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Rebels without a Cause? Civil disobedience, Conscientious Objection and the Art of Argumentation in the Case Law of the European Court of Human Rights

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Abstract

Civil disobedience is often seen as a political statement whilst conscientious objection is understood as a private matter. This article discusses real-life acts of disobedience in the case law of the European Court of Human Rights. The emphasis is on the argumentative strategies by which the potential for profound social change can be neutralised in legal argumentation. The cases discussed here concentrate on Turkey and represent acts of conscientious objection and civil disobedience. The main finding is that in legal argumentation there are two strategies for neutralising the potential for change: first, labelling the disobedient act as a *private matter* in order to deprive it of its political message, or second, labelling the act as *violent, undemocratic behaviour* so that it can be disregarded. The article shows that the law is unable, and perhaps unwilling, to fully acknowledge the political claims of disobedience.

Key words

Civil disobedience; conscientious objection; Articles 9 and 10 of the European Convention on Human Rights; European Court of Human Rights; Turkey

Resumen

A menudo se percibe la desobediencia civil como una declaración política, mientras que la objeción de conciencia se entiende como un asunto privado. Este artículo analiza actos de desobediencia de la vida real a través de la jurisprudencia del Tribunal Europeo de Derechos Humanos. Se enfatizan las estrategias argumentativas por las que se puede neutralizar el potencial de cambio social profundo a través de la argumentación jurídica. Los casos analizados aquí se centran en Turquía y representan actos de objeción de conciencia y desobediencia civil. La conclusión principal es que en la argumentación jurídica existen dos estrategias para neutralizar el potencial de cambio: en primer lugar, etiquetar el

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acto de desobediencia como un *asunto privado*, para privarlo de su mensaje político, en segundo lugar, etiquetar el acto como un *comportamiento violento y no democrático*, para que pueda ser ignorado. El artículo demuestra que el derecho es incapaz de, y tal vez reticente a, reconocer totalmente las reivindicaciones políticas de la desobediencia

Palabras clave

Desobediencia civil; objeción de conciencia; artículos 9 y 10 de la Convención Europea de Derechos Humanos; Tribunal Europeo de Derechos Humanos; Turquía

Table of contents

1. Introduction

The law affects the possibilities of social change in a society; it both facilitates and defuses impacts for change. However, the state law is embedded in the power structures of the society in a way that prevents it from functioning as an instrument of profound change. This does not only mean that in a democracy the law safeguards the society from becoming an undemocratic regime, but it also means that law prevents radical rethinking of democracy. In this article the discursive strategies in legal argumentation for neutralising social pressure for change are explored.

Committing to the idea of social constructionism, it can be argued that language is essential in producing the reality. Not only are the legal norms indeterminate and ambiguous, but the law is a linguistic exercise which participates in creating the world with words. The speech act theory recognises that it is possible to do things with words; to declare war or marriage, to sentence someone into prison and to name a ship (Burr 2003, p. 58). In these examples the words equal deeds. But this is not all that can be done with words. Drawing from discourse analysis and Foucault's (1980) analysis of power, language can be understood as a site of meaning production. By attaching meaning with phenomena, it is possible to produce the reality: what does it mean to be married or to become a prisoner? Meaning here does not only refer to the relationship between the signifier and the signified, but to truth production. As meaning is never fixed, the truths are always contestable. The disobedient can either reject the state's law altogether, or try to challenge and transform the meaning it creates, the world it calls into being (Cover 1983). In this article the focus is on those who try not to replace the law per se, but to transform the world the law creates.

The questions addressed in this article are to what extent the law can serve as a tool for social change and how meaning is created in legal argumentation in cases of disobedience. The discussion here concerns law and legal argumentation in general, but the examples are drawn from the case law of the European Court of Human Rights (the Court, ECtHR) and especially cases concerning conscientious objection and civil disobedience in Turkey. Turkey provides an illustrative example of the ways in which the state law can be used both to challenge and to re-establish the status quo. Until recently Turkey has been reluctant to acknowledge conscientious objection to military service in any form. Not only the refusal to perform military service, but also publicly declaring opposition to the military system has initiated prosecution and has sometimes led to conviction. Also statements made in defence of conscientious objectors have led to similar results. With the amendments to the Anti-Terror Law in 2006, criticism directed at the Turkish Army is within the scope of the law, and consequently has led to increased sentences. (Yildirim 2010, p. 89).

Besides the duties of a good citizen, such as serving in the military, the Turkish national identity rests heavily on the idea of a unified and homogenous people. Expressions of minority identity, such as Kurdish, have been supressed leaving, according to some, violence the only viable method of making claims based on the ethnic and cultural identity of the Kurds. From the state's perspective the so called Kurdish question is a question of terrorism and preserving the national unity of the nation. In fact, Turkey has engaged in a conflict against the PKK (*Partiya Karkerên Kurdistan*, Kurdistan Workers' Party) for the last quarter century. (Tezcür 2009, see also Watts 1999).

The main arguments in this article are that ultimately the law protects the status quo in a given society, and that in order to neutralize impacts for radical change the legal meaning of acts of disobedience can be constructed in a way that allows their political challenge to be disregarded. More specifically it is argued that in the Court's reasoning, two strategies of neutralisation can be outlined: first, the political aspirations of the applicants can be transformed into private claims of

rights and thus deprive the disobedient act of its political implications, and secondly, the political motives of disobedience can be identified as undemocratic, violent, even terrorist acts and dismissed as such. These argumentative strategies allow controlling the initiatives for social change.

The strategies are discussed from the point of view of civil disobedience and conscientious objection. First, the theories of disobedience are briefly examined. Then, the two legal strategies for defusing pressure for social change are illustrated by analysing the Court's case law. The cases are selected according to the features attached to civil disobedience and conscientious objection in the theories of disobedience. The first set of cases consists of typical cases of conscientious objection to military service, and the second set of cases concerns campaigning against military service and for minority rights. The cases represent civil disobedience as they fulfil the usual requirements of non-violent, public and politically-motivated breaches of law.

2. Civil disobedience and conscientious objection

There are three basic elements that are usually associated with civil disobedience: illegality, conscientious motivation and the performance of the act of disobedience for a limited end. Thus, civil disobedience is separated from legal protests, ordinary crimes and revolutionary acts, as well as from terrorism. (Jones 2004, p. 321.) Both Raz (1979, p. 267-268) and Rawls (1991, p. 364-366) stipulate that civil disobedience is a politically motivated breach of law aimed at bringing about a change in laws or policies. According to Rawls, besides contributing to change directly, civil disobedience can also be an expression of one's protest against, and dissociation from, a law or a policy. For Rawls, not all disobedient acts count as *civil* disobedience. For him, the cause of disobedience must appeal to a common conception of justice that underlies the constitution. Therefore civil disobedience must also be public; dissent cannot be addressed to the majority's conception of justice unless it is public. Here we can see that the definition of civil disobedience quickly becomes a normative one – not all acts of disobedience are accepted as *civil* disobedience. A further requirement quite often attached to civil disobedience in one way or another is the requirement of non-violence. Also the actors are often presumed to accept the legal consequences of disobedience, since, by definition, they are required to show fidelity to law in general.

According to Rawls (1991, p. 371-374), in order to be justified, civil disobedience has to meet four conditions. He requires 1) that all other ordinary avenues towards change have been closed off, 2) acts of civil disobedience should usually target only substantial and clear violations of justice (as understood by the majority), 3) civil disobedience should be restricted to those cases where the disobedient allows that anyone else subjected to similar injustices would have a right to disobey in a similar way, and 4) that disobedience should be exercised only when it is likely to be an effective means of achieving the ends. Variations on these conditions for a justification of civil disobedience can be found in many of the other theories as well (Brownlee 2012).

In contrast with public and political civil disobedience, conscientious objection is often seen as an expression of private conviction. In Raz's (1979, p. 276) view, 'conscientious objection is a private act, designed to *protect the agent from interference to public authority* (…) [The conscientious objector is] an individual asserting his immunity from public interference with matters he regards as private to himself' (emphasis added). (See also Rawls 1991) Furthermore, according to Singer (1973, p. 93), conscientious objection is undertaken in order to avoid taking part in the policies to which one objects, rather than pursuing a change in those

policies.[1] In the following sections this idea is challenged, and it is argued that it is not always obvious how conscientious objection should be regarded in this respect.

Brownlee (2012, p. 12-13) pinpoints one of the crucial differences between civil disobedience and conscientious objection: where civil disobedience is always *communicative,* conscientious refusal is not. According to Brownlee, the conscientious objectors 'merely wish to act without interference in ways consistent with their own convictions'. To the extent to which the conscientious objector aims at communicating with their society, the act is a political act. However, for Brownlee, the objector's communication is incidental and secondary to their purposes. Depending on theory, the justifiability is either enhanced or reduced according to the extent to which the disobedient act is deemed political (Singer 1973, Rawls 1991, Brownlee 2012). Brownlee (2012, p. 19) states that conscientious objectors to military service are most plausibly protected not when they are out to seek a personal exemption or keep their own hands clean, but when they are willing to be seen to dissociate themselves from the order to go to war and to bear the risks of communicating and defending that decision before their society.

Framing civil disobedience as political and conscientious objection as private is also reflected and reproduced in the case law of the European Court of Human Rights. Cases of disobedience in general mostly fall under Articles 9 (freedom of religion and thought) and 10 (freedom of expression). As will be discussed later in more detail, it is not obvious which type of freedom is in question in the cases. As Murdoch (2012, p. 16) points out, the Court has accepted pacifism, atheism and veganism within the scope of Article 9, as well as political ideology, such as communism, but expression of this type of conscience and belief has often been examined under Article 10.[2] Thus, although the terms 'thought, conscience and belief' suggest a potentially wide scope for Article 9 of the Convention, the case law of the Court indicates a somewhat narrow interpretation. The Court has stated that 'belief' is not the same as 'opinion', for to fall within the scope of Article 9, personal beliefs must satisfy two tests: first, the belief must 'attain a certain level of cogency, seriousness, cohesion and importance', and second, the belief itself must be one which may be considered compatible with human dignity (*Campbell and Cosans v The United Kingdom* 1982). The primary focus of the freedom of thought, conscience and religion is private and personal belief and its individual and collective manifestation. (Murdoch 2012, p. 14, 16). In order to invoke the protection of Article 9, the conviction or belief is required to be sufficiently *sincere.*[3]

I will now move on to discuss how the categories of private and political can be utilised in analysing the legal strategies for neutralising the potential for profound social change in the society. The first strategy is to transform a political challenge into a private claim of right. To illustrate this point, the cases concerning conscientious objection to military service are discussed, the focus being on *Ülke v*

[1] Conscientious objection has been classified according to several sub-categories. According to the basis of their motivation, conscientious objection can be either religious or secular. Objecting to military service can be universalistic (objecting to all wars) or selective (objecting to a particular conflict). Also, objectors of military service can be classified as alternativist, who agree to participate in alternative civilian service, or absolutist (total objectors), who refuse to cooperate with the authorities in any way in regard to the conscription system.

[2] See *Arrowsmith v United Kingdom* (1977), *Angeleni v Sweden* (1986), *Hazar, Hazar and Acik v Turkey* (1991), *Vogt v Germany* (1995).

[3] In theories of disobedience, the sincerity of the pacifist conviction whether it is religious or secular, is often highlighted. In the case of religious conscientious objection, the sincerity is automatically assumed: apparently the membership of a religious domination known for its pacifist beliefs is taken as a proof of the sincerity of the conviction in itself. However, in the secular form of conscientious objection, further proof of sincerity may be required. For Brownlee the civility of civil disobedience lies in the conscientious motivations of its practitioners; 'Civil disobedience involves not just a communicative breach, but a conscientious communicative breach of law motivated by *steadfast, sincere and serious* (…) moral convictions' (emphasis added, Brownlee 2012). Thus, it is in the self-restraint and reason-based sincerity that we find the civility of civil disobedience, although Brownlee does not require civil disobedience always to be non-violent, covert or non-revolutionary.

Turkey (2006)*, Bayatyan v Armenia* (2011), and *Savda v Turkey* (2012). The second strategy of neutralisation is to transform the political claim into an undemocratic coercive demand and to dismiss it as such. This point is illustrated with cases of campaigning for minority rights and against military service, namely *Yurdatapan v Turkey* (2008)*, Düzgören v Turkey* (2006), *Saygili and Falakaoğlu v Turkey (2)* (2009)*, Sürek v Turkey (1)* (1999)*, Sürek v Turkey (2)* (1999), *Sürek v Turkey (3)*(1999), and *Sürek and Özdemir v Turkey* (1999).

3. How political becomes private: conscientious objection

The cases of conscientious objection discussed here are typical in that they all involve a young man refusing to serve in the military, some for pacifist (either religious or philosophical) reasons, and some for other political reasons. Some of the objectors are willing to perform an alternative civilian service, some reject both military and civilian service. The argument here is that in legal argumentation the political challenge the objectors pose to their society is transformed into a question of the personal right to freedom of religion and belief (Art 9 of the Convention).

The first case of conscientious objection to military service decided by the European Commission on Human Rights (the Commission) was *Grandrath v Federal Republic of Germany* (1965). The Commission found that states were not under an obligation to recognise the right to conscientious objection under Article 9 of the Convention.[4] Until *Bayatyan v Armenia* in 2011, the Court did not assess conscientious objection to military service independently under Article 9, that is, as a pure question of freedom of religion and thought. As recently as 2006, in the case of *Ülke v Turkey,* the Court instead dealt with conscientious objection by applying Article 3, which prohibits inhumane and degrading treatment.[5] The circumstances that led the Court to assess the applicability of Article 3 on the cases of conscientious objection in Turkey were that declaring conscientious objection to military service was, and sometimes still is, followed by harsh consequences sometimes referred to as civil death. A person may be forcibly taken to perform his service, prosecuted and sentenced repeatedly and ultimately compelled to live in hiding in order to avoid the punitive cycle. (*Ülke* para 62, see also Yildirim 2010, p. 75, 85).

In the ground-breaking case of *Bayatyan* where the Court decided to apply the article 9 independently from other articles, the facts of the case were typical: Mr Bayatyan was a Jehovah's Witness, who refused to perform military service, but was prepared to do alternative civil service. At the time there was no alternative service available in Armenia, and Bayatyan was sentenced to prison for draft evasion. The Court based its decision on *European consensus*, since the overwhelming majority of Council of Europe Member States recognised the right to conscientious objection and provided an alternative to military service. The case of *Savda v Turkey* (2012) was ruled along the same lines, with the exception that Halil Savda was not appealing to his religious, but to his secular pacifist conviction.[6]

[4] Cf. Article 18 of the Covenant on Civil and Political Rights (ICCPR) which protects the right to freedom of religion and belief. Although it does not make an explicit reference to conscientious objection to military service, the monitoring body of the ICCPR, the Human Rights Committee (HRC), has stated in its non-binding General Comment on Article 18 that such a right can be derived from Article 18 'inasmuch as the obligation to use legal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief'. In the case of *Yeo Bum and Myung-Jin Choi v. Republic of Korea* (2006) the HRC decided that, by prosecuting and sentencing the applicants for their refusal to perform compulsory military service on account of their religious beliefs as Jehovah's Witnesses, the Republic of Korea violated Article 18 (1). The HRC provided protection for 'genuinely-held religious belief' and noted that the refusal to be drafted was a direct expression of the applicants' religious beliefs.

[5] Originally in its decision on the admissibility of the application, the Court decided to deal with the applicability of Article 9 at the same time as the merits. However, it later considered that the case should be examined under Article 3 (*Ülke* paras. 52-54).

[6] The Court seems to privilege religious conscientious objection over secular objection to military service. This is shown in the way the Court identifies Article 9 in its religious dimension as an essential aspect of

In the Court's case law, conscientious objection has not been treated as a political statement but as a private, conscience-related choice. This line of legal evaluation is not as self-evident as one might think. It is not obvious why conscientious objection should be evaluated only as a manifestation of belief and not as an expression of a political opinion, as a pacifist political statement. Some of the applicants have relied on Article 10 as well as on Article 9, which implies that they themselves attach a political motivation to their objection to military service, and that they think that objecting to performing the service is not only a manifestation of their belief, but also an expression of their political opinion.[7]

Furthermore Halil Savda's refusal to perform military service had an explicit political connotation: he was a well-known figure in the antimilitarist movement in Turkey, and he publicly declared his secular pacifist conviction (*Savda* para 5). He had previously been convicted for supporting the PKK and claimed having been tortured by the Turkish officials for that reason. He stated that it was impossible for him to wear a uniform of the institution that had tortured him. Before the ECtHR, Halil Savda appealed to the Articles 6, 9 and 10 of the Convention. The Court referred to 'civil death'(para 80) and found a violation of Article 3 on the same grounds as in *Ülke* and a violation of Article 9 along the recently established case law in *Bayatyan*, where the court for the first time acknowledge violation of freedom of thought and religion independently from other articles. The Court also found a violation of Article 6. The Court did not, however, assess the question of a possible breach of Article 10.

According to Savda himself, he and the other conscientious objectors were not interested in pursuing their cases in the Court in order to receive compensation from the state, but to campaign for the transformation of the basis on which the state is built: to challenge the militaristic structure, glorification of killing and dying in the name of the nation. Savda was finally released in 2008 after the military health council declared him unfit for military service due to his 'anti-social behaviour and lack of masculinity and Turkishness'.[8] (Rumelili and Keyman 2010, Amnesty International 2012b).

In the ECtHR, Savda and other conscientious objectors after *Bayatyan* have been successful in their aim of promoting civilian service as an alternative to military service. This is, admittedly, a political aim that has been successfully furthered by legal means. However, both the European Court of Human Rights and the national

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one's identity, whereas in its secular sense, its value is rather instrumental: '[Article 9] in its religious dimension, is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious *asset* for atheists, agnostics, skeptics and the unconcerned' (emphasis added). This formulation, originating from *Kokkinakis v Greece* (1993, para 31), is repeated in *Bayatyan v Armenia* (para 118), *Savda v Turkey* (para 90)*, Tarhan v Turkey* (2012, para 52), *Feti Demirtas v Turkey* (2012, para 103) and*, Ercep v Turkey* (2011, para 54). The Court criticised the respondent state for not having introduced a procedure for the applicants to establish their pacifist beliefs and to claim the status of conscientious objector (*Tarhan* para 54, *Savda* para 97). Unlike in the cases concerning Jehovah's Witnesses, the Court formulated the essential legal question to be about the extent to which Savda's and Tarhan's secular pacifist conviction was protected by Article 9. *'(…) le requérant (…) n'invoquait aucune conviction religieuse pour se prévaloir du droit à l'objection de conscience. L'intressé declare adhere à la philosophie pacifiste et antimilitariste et être objecteur de conscience. De son côté, le Gouvernement conteste cette affirmation et soutient que le requérant ne peut être admis comme étant un objecteur de conscience. La question qui se pose est (…) celle de savoir dans quelle mesure l'objection de M Savda au service militaire relève de l'article 9 de la Convention.* (*Savda* para 96, see also *Bayatyan* para 110, *Tarhan* para 58). In *Feti Demirtas* and *Ercep*, in which the applicants were Jehovah's Witnesses, the Court explicitly stated that it did not doubt the sincerity of their motivation: *'La Cour note qu'en l'espèce le requérant, témoin de Jéhovah, a demandé à être exempté du service militaire non par intéret ou par convenance personnelle mais en raison de convictions religieuses sincères. La Court ne doute pas que des motifs solides et convaincants aient justifié sa demande d'exemption su service militaire.'* (*Feti Demirtas* para 109, *Ercep* para 61) In these cases the Court found the problem to be the lack of provision of alternative civilian service.

[7] See *Ülke v Turkey* para 15, *Savda v Turkey* paras 3, 59.

[8] Savda has also been repeatedly prosecuted for 'alienating the public from military service', (Amnesty International 2012b).

Oñati Socio-legal Series, v. 5, n. 5 (2015), 1291-1308
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authorities neutralised Savda's ultimate aim (and that of others like him) to question the militaristic ideal of a citizen; the Court by transforming his claim into a question of an individual's right of freedom of thought, and the national authorities by declaring him personally unfit for service.

To acknowledge the political nature of the objectors' action to the extent it is possible within the legal realm would require an assessment of the cases not only from the point of view of freedom of religion and thought, but also from the point of view of freedom of expression. This does not mean that the legal end result would necessarily differ from the prevailing one, but the reality created by the law would: to treat conscientious objection solely as a matter of personal conviction is to shut one's eyes from half of the motivational background of the act of disobedience and to limit the scope of discussion around the topic. A political challenge to the prevailing social order is muted as it is transformed into a question of pursuing personal aims.

The Turkish conscientious objectors have established intense contacts with objectionist civil society movements and organisations across Europe. According to Mr Ülke, conscientious objection is a political and ethical stance against the militaristic structure on which not only the Turkish state, but all nation states are built, and as such should not be approached as an individual's personal struggle to have his rights recognized. Besides campaigning for alternative service, Turkish conscientious objectors are also contesting the prevailing idea that military service is an integral part of Turkish citizenship; the refusal to serve in the military has been interpreted within the nationalist discourse as a threat to public order and a weakening of the nation. (Rumelili and Keyman 2010, *Ülke* para 11).

Some gradual progress can be seen in Turkey in this regard. Following the recently established case law of the Court, two Turkish military courts have now for the first time recognised the right to conscientious objection, albeit within strict limits. On 7 March 2012, the Malatya Military Court ruled on the case of Islamic conscientious objector Muhammed Serdar Delice, who declared his unwillingness to serve in a non-Muslim army. According to Yildirim (2012, p. 331), the Military Court did not extend the scope of freedom of religion to include individual beliefs, but instead, the court relied on the rejection of military service by an intellectual, religious or political *group*. An individual can have recourse to conscientious objection only as a member of a group, and only if the group is known for its rejection of military service. According to the Military Court, this is not the case for Islam; the court claimed that Islam 'is not a belief or ideological movement that rejects the performance of military service'. However, being a Jehovah's Witness, Baris Görmez was granted the status of a conscientious objector by the Isparta Military Court on 13 March 2012 following the same line of argumentation. The Turkish case law is not, however, settled, and conscientious objectors continue to be arrested and prosecuted. (Amnesty International 2012a, 2012b, Council of Europe 2012, Karaca 2012a, 2012b, War Resisters' International 2012).

In this section I have discussed the way in which potential for social change is neutralised in legal argumentation by transforming the political claim into a question of an individual right and applying the Article 9, instead of Article 10, to the cases. This strategy allows the Court to recognise the objectors' claims to some extent and at the same time defuse the radical challenging of the foundations of the state that the objectors are trying to pursue. Next, I will explore another strategy for neutralising disobedience, namely labelling it as undemocratic and thus falling outside the scope of political rights. In the Court's case law, this strategy has been utilised in cases in which individuals have raised test-cases for challenging their political leeway, and in cases in which the state has taken the initiative in constructing disobedience and claimed it to pose a threat to its own existence.

4. (Con)testing the limits of political activism

A parallel can be drawn between civil disobedience and test cases, which are trial lawsuits for verifying the interpretation of a law or public actions with the aim of contesting a particular law (see e.g. Y Tella 2004, p. 316). It is possible to find such test cases from the case law of the Court. In 1995, a civil disobedience movement called the 'Initiative for Freedom of Expression´ (IFE) followed the trial of a famous Turkish writer, Yaşar Kemal, who was prosecuted for an article he wrote for the German magazine *Der Spiegel*. The protesters re-published and distributed Kemal's banned articles in order to further the amendment of the provisions of the Turkish legislation concerning freedom of expression. In 1999, Mr Yurdatapan filed a complaint against himself for distributing a leaflet, which contained statements made by conscientious objector Osman Murat Ülke and maintained that he should be prosecuted for re-publishing a banned leaflet.[9] The military public prosecutor initiated criminal proceedings and charged Mr Yurdatapan with seeking to dissuade persons from serving in the military (*Yurdatapan* paras 6, 9). Similarly, in 1998, Mr Düzgören distributed a leaflet, containing a press release by Mr Ülke, who had previously been convicted on account of the same press release. Moreover, Düzgören handed the leaflet to the public prosecutor and stated that he should be prosecuted for the same offence for which Ülke had been convicted (*Düzgören* paras 5, 7).

In both *Yurdatapan* (para 29) and *Düzgören* (para 25), the European Court of Human Rights found an interference with the applicants' freedom of expression and that it was, as required, prescribed by law and in pursuance of legitimate aims, namely the prevention of disorder. In order to determine whether the interference with freedom of speech was necessary in a democratic society and proportionate to the aims pursued, the Court examined the *content* of the leaflet and the *context* in which it was distributed. As to the content of the leaflet in *Düzgören*, the Court maintained that 'although the words used in the impugned article give it a connotation hostile to military service, they do not encourage violence, armed resistance or insurrection and do not constitute hate speech (…)' (para 31).

Now the impression is that the crucial point for the Court is whether or not the content can be regarded as capable of inciting violence in its specific context. However, there is another factor the Court refers to, namely the potential *impact* of the expressions for the aims protected by restrictive measures. Here we come to the second defusion strategy: the legal result depends on whether or not the disobedient act is regarded as incitement to violence *or* having real potential to challenge the status quo and to pursue (fundamental) social change within the society in question. This 'impact-factor' evaluation originates from the famous case of *Arrowsmith v UK* (1977).

In early 1970's Ms Arrowsmith distributed leaflets to troops stationed at an army camp 'endeavouring to seduce them from their duty or allegiance in relation to

[9] The Turkish conscientious objection cases that have ended up in the ECtHR are connected to domestic campaigns for the right to a form of action that can be described as civil disobedience. For example, a journalist for the pro-Kurdish daily *Ülkede Özgür Gündem* (Free Agenda in the Country), Birgül Özbaris was charged for discouraging people from military service because of her articles in support of the conscientious objector Halil Savda. Also Perihan Mağden was charged for the same offence in 2005, when she expressed her support for Mehmet Tarhan in an article published in the magazine *Yeni Aktüel* (The New Actual). In the article she voiced her opinion about civilian service and stated that, had she raised a son who objected to bearing arms for conscientious reasons, she would have supported him and his cause to the end. Although she was not sentenced for this declaration, the prosecution emphasised that 'compulsory military service is crucial for Turkey, considering its geographical region'. Conscientious objectors who publicise their objection to military service, as well as others who voice their support for conscientious objection can be prosecuted and sometimes convicted under Article 318 (previously article 155) of the Turkish Penal Code for alienating the public from military service. Sometimes the charges are based on Article 216, which includes the charge of 'inciting hatred and enmity among the people' or Article 301 of the Turkish Penal Code which punishes actions that lead to 'denigrating Turkishness, the Republic and the organs of the state'. (Üçpınar 2009, 330-331.)

Oñati Socio-legal Series, v. 5, n. 5 (2015), 1291-1308
ISSN: 2079-5971

service in Northern Ireland' and continued to do so despite the police orders. She was sentenced to imprisonment under the Incitement to Dissaffection Act. In her appearance before the Commission, the applicant stated that the conviction interfered with her right to manifest her pacifist belief as guaranteed by Article 9 of the Convention and her right to freedom of expression as guaranteed by Article 10. The Commission stipulated that in order to be regarded as a manifestation of her belief in the meaning of Article 9, the action in question had to express the conviction directly. Finally the Commission found that the leaflet did not express pacifist views, and by distributing it the applicant did not manifest her belief in the sense of Article 9, and found no violation of freedom of thought.

As to the freedom of expression, the Commission found that there had been an interference with Article 10 of the Convention, but found that it was prescribed by law and that there had been a legitimate aim of protecting the national security, the prevention of disorder and the protection of the rights of others. The Commission concluded that the applicant was not convicted for statements showing her discontent with British policy in Northern Ireland, but because she had encouraged individual soldiers to disaffection. The Commission also found the measures taken against the applicant necessary in a democratic society. The far-reaching elements in *Arrowsmith* are the arguments the Court used in assessing whether the interference with Ms Arrowsmith's freedom of expression was justified. The Court stressed that

> as regards to the justification of prosecution in the applicant's case, the Commission observes that both the Director of Public Prosecution and the courts dealing with the case attached particular importance to the facts that the leaflet was aimed at and distributed to soldiers who might shortly be posted to Northern Ireland and that the applicant herself would go on distributing the leaflets unless strict measures were taken to stop her (…). In all these circumstances, the Commission considers that the applicant's prosecution, conviction and sentence (…) served an aim which was consistent with Article 10 (2) of the Convention (…). (Paras 93-94).

In *Arrowsmith,* the importance of the potential impact is further clarified in the dissenting opinion of one of the members of the Commission, Mr Klecker (para 12), who emphasised the lack of potential impact of Miss Arrowsmith's action. The majority in *Arrowsmith* saw that there could be an immediate impact on the soldiers, whereas Mr Klecker did not:

> It must be clear that there are alternatives to violence in a society that claims to be democratic. If freedom of expression and freedom to manifest beliefs in practice are to be worthwhile values then ideas which are provocative and anti-establishment must be given a wide berth unless a case is made out that a real threat is posed. This is not the case here. It might have been had the campaign been more widespread or where there were signs that army morale was being affected or if the leaflets carried threats. However, these factors are not present. In essence, this application concerns *an ineffectual troop of leafleteers*.

The Court differentiated the cases of *Düzgören* and *Yurdatapan* from that of *Arrowsmith* precisely by stressing the limited impact-potential of the actions. In the case of *Düzgören,* the 'offending leaflet was distributed in a public place in Istanbul. It did not seek, either in its form or in its content, to precipitate *immediate desertion*. In the Court's view, these are the essential factors in the assessment of the necessity of the measure'. (Para 31, emphasis added). Thus, the Court found that the interference with the applicant's freedom of expression was not proportionate and necessary in a democratic society (para 32-34). The reasoning of the Court was similar in *Yurdatapan* (see paras 35-38).

Impact was a relevant factor also in a set of cases concerning promotion of minority identity. On 8 July 1999, the Court delivered thirteen judgements dealing with criticism of the Turkish government's Kurdish policy. In eleven cases the Court

found a violation of Article 10 of the Convention.[10] In the two remaining cases, *Sürek v Turkey (1)* and *Sürek v Turkey (3)*, the Court found the interference with the applicants' freedom of expression to be justified. In the majority of the cases, the Court referred to its decision in *Zana v Turkey* (1997) and stated that the security problems in the Kurdish south-eastern Turkey could, at the time, justify measures in furtherance of the protection of national security and territorial integrity. However, the Court did not consider the government's measures to be either necessary or proportionate. In several of the 1999 cases, the Court explained that the context of the words used was such as to reduce its potential impact on national security and public order. (Scottiaux 2008, p. 92-93). An important factor here, for the Court, was the medium used to convey the message; views made public by literary work (*Polat*), in a periodical whose circulation was low (*Okcuoğlu*), through poetry (*Karataş*), or to a limited group of people attending a commemorative service (*Gerger*). In regard to the content of the message, the Court emphasised the potential of the words to incite violence.[11]

In two of the 1999 cases, *Sürek (1)* and *Sürek (3)* the Court found no violation of article 10 of the Convention.[12] In *Sürek (1)* the applicant's review *Haberde Yorumda Gercek* published two letters submitted by its readers. The letters condemned the military actions in south-east Turkey and accused them of brutal suppression of the Kurdish independence struggle and claimed that the army had committed two strategic massacres in the area. The second letter alleged that the Turkish institutions connived in imprisonment, torture and killing of dissidents in the name of the protection of democracy and the Republic (paras 10-11, 60). After iterating its doctrine on Article 10 and margin of appreciation, the Court concluded that, in the context of the situation of the south-east Turkey, the content of the letters 'must be seen as capable of inciting to further violence in the region by instilling a deep-seated and irrational hatred against those depicted as responsible for the alleged atrocities. Indeed, the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor'. (Para 62, see also *Sürek (3)* para 40). In the case of *Sürek (3)*, a similar conclusion was reached by the Court with reference to the fact that in a news commentary published in the same journal the struggle in south-east Turkey was described as a 'war directed against the forces of the Republic of Turkey' and that the article 'associated itself with the PKK and expressed a call for the use of armed force as a means to achieve national independence of Kurdistan' (para 40).

In addition to the issues of violence and impact, the Court also evaluates whether the expression incites general disobedience. In 1997 the Commission gave its ruling on admissibility in *Saszmann v Austria*. Here, the applicant was the responsible editor of a periodical and had been convicted of incitement to general disobedience of laws and incitement to the commission of criminal acts under the Austrian Penal Code for having published a petition in support of, among other things, abolishing the Federal Army and for the discontinuation of all legal proceedings against conscientious and total objectors. According to the national court, the demand to bring about the dissolution of the army by general disobedience to military laws

[10] *Erdo□du and İnce v Turkey*, *Karataş v Turkey*, *Polat v Turkey*, *Gerger v Turkey*, *Ceylan v Turkey*, *Arslan v Turkey*, *Başkaya and Okcuo□lu v Turkey*, *Okcuo□lu v Turkey*, *Sürek and Özdemir v Turkey*, *Sürek v Turkey (2)*, *Sürek v Turkey (4)*.

[11] In *Sürek and Özdemir* the Court considered the convictions of the owner and the editor-in-chief of a weekly review entitled *Haberde Yorumda Gerçek* (The Truth of News and Comments).The review published two interviews with a senior figure in the PKK, as well as a joint statement issued on behalf of four unlawful political organisations. In *Özgür Gündem* (2000) the setting was similar, as the newspaper in question published reports and declarations of PKK-related organisations, as well as interviews with PKK commanders. According to the Court, the mere fact that the interviews and declarations are given by members of a proscribed terrorist organisation does not in itself justify the interference with the applicants' freedom of expression. But once again, the Court paid attention to their context: the Court was sensitive to the fact that views dispersed by media may have a greater impact on national security than views made public by other means. (Scottiaux 2008, p. 120-121.)

[12] Instead the Court found a violation of article 6 (1).

Oñati Socio-legal Series, v. 5, n. 5 (2015), 1291-1308
ISSN: 2079-5971

constituted the exercise of *unconstitutional coercion* and could jeopardise the functioning of a *democratic society*. The Commission found that the interference with Ms Saszman's freedom of expression was prescribed by law, pursued a legitimate aim and also that it did not go beyond the margin of appreciation granted to the state, and therefore found the application manifestly ill-founded. Saszmann's petition explicitly condemned violence as means of conflict resolution and called upon everybody not to obey military laws. According to the Austrian government,

> one has to distinguish between polemical but permissible criticism of the military forces and impermissible calls for disobedience. While the State must tolerate criticism of its democratic institutions and allow debates on the need for military defence it cannot go so far as tolerating calls for disobedience, as such incitement would constitute considerable danger to the internal peace in a democratic society (…) what must be not allowed to arise is the wrong impression that the organs of the State would tolerate such breaches of the law in respect of the Federal Army.

The Commission accepted public safety and prevention of disorder as legitimate aims of the interference with Ms Saszman's freedom of expression and accepted also that 'incitement to disregard military laws constituted unconstitutional pressure aiming at the abolition of laws which had been passed in a constitutional manner. Such unconstitutional pressure could not be tolerated in a democratic society'. The Commission also referred to *Arrowsmith* and *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* (1992) and stated that in *Gubi*, which concerned the prohibition on distribution of a military periodical among servicemen in the military barracks, the Court, in finding a violation of Article 10, attached 'particular importance to the fact that the publication at issue, though putting forward proposals for reforms and encouraging its readers to institute legal complaints, did not recommend disobedience *or* violence' (emphasis added). The Commission concluded that the applicant's conviction did not go beyond the margin of appreciation left to the national authorities and that therefore the application was manifestly ill-founded.

So far we have seen that the Court may construe the act as an act of disobedience and as such, as violent or undemocratic and therefore find the infringements of rights justifiable. But what is violent according to the Court? In *Saygili and Falakaoğlu v Turkey (2)* (2009), the applicants were the owner and the editor-in-chief of a daily newspaper called *Yeni Evrensel*. In 2000 the newspaper published three declarations by detainees who were being imprisoned and who were either convicted or being tried on charges of having been involved in the activities of illegal left-wing organisations. By the declarations the detainees protested mainly against the high-security F-type prison system and stated that they would go on hunger strike until the Government abolished this type of high security prison. They also made other statements asking the abrogation of the Anti-Terror Law, the state security courts and anti-democratic laws, as well as prosecution of those who tortured detainees (para 6). The applicants were convicted for disseminating terrorist propaganda and sentenced to heavy fines, and the publication of the newspaper was banned for three days (para 12).

With its established line of reasoning, the Court found that there had been an interference with the applicants' freedom of expression, that it was prescribed by law and pursued a legitimate aim of prevention of crime. In order to assess whether or not the infringement was proportionate to the aims pursued, the Court once again evaluated the content of the declarations in their context (paras 23-25). According to the Court,

> there is no doubt that it is perfectly legitimate to make suggestions to achieve [the goals of abolishment of the state security court, punishment of perpetrators of torture etc.]. However, the problem results from the wording of the overall message given to the readers, where their authors state that they will rather die than enter the cells and call on others to take action in order to support their

> *general resistance* and not to content themselves with mere declarations. It is clear that the message given is *not a peaceful one* and cannot be seen as a mere criticism of the new prison system. While it is true that the applicants did not personally associate themselves with the views contained in these declarations, they nevertheless provided their writers, who expressed their affiliation to illegal armed groups, with an outlet to stir up violence and hatred. Accordingly the content of these declarations must be seen as *capable of inciting violence* in the prisons by instilling an *irrational reaction* against those who introduced or were in charge of the new incarceration system (…) (para 28, emphasis added).

The Court found no violation of Article 10. In its argumentation the Court created the oppositional pair *violent/peaceful*. Instead of looking at the applicants' action in the continuum of *violent—non-violent*, the Court stated that the message the hunger striking sends was not peaceful in tone and therefore identified it with violence. In their joint dissenting opinion, Judges Power and Gyulumyan stated that

> it appears (…) that the problem is not with the prisoners' goals *per se*, but *'the wording of the overall message*', namely, their willingness to die for their convictions and their call for support in their resistance. The majority considers that the message (…) was *'not a peaceful one'* and that it went beyond *'a mere criticism'* of the prison system (…). Such a consideration is disquieting. 'Watchdogs' are not meant to be peaceful puppies: their function is to bark and to disturb the appearance of peace whenever a menace threatens. A new, and in our view, dangerous threshold in the protection of free speech has been reached if expression may be suppressed lawfully, because it is neither 'peaceful' nor confined to 'mere criticism'.[13]

As we have seen so far, by discursively placing the motivational background of conscientious objection within the private sphere, any political motives it may have can be kept out of the political debate. For the same reason, for the purpose of defusing dissent within the society, campaigning against the military or for minority rights is assessed from the point of view of its possible impact on the society. Not only incitements to violence or non-peaceful expressions, but also expressions that may have an impact on the general respect for law and order can fall outside the scope of the protection of freedom of expression. In legal argumentation this is done by identifying this kind of voicing of opinion either with violence or with undemocratic acts, possibly even terrorist ones. These kinds of argumentative choices illustrate how meaning, and thus the reality, is created through law.

5. Conclusion

By most scholars civil disobedience is perceived as a politically motivated act, whereas conscientious objection is seen as an expression of private beliefs. As discussed in the Introduction, Raz and Rawls regard civil disobedience as politically motivated breach of law which aims at bringing about a change in the society, whereas conscientious objection is seen as a claim of immunity for the individual from the state's interference. Following Brownlee's categorisation, it would perhaps be possible to claim that some cases of conscientious objection are political so far as they fulfil the requirement of communication, whereas other cases remain personal. However, it is possible to reject the personal/political dichotomy all together. In this article it has been argued that there is no reason to assess real-life cases of civil disobedience and conscientious objection based on this dichotomy and that both types of disobedience can be understood as expressing political opinion. There is no inherent nature in the act itself that would separate one type of disobedience as political and the other as personal, but instead these attributes become discursively attached to them. In moral and legal argumentation, it is not an irrelevant factor whether one or the other is preferred.

[13] The dissenting judges went on to assess the case in the light of the Court's previous case law and concluded, that in their view, there had been a violation of freedom of expression.

Oñati Socio-legal Series, v. 5, n. 5 (2015), 1291-1308
ISSN: 2079-5971

The analysis of the Court's case law illustrates the law's capacity to imbue action with meaning. The meaning the Court chooses to attach to disobedience does not, and cannot, derive from legal sources – thus it is an extra-legal element in legal argumentation, ultimately a matter of preference. To return to the starting point of the discussion, to the idea of the law's twofold functioning both as facilitator and preventer of social change, it can be argued that if the challenge the disobedient act poses to the state is regarded as too far-reaching, it can be neutralised with either of the two strategies identified in this article: the political message of disobedience can be transformed into a private claim of rights or, it can be labelled as undemocratic and dismissed as such.

The claims of meaning are claims of truth, and when the meaning changes the perception of the reality changes as well. Therefore the Court's argumentation, which cannot be derived directly from the legal norms, is not only a matter of doctrinal analysis. Discourse analysis provides tools which can be used for recognising the discursive tactics the Court uses in its argumentation. In this article I have demonstrated not only that the law sometimes serves as preventer of social change, but also *how* discursive choices allow the Court to take its argumentation to a preferred direction in crucial intersections: how acts of disobedience being understood as private rather than political acts directs the course of legal argumentation. This, in turn, does not only result in Article 9, rather than Article 10 of the Convention, being applied, but also in the way the reality is constructed in the Court's argumentation. Speaking in Foucauldian terms, what takes place is epistemic violence; the conscientious objector's interpretation of their action is disqualified while reproducing and reinforcing the status quo.

Meaning is not a question of mere signification, referential relationship between things and words or, of the essence of things; rather, concepts and categories, such as disobedience, can always be constructed differently and thus perceived and treated differently. In the legal practices the disobedient subject is absorbed into the law by forcing legal rights on them thus depriving them their political message. Rights and freedoms can be, besides protecting and empowering, used to avoid the potentially radical challenge of disobedience.

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