing with a democracy as it was defined. If protection of human rights is part of the definition of democracy, it is undemocratic - not simply wrong or ill-advised, but undemocratic - for the majority to violate the basic rights of the individual and they could consequently be resisted.

Power in a democratic society is controlled by majority decision-making, but the above circumscription of democracy implies that there is an exception: That rule applies only insofar as the basic rights of the individual are not being infringed upon. We may call this the 'human rights exception' to the majoritarian principle of democracy. When the majority impinges on the basic human rights of the individual, resistance could be justified, even in a society which would otherwise be considered democratic.

In short, then, violations of basic human rights could justify illegal resistance in all societies where such resistance is the only reasonable alternative under the circumstances.

The approach outlined above does provide a general framework, but it also has serious limitations as a general answer to the question when civil disobedience is justified. In some instances there is a reasonably wide consensus on the contents and reach of the term 'basic human rights' and in those cases the proposed approach provides clear guide-lines. In many instances, however, there is no such agreement. Consider, for example, the controversy which surrounds the recognition of so-called second generation rights and also some third generation rights, such as the right of self-determination, and even the exact limits of a well-recognised first generation right, such as freedom of expression. Even after many centuries of debate and conflict on this issue, no consensus has been reached.

If we were to make our assessment of the justification of acts of resistance dependent on the question whether the resisters are pursuing basic human rights, but we do not agree on the contents and scope of the term 'human rights' as applied to the particular case, we are no closer to a solution to the question when leniency should be applied than we were at the outset. We have merely rephrased the problem we are dealing with in a not too useful way. Insofar as there is no clear consensus on the question whether, for example, secessionist, anti- or pro-abortion, anti-nuclear or pro-environment protesters are rightfully claiming a violation of basic human rights, a different criterion is needed.

Adopting and adapting an idea of Ronald Dworkin, it is submitted that in such cases of uncertainty, instead of evaluating the merits or demerits of a particular cause pursued by the resisters, one should ask oneself whether it is possible to establish what kind of conviction is involved, and then to ask how acceptable or unacceptable those in the Original Position would have considered resistance based on that type of conviction to be. In short, it is submitted that in cases of uncertainty the test should not be whether we are in fact dealing with a defence of basic human rights, but whether we are potentially dealing with it. (See Dworkin 1985, 106ff.)

On the basis of the type of conviction involved, as opposed to its merits, one could distinguish what could be called integrity-based, anti-exploitation and **POLICY-BASED CIVIL DISOBEDIENCE**. The question will now be posed whether resistance motivated by each of these types of convictions would potentially constitute a protection of basic human rights.

INTEGRITY-BASED CIVIL DISOBEDIENCE involves people's ultimate concerns; that which determines the very meaning of their lives, now and possibly in eternity. A typical example would be religious persuasions. It is submitted that those in the Original Position would allow the greatest degree of tolerance for resistance based on this type of conviction, even if such resistance could possibly fall outside the scope of what is normally considered to be the boundaries of free speech. In the Original Position no one knows whether they will have popular or idiosyncratic beliefs when the 'veil of ignorance' is lifted, but they do realise that preserving such beliefs, whatever they are, could be the most important aspect of their lives and consequently they would agree to a high level of tolerance. This holds true for majoritarian and non-majoritarian systems, because, as it were, truth is not a popularity contest.

On the other side of the spectrum, policy-based civil disobedience would be lowest on the list of priorities of those in the Original Position. Here the resistance is motivated not by the conviction that those in power are requiring one to violate one's deepest held beliefs, nor is it believed that the powerless are being exploited; it is merely believed that those in power are making an error of judgment, to the equal detriment of us all. This occurs typically in cases of pure co-ordination decisions. For example, civil disobedience aimed at ensuring that everybody is required to drive on the right as opposed to the left hand side of the road is based on this type of conviction.

Policy-based civil disobedience does not potentially involve the protection of basic human rights, at least not in majoritarian systems. Democratic theory, as circumscribed earlier, allows the majority to impose its will on the minority in respect of matters of policy. Consequently there should not be room for policy-based civil disobedience in a majoritarian system, even if it could turn out that the charges of the protesters that the wrong policy is being followed are substantiated.

The situation is different where there is minority rule. The principles of democracy do not allow the minority to impose its will on the majority - not even in respect of matters of policy. In many instances, however, one would have to ask the question whether disagreement about matters of policy is serious enough to warrant drastic action. In general it could therefore be said that there would be no, or little, tolerance for this type of resistance.

Whereas the charge in the case of policy-based civil disobedience is that the rulers are being ill-advised or misguided, **ANTI-EXPLOITATION CIVIL DISOBEDIENCE** is based on the conviction that those in power are being selfish, in that they are sacrificing the interests of the powerless to their own advantage. They are misusing their power. The essence of the human rights exception to the majority principle of democracy is that not even a majority is allowed to exploit their fellow-citizens. The charges of such protesters, even if uncertain, are therefore serious. Unlike the case with policy-based civil disobedience, anti-exploitation civil disobedience carries with it the potential of compliance with the human rights exception to the majoritarian principle of democracy. In non-majoritarian systems this potential is even greater, as is, therefore, the need for tolerance.

It is consequently submitted that those in the Original Position would require less tolerance for anti-exploitation civil disobedience than for integrity-based civil disobedience, but more tolerance than in the case of policy-based civil disobedience.

To summarise and tighten up the conceptual framework developed above: The overall level of tolerance which could be shown to acts of civil disobedience in each society depends on a variety of considerations, most notably the potential for anarchy in that particular society. Given these constraints, the priorities in respect of showing tolerance that those in the Original Position would probably agree on are as follows: There is a rebuttable presumption in favour of some tolerance for all acts of resistance, on the basis of non-cause-sensitive arguments. Depending on the merits of the cause being pursued, the presumption could be strengthened or weakened in particular instances. If the protest is manifestly aimed against a breach of basic human rights, the presumption is strengthened and additional tolerance is due. If that is clearly not the case, the presumption is weakened.

Insofar as the question whether we are dealing with a violation of fundamental human rights has no clear answer, attention should be paid to the type of conviction involved. Integrity-based civil disobedience is deserving of great additional tolerance, anti-exploitation civil disobedience is deserving of some additional tolerance, and policy-based civil disobedience is deserving of no additional tolerance, except perhaps in non-majoritarian societies. It might be difficult to make a clear distinction between the different types of convictions that could be in play in a particular case. It is submitted that where more than one type of conviction is applicable in a particular instance, the degree of tolerance due to each type of conviction should be applied in a pro rata fashion.

It remains to apply this conceptual framework to a number of practical examples. Consider the situation which arises when a group of people occupies the State President's office as an act of political protest under the following circumstances:

1. They are there to protest the prohibition on sexual assault of small children.
Comment: Their protest is clearly aimed at the violation of the basic rights of others, hence the presumption in favour of general tolerance is rebutted. No tolerance is due.
2. It is some years ago. The protest is aimed against the requirement imposed on people of colour to carry passes and their removal from the common voters' roll. Comment: They were clearly protesting the violation of basic human rights. If resistance is the only reasonable alternative under the circumstances (for example if no bona fide negotiations to change the situation are being conducted) not only general, but additional tolerance is due.
3. The time is the present. The protesters are members of a small ethnic minority. They wish to secure the secession of a relatively poor section of the country. They claim to fear exploitation in a unitary state and insist that they have an inalienable right to the self-determination of their people. Comment: There might be a legitimate debate on whether or not they are exercising a basic human right. On the basis that we are dealing with anti-exploitation civil disobedience, general as well as additional tolerance might be due, depending on whether other less drastic options, apart from occupying the State President's office, are open to them and could reasonably be expected to yield the required result.
4. The people occupying the office are anti-apartheid activists. Multi-party negotiations are under way, but they claim that it is taking too long and the government is not acting in good faith. Comment: They deserve general tolerance, but is additional tolerance due? They clear the first hurdle, in the sense that they are protesting the

denial of basic human rights. On the basis that apartheid entails the denial of virtually every recognised human right, additional tolerance appears prima facie to be due. The second hurdle could, however, be more problematic - was their conduct the only reasonable alternative under the circumstances? The answer to this question will depend on one's views on the prospects for the negotiation forum to redress these wrongs. Would it be reasonable to expect them to rely on the negotiation process? That is a factual question which has to be determined in the light of the prevailing circumstances.

5. Assume that democratic elections have taken place and we are in the new South Africa. The protesters are campaigning against a decision of the new government to redevelop the country's nuclear military potential and to exploit its natural resources on a scale that will have a permanent detrimental effect on the environment. Comment: Is additional tolerance due? There is no consensus on whether we are dealing with a violation of basic human rights. Dworkin has argued that in such cases we are dealing with policy-based civil disobedience. The majority in fact has the authority to take such decisions on behalf of the population as a whole. Anti-nuclear, and presumably also pro-environment protests, are therefore deserving of very little tolerance. Such protest is qualitatively on a par with protest about the side of the road on which we drive. (See Dworkin 1985, 111.)

If Dworkin is right in labelling this type of protest as policy-based, that would spell the death-knell for anti-nuclear and pro-environment civil disobedience. However, it is submitted that Dworkin's classification is wrong, if we consider the question of justice between generations and the requirement that one generation should not exploit another. The protest in question could in fact be aimed against exploitation of future generations by the present one. Irrespective of whether one agrees with them or not, we are dealing with an instance of anti-exploitation civil disobedience. If there are no other channels the protesters could reasonably be expected to follow, such protest could therefore be deserving of general as well as additional tolerance.

To conclude: It was said at the outset that South Africa gave the world apartheid and civil disobedience. We are now hopefully approaching an era in which South Africa could be associated rather with Satyagraha than with apartheid, with resistance rather than with repression. The ideal would of course have been to create a social system in which there will be no need for resistance, a society in which we could have peace because we have justice. In view of the political reality in our country, that hardly seems a feasible option. The future spells conflict, not harmony, well into the twenty-first century. The problem is that, in many instances, we will be dealing with a conflict of what is commonly considered to be basic human rights on both sides.

Through their conflict, through their resistance, our people will either plunge our society into irredeemable chaos, or eventually shape a more stable structure for our future society. In some instances this will have to involve redefining the boundaries of what we consider to be basic human rights. Insofar as this process is within the control of lawyers and politicians, the determining question will be whether we have the sensitivity and wisdom to steer our society in the direction of non-exploitation. In a very real way the future of the country depends on whether we could find legitimate ways of expressing and handling dissent. In turn, the answer to that question will depend on whether those expressing and those handling dissent could place themselves in each other's position.

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NOTE:

This paper is based on the research done by the author for his doctoral thesis, entitled 'A jurisprudential analysis of civil disobedience in South Africa', submitted to the Faculty of Law, University of the Witwatersrand, Johannesburg in 1992. The thesis contains a detailed legal historical overview of the use of civil disobedience in South Africa by Gandhi at the beginning of the century and by the liberation movements before 1990.

The paper, which focuses on policy issues, was delivered at the 16th World Congress in Philosophy of Law and Social Philosophy in Reykjavik, Iceland, in June 1993 and during the LLM lecture series on human rights at the University of Pretoria in 1992 and 1993.

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