

Do we have an obligation to obey the law?

If we start from the premise that when considering whether or not to obey the law, we conduct a rational assessment of the advantages and disadvantages of doing so, we might include in the advantages some sense of 'obligation' to obey, instilled in us during the process of socialisation. As will be argued, this sense of obligation is a false one, and no over-arching and concrete obligation to obey the law underlies it.

It is worth stating to begin with what is meant by 'having an obligation' to obey the law, as the term can lead to some confusion. We should note the difference between 'being obliged' to do something and 'having an obligation' to do it - the two are separate concepts. In a famous example taken from Hart, if a gunman orders a clerk to hand over his money (with a credible threat that he will shoot the clerk for failure to comply) then the clerk, if he obeyed, 'was obliged' to hand over the money. However, it would be a misinterpretation of the situation to suggest that the clerk 'had an obligation' or 'had a duty' to obey. If this situation is writ large in society, the gunman can be seen as the sovereign habitually obeyed and the orders are general, prescribing courses of conduct rather than single actions. However, the distinction remains. 'Being obliged' is a statement about the beliefs and motives with which an action is done - in this case the belief that serious harm would occur to the clerk if he failed to comply. Of course, the clerk would not have 'been obliged' if the gunman had threatened merely to pinch him, as the cost of non-compliance would be trivial. Nor would the clerk have 'been obliged' if he had good reason not to believe the gunman would carry out his threat. 'Having an obligation', on the other hand, is a matter of legal fact: for example, it could be stated that one 'has an obligation' to tell the truth in court. Whether or not this is the ever in fact the case, the term is defined by this type of situation.

'Having an obligation' could be seen as a moral, rather than legal, principle - it can be either one but not the other, or it can be both. It does not just refer to an order backed by a threat - it could, for example, include cases where one is forced to conform to a general morality. An over-riding concept of 'justice' unites law and morals: we can talk of 'the justice of the Law' and 'the justice or injustice of the laws' at the same time. In some classes of law the analogy of orders backed by threats fails, since they perform a different social function (for example, marriage and contract law). Such laws do not impose duties or obligations, but confer upon

individuals the legal power to create structures of rights and duties within the coercive framework of the law.

There is another interpretation of 'having an obligation', which Hart describes as the 'predictive interpretation'. This defines it in terms of the chance or likelihood that the person having the obligation will suffer a punishment or 'evil' at the hands of others in the event of disobedience. This states obligations not in psychological but in empirical terms. Hart dismisses this view as wrong. Deviation from the rules is not merely a prediction that hostile reactions will follow, but are also a reason or justification for such reactions. If 'having an obligation' is defined by the likelihood of the perpetrator suffering in the event of disobedience, this suggests that if there was no chance of him being caught (for example, if he had successfully bribed the police) then he would no longer have an obligation. It is therefore crucial to see that the statement of having an obligation and the prediction of suffering may diverge.

Another definition of obligation is clearly required. Obligation implies the existence of a rule, rather than a one-off order. It exists where the general demand for conformity is insistent and the social pressure brought to bear on deviants (or those who threaten to deviate) is great. According to Hart, obligation has three common characteristics: firstly, the insistence on the importance or seriousness of social pressure behind the rules; secondly, the rules are seen as necessary for the maintenance of social life or some highly-prized feature of it; thirdly, recognition of a sacrifice or renunciation on the part of the person with the obligation. However, this does not necessarily mean that there is any feeling of pressure or compulsion on the part of the person so obligated.

Obligations can also be seen from internal and external points of view. The observer may, without himself accepting the rules, assert that a particular group accepts the rules. For example, a red light is not just a sign that people will probably stop driving (the external point of view) but also a signal to the driver to stop (the internal point of view). Hart's main criticism of predictive theory is that it defines the internal aspect of obligation out of existence.

Definitions aside, this leaves us with the question of whether or not we do, after all, have an obligation to obey the law. Walzer says that there is no 'conventional wisdom' on the subject. His argument starts however from the conventional wisdom (once revolutionary doctrine) that the government derives its power from the

consent of the governed in a form of social contract: "I have committed myself (i.e. consented): therefore I am committed (i.e. obligated)." A contract is signified by some action (word or deed) of our own. Tacit consent can be interpreted in different ways: the best interpretation seems to be that a silent man is taken to consent if the man himself is made aware that this assumption is being made. The contract is of course an exchange: obligations can be compared to debts as they are other people's resources and not ours, while consents are conveyances of our own autonomy to others.

In Locke's liberal theory, any oppressed citizen has the right to disobey. In reality, civil disobedience is carried out only by those who are a part of a group, when citizens feel an *obligation to disobey*. The reasoning is as follows: "Law X is inconsistent with *our* (not *my*) moral convictions, therefore I ought to disobey". Wolff expresses this in very cynical terms:

"To be true to one's principles is either a metaphor or else an elliptical way of describing loyalty to other men who share those principles and are relying on you to observe them".

This is of course exaggerated, but commitments to 'principles' are also usually commitments to a group. 'Selling out', that is giving up an heretical point of view in favour of the orthodoxy, is seen by the heretical group not just as a betrayal of principles, but a betrayal of them as a group.

So obligation begins with membership, which can, in its broadest sense, begin with birth into a society. During one's formative years, a *sense* of obligation arises through the process of socialisation. However, *real* obligation comes with *wilful* membership. Even this, though, can be defined in different ways. From a minimal, 'Menshevik' point of view, wilful membership is simply continued membership after a certain age. From a maximal, 'Bolshevik' point of view, wilful membership requires a public profession of the faith and long-term involvement in group activities. At the maximal extremes, secret societies will practice rituals such as tests, initiations and oaths, to ensure that membership is wilful and commitment is high.

The state can be viewed as an 'ideal or potential community', obligating its members to oppose those who act legally but immorally in its name. Therefore those who disobey a collaborationist government after military defeat (or a satellite government after peaceful capitulation) often claim that their *state* has been betrayed, and that

they are obligated by a previous membership and driven by patriotism to resist. However, they cannot claim that all of their fellow citizens are so obligated. If resistance is successful, while active collaborators could possibly be punished, those who had simply refused to join the fight could not be, as they had never incurred a duty to do so. To insist that obligations can only come from wilful conduct is to restate the theory of the social contract - this applies well to small groups such as secret societies, but much less well to the state itself, to established churches or to some vague concept of 'humanity'. The key is this: groups in which wilfulness is maximised can rightfully impose greater obligations than those where membership is effectively inherited, unless of course membership of the latter group is seconded by voluntary participation in the activities of that group. This is why, according to Rousseau, small societies are generally 'morally superior' to large ones: they can impose greater obligations upon their members.

The 'obligation to disobey' arises when obligations incurred in some small group come into conflict with those incurred in a larger, more inclusive group (generally the state). When the small group is a secondary association (i.e. overruled by the state) it ought to yield without conflict to the primary association (the state, with its monopoly on the legitimate use of violence). 'Selling-out' is simply a matter of behaving like a member of a secondary association. Conflict occurs when groups are formed, and their claims announced, which are 'secondary associations with claims to primacy'. However we need to draw an important distinction between two types of association. The first type has a 'total claim to primacy' - whenever commanded, its members must challenge the established legal system, to overthrow and replace one government with another, and to attack the *very existence* of the larger society - these groups can be described as revolutionary. The second type has only a 'partial claim to primacy' - the larger society is asked to recognise their primacy in some particular sphere and so limit its own primacy, and the members are required only to disobey certain laws at certain times. These are clearly not revolutionary in the above sense, but when the state assigns labels of 'rebel' or 'subversive' to such types, who reject such labels, they are often forced to transform themselves into revolutionaries for the purposes of self-defence. The state can live with such groups - indeed this is the historical basis of liberalism, whereby disobedience or heresy is transformed into mere nonconformity.

So what of the cases where the partial claim to primacy is not recognised? According to Locke, one can be a part of the wider society or outside it. In the first category, one can be a citizen (with *full* recognition of the primacy of the state, though certain areas of social life may be kept beyond the government's reach) or a rebel (who seeks to replace the government and its laws). In the second category, one can be an emigrant (who has left the society in order to renounce one's social obligations) or an alien (who cannot commit entirely to the new society, but has certain obligations in reward for its protection). Membership of a group with partial claims to primacy falls into none of these categories however; one is not a citizen (as loyalties are divided) nor a rebel (as one seeks no change in government), not an emigrant (as one does not leave) nor an alien (as one can demand the right to remain in the state). It is possible to talk of some kind of 'internal emigration' as Walzer does, but this odd assortment of tribes, clans, sects, trade unionists, pacifists and others are united by one belief - that they have no claim to the moral supremacy or political sovereignty of the larger society. Figgis claims that sovereignty is just 'a venerable superstition' and that in reality 'it is as a series of groups that our social life presents itself.' Maybe this is why such groups have no claim to sovereignty; as smaller, 'morally superior' groups they recognise the negative consequences of 'diluting' the group by becoming more inclusive.

Walzer defines our obligation in terms of a *prima facie* obligation to obey the state, as it is the most inclusive society of which we are a part. This is not unreasonable, provided of course that the state provides equally to all its members certain essential services. But this *prima facie* obligation simply means that disobedience must always be justified. Men also have a *prima facie* obligation to honour their engagements, to defend the groups and uphold the ideals to which they have voluntarily committed themselves, even against the state, so long as their disobedience of laws does not threaten the very existence of the larger society or endanger its citizens. In other words, sometimes it is *obedience* to the state, when one has other moral commitments, which must be justified, not disobedience: explanations are owed to the brethren or comrades who one has betrayed. In reality, it is rarely the case that limited civil disobedience threatens the very existence of the state and of services such as public health and personal security which the smaller group cannot provide. The two forms of claims to primacy (total and partial) usually remain distinct. Groups who exercise civil disobedience may claim that the law is over-extended, but they do not wish to abolish laws in other areas.

Criminal disobedience is a different matter entirely. Firstly the activities of criminals endanger us all, so they cannot claim to be operating in a different sphere from the state. Secondly, criminals do not make any claim to primacy - they seek only to evade, not to limit, the authority of the state. As such the criminal's only association is with the state itself, and the obligation of the state is being rejected.

The insistence that the state itself comprises of only wilful members is extremely dubious: wilfulness of state membership can only be described in terms of joining or not joining secondary associations - 'internal emigration' - which offer real (though partial) alternatives to state membership. If groups within which men learn to object are repressed by the state, then crucially the state can no longer be seen as a voluntary association. Aristotle, and some more recent utilitarian philosophers, attempted to skirt round this problem by dismissing social contract theory altogether. The obligation to the state is defined in terms of the state's *value*, in achieving the 'highest good', not the wilfulness of membership. There are however major difficulties with this point of view. A state with no toleration of minorities will not be valuable to these minorities; rather it will have a net cost to them. A state cannot 'include' those with universalist or internationalist pretensions, such as the Roman Catholic Church, and no true pacifist would feel that a war-mongering state was aiming towards his definition of a 'higher good'. It is eminently possible that states pursue not the 'highest good' but simply the 'lowest common denominator', and in any case, there is no universal definition of the 'higher good' which the state could ever aim for, as opinions vary so widely. Pateman extends this criticism of liberal theory further, by saying that the utilitarian position is essentially not an argument for obligation at all, it is simply an argument for *obedience*. As voluntarism has been abandoned, there is no sense of obligation left. The state is redefined as a fragile, continuously reassessed bond between governors and governed, rather than a voluntary assumed commitment - according to Bentham, "it is men's duty to obey, just as long as it is in their interest, and no longer". There is no mediation between the demands of self-interest and the claims to primacy of the state, and as such the utilitarian theory cannot be construed as a theory of obligation.

The utilitarian position is not the only liberal view though: a liberal form of social contract theory, where legitimacy is based on the 'motivations' of the bourgeois culture, suggests that all participants in a liberal social contract are held to be able

to see its advantages. The social contract, by virtue of being a promise, transforms obedience into obligation: substantive political freedom and equality are given up or exchanged for the protection of the liberal state. Yet there is one insurmountable flaw when this theory is applied to the state - there has been no explicit 'social contract', as we are not easily able to reject the terms of the contract, more a 'social diktat' which is not inclusive of all members of the society.

The democratic view is rather different. Theorists are now turning away from a vertical model of political obligation. The central plank of a liberal-democratic state is the alienation by voters, through elections, of their right to make political decisions. There can therefore be no self-assumed obligation if the authority of the liberal-democratic state and the political obligation of its citizens is to be justified. Democratic theory is reclaiming this self-assumed obligation, viewing political obligation as an horizontal relationship between citizens. This cannot be reconciled with the vertically-oriented liberal view. McBride perhaps sums up the modern democratic theory of the state better than anyone:

"a society that formed a single voluntary association for certain purposes and that consisted of a plurality of voluntary associations for other purposes - both the respective purposes (of the largest associations and the others) and the identities and memberships of the sub-associations could be conceived of as fluctuating in response to conditions."

This leaves us with a rather fragile model of the state.

Singer argues that our ultimate obligation to obey the law is a moral, not legal one, otherwise the legal obligation would lead to infinite regress. Moral considerations are ones which one is prepared to apply universally, and which are (for the individual in question) more important than other universal considerations such as aesthetics and etiquette. Singer defines a *prima facie* obligation to the law as an obligation to which weight has been given, but which is not absolute. In a model democracy, Singer sees reasons for obeying the law which are not present in other types of government, and concatenates them into this one term. The two main premises are these: firstly, a democratic society where all have equal power, and where there is no tendency for the majority to oppress a minority, is a fair compromise between otherwise competing forms of power. But it is inconceivable that a democracy like this could exist - if we believe that the majority will act in their own self-interest, certain extant minorities which prove threatening to the majority will undoubtedly be

oppressed. Secondly, Singer claims that taking part in a decision-making process gives rise to an obligation to act as if one had consented to be bound by the result. If participation is voluntary, actual consent is not required. But again, who can claim that any modern democratic society is entered into entirely voluntarily? And again, who can claim that all interest groups in a modern democratic society will be included in the decision-making process?

Wolff takes this argument even further in his essay *In Defence of Anarchism*. Wolff starts from the following question:

"I have an obligation to obey the laws which I enact, or those which my agent enacts in strict accordance with my instructions. But how can it be claimed that I have an obligation to obey laws made in my name by a man who has no obligation to vote as I would, or indeed no effective way of discovering my preferences?"

If obligation rests on a promise, once the promise is given one ceases to be autonomous. Therefore even traditional representative democracy can diverge from the will of the people. This is exacerbated on a grand scale in modern democracies: the need for technical knowledge, the discussion of increasingly complex issues and above all the secrecy surrounding national security concerns all ensure that a modern 'representative democracy' is not simply the executive of the will of its people; it is more like political stewardship or, in Plato's terms, 'elective guardianship'. It may be the case that there are arguments for individual obedience to the state, but these do not in any way confer on the members of such a state any *obligation* to obey the law.

But could these laws still be legitimate at the price of individual autonomy? Rousseau claims that when a political community deliberates together on the 'general good', and embodies its deliberations in general laws, it acquires legitimate authority over all members of the deliberating body. There is therefore apparently a moral obligation to obey laws willed by collectivity. However, this argument fails when modern democracies are seen in the light of Wolff's criticisms, as the majority of members of the state cannot be seen as taking part in the deliberative process. The argument also has to be accompanied by the suggestion that the state can repress the individual 'in the interest of his own true self', but this begs the question of how the state can have a better idea of one person's self-interest than that person himself. In fact, the model proposed by Rousseau only works with an entirely unanimous, open,

direct democracy, a model which is virtually impossible in practice, and which in fact presupposes a complete lack of the conflicts upon which politics is built.

Wolff sees any *prima facie* obligation as a form of double counting. Some philosophers use the term as a shorthand to say that the advantages of compliance outweigh the advantages of disobedience. If this is all these philosophers have in mind when they refer to a *prima facie* obligation, they have no right then to add it to the other pointers to compliance, for it has already been taken into account. This is a false weighting in favour of obedience. If, however, the *prima facie* definition includes some other concept, it has not been explained in any detail, just left as a 'matter of fact'.

Edmondson claims that we should obey the law if, by breaking the law, one would undermine the authority of the law to an audience. And Raz claims that, in a sensible and just society, a 'respect for the law' can be built up, which is seen as a factor in its own right. But these are just two of many factors, and neither can be seen as an over-arching factor which outweighs all reasons to disobey the law (such as one's loyalty to secondary associations with partial claims to primacy as described above). They certainly do not, on their own, account for an 'obligation to obey the law'.

Wolff concludes with a brilliant passage which explains the unfeasibility of our perceived obligations to obey the law:

"A band of robbers ride into town with guns drawn and demand all the gold in the bank. They are called criminals. They return the next year on the same day and repeat their demand. Again they are called criminals. They put on uniforms and return each year on the same day. Eventually, they are called tax collectors. Finally, the smallest and least offensive of the bandits rides into town unarmed and the townspeople give him their gold without a struggle. The state has arrived."

It seems from these arguments that the only valid conclusion is this: for better or for worse, the state is held together in only the most fragile way by the tacit consent of individuals to obey laws which fit in with what they personally believe. The law does not by its definition include contingencies for moral obligations: it might compete with moral obligations for the sympathy of the jury in a court of law, but this is different. Minor civil disobedience can, if tolerated, be transformed into mere

nonconformity by a state which agrees to limit the extent of its primacy, or can, if repressed, be transformed into revolutionary fervour and threaten the very existence of the state itself. This civil disobedience will always be with us, and should be respected, as a separate and all-enveloping obligation to obey the law simply does not exist in modern democratic societies.

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