



Human Rights Law Clinic Papers 2017

EXPLORING THE BOUNDARIES OF ‘CIVIL DISOBEDIENCE’ AS A LEGITIMATE FORM OF DISSENT

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Introduction

Peaceful protest is one of the most important features of democracy. While various forms of publicly expressing a dissenting opinion have already been acknowledged as being protected by international human rights law and standards, there is still no clarity about the precise meaning, scope and implications of the lesser-known notion of 'civil disobedience' as a legitimate form of expressing dissent. This project therefore focuses on comparative research on the notion of 'civil disobedience'. This memorandum first explores the historical and philosophical background as well as the definition of the term civil disobedience. It outlines some general guidelines to the permissibility of different forms of civil disobedience, such as sit-in demonstrations, actions against threats to the constitutional order and actions against companies and corporations, while referring to relevant jurisprudence from within the OSCE region such as Germany and the Netherlands. It also examines the legal consequences of civil disobedience in cases where the boundaries of its permissibility have been exceeded.

Background

To understand civil disobedience, one needs to know more about its historical context. Therefore, this section gives a closer insight on the historical roots of civil disobedience, which mainly come from India and America.

Gandhi's fight against discrimination in South Africa

*"...the real road to ultimate happiness lies in going to jail and undergoing sufferings and privations there in the interest of one's own country and religion."*¹ - Gandhi

This statement shows well Gandhi's attitude towards acts of civil disobedience. Gandhi had an important role as political protester, initiating many protests against the discrimination of Indians in South Africa.² As it would be too comprehensive to examine all of his protests, this section will take his fight against the Asiatic Registration Act as an example for his attitude in political protest. Gandhi was fighting sedulously the Asiatic Registration Act, also known as the "Black Act", which forced all Asians and persons of colour in South Africa to register and give their fingerprints.³ Raising awareness to the effect of the "Black Act" in his newspaper, the Indian Opinion, Gandhi, who himself refused to register, motivated the Indian community to openly defy the "Black Act".⁴

Soon, Gandhi was arrested for his refusal to register and was sentenced in January 1908 to two months' imprisonment.⁵ While imprisoned, Gandhi bargained a compromise settlement with Transvaal authorities to repeal the Asiatic Registration Act in exchange for the voluntary registration of Indians.⁶ When after Gandhi's release from prison the settlement was ruled invalid by the South African authority, Gandhi, in another act of civil disobedience, initiated the burning of the registration certificates which resulted in another prison sentence.⁷ Gandhi played an important role in the fight against the discrimination of Indians in South Africa. His protests as well as his hunger strike inspired many people to fight in a non-violent manner against discrimination.

¹ George Hendrick, 'The Influence of Thoreau's "Civil Disobedience" on Gandhi's Satyagraha' (1956) 29 *The New England Quarterly* 462.

² Ibid.

³ Ibid.

⁴ Hendrick, op cit.

⁵ Ibid, 467.

⁶ Paul F Power, 'Gandhi in South Africa' (1969) 7 *The Journal of Modern African Studies* 441, 453.

⁷ Hendrick, op cit, 469.

The civil rights movement in America

In the Western world, civil disobedience first gained importance as a means of protest during the civil rights movement in the United States. One decisive event in the civil rights movement, that can also be seen as its starting point, was the Montgomery Bus Boycott, which was initially inspired by Rosa Parks, a black woman who refused to give up her seat in the bus for a white person.⁸ Even when the police entered the bus and demanded her to give up her seat, she continued her refusal and was arrested.⁹ The arrest caused widespread dissatisfaction within Montgomery's black community and resulted in the Montgomery Bus Boycott that was led by Martin Luther King Jr. and lasted for 381 days.¹⁰ In the end, the Supreme Court ended segregation in intrastate transport in *Gayle v Browder*¹¹ as a result of the Boycott.¹²

The Montgomery Bus Boycott, granting more rights for black people, played an important role in the American civil rights movements and proved the effectiveness of civil disobedience as a form of political protest.

Definition

Before examining the definition of civil disobedience, it should be noted that civil disobedience is not only one of the lesser known forms of protest, but also a form of protest opposed by many State authorities. The word "disobedience" indicates a challenge to the law and civil order which is hard to accept for a society.¹³ It is especially hard to acknowledge civil disobedience for many States since it may not just present a test case for a constitutional decision but also seeks to oppose the law, even if the courts should decide to uphold it.¹⁴ This aversion is understandable, as ongoing challenges to the law always contain a certain danger to a State and its structure, especially in less democratic States, but civil disobedience is an important form of protest, so States should be persuaded into acknowledging and protecting it. Nevertheless, one needs to be aware of the general reluctance against accepting civil disobedience as a legitimate form of protest.

Over time, there have been many attempts to define civil disobedience. Most led to similar results, with just minor discrepancies on whether civil disobedience must be strictly non-violent and whether the person in action must be willing to accept the legal consequences. According to the core definition that most authors and judges agree on, civil disobedience can be defined as a violation of a legal command in order to register opposition and to motivate reform.¹⁵ Some definitions of civil disobedience stress the aspect of gaining public attention, such as the one used by the German Federal Constitutional Court, the *Bundesverfassungsgericht*,¹⁶ but the overall content remains the same. Civil disobedience can take many different forms, depending on the legislation of a country. For instance, it can be exercised as a sit-in demonstration, protest march, teach-in or wade-in or, more generally speaking, in nearly any form that makes use of the body of an individual.¹⁷

⁸ Randall Kennedy, 'Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott' (1989) 98 *The Yale Law Journal* 999.

⁹ *ibid.*

¹⁰ Raymond Gavins, *The Cambridge Guide to African American History* (Cambridge University Press, 2016) 193.

¹¹ *Gayle v Browder* [1956] US Supreme Court 352 U.S. 903.

¹² Kennedy, *op cit.*

¹³ Harrop Freeman, 'The Right of Protest and Civil Disobedience' (1966) 41 *Indiana Law Journal* 228, 230.

¹⁴ Jessica Bulman-Pozen and David Pozen, 'Uncivil Obedience' (2015) 115 *Columbia Law Review* 809, 814.

¹⁵ *Ibid.*, 810.

¹⁶ Peter E Quint, *Civil Disobedience and the German Courts: The Pershing Missile Protests in Comparative Perspective* (Routledge, 2007), 166.

¹⁷ Freeman, *op cit.*, 228.

With view to the question whether civil disobedience must be non-violent, the *Bundesverfassungsgericht* has stated that the act must be absolutely non-violent.¹⁸ This point of view has been widely shared by other authors who argue that the non-violence is the main factor for the civil disobedience to be 'civil'.¹⁹ The requirement of the willingness of the acting person to accept legal consequences, on the other hand, is not indispensable for distinguishing civil disobedience from other forms of protest, but is important for civil disobedience to be an appropriate form of protest. If civil disobedience would be seen as legitimate form of dissent even when the person is not willing to accept legal consequences, the scope of civil disobedience would be vast. Anyone coming in conflict with the law could refer to his action as being civil disobedience and that would counteract the original purpose of protest, i.e. prompting reform.

Since there are many, sometimes merging, forms of protest it can be hard to define at what point an action can be called civil disobedience. The requirement of the action to be non-violent is certainly helpful to distinguish civil obedience from other forms of protest such as direct action. But the best distinction is the law-breaking aspect.²⁰ For instance, civil disobedience is contrary to uncivil obedience because of its law-breaking requirement. Uncivil obedience denotes a legal provocation that strikes others as subversive because of its attentiveness to the law, such as questioning the speed limit by adhering strictly to it.²¹ While civil disobedience is more civil than ordinary law-breaking, uncivil obedience is the complete opposite, being less civil than ordinary law-following.²²

To sum up, civil disobedience should be defined as an intentional violation of a legal command for the purpose of achieving reform. Additionally, it should be made sure that the civil disobedience is non-violent and participants are willing to accept legal consequences.

What kind of activities are to be protected by the State?

There are many kinds of activities that can constitute civil disobedience. For reasons of clarity and conciseness, this section focuses on three forms of civil disobedience and draw some general guidelines for the permissibility of civil disobedience based on the judgments and statement made within the context of these forms. The three kind of activities examined in this section are: sit-in demonstrations (sit-ins); activities against threats to the constitutional order; and actions against companies and corporations.

Sit-in demonstrations

First of all, it should be noted that there is agreement in international human rights law to recognize sit-ins as a form of protest, that is protected by the right to Freedom of Assembly. This has, among other, been stated by the Special Rapporteur on the rights to freedom of assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies who understand "assembly" as something that does not only cover temporary gatherings, but also long-term demonstrations such as sit-ins.²³ The OSCE comes to a similar decision, seeing sit-ins as static assemblies that are covered by the right to freedom of peaceful assembly.²⁴ The fact, that sit-ins are in general protected by the right to Freedom of Assembly, however, doesn't automatically mean that every sit-in is protected. Rather, each sit-in needs to be examined on its own regarding its permissibility. This section of the memorandum therefore focuses on

¹⁸ Quint, op cit.

¹⁹ Bulman-Pozen and Pozen, op cit, , 816.

²⁰ Ibid, 827.

²¹ Ibid, 826.

²² Ibid.

²³ A/HRC/31/66, para 10.

²⁴ Venice Commission and OSCE ODIHR, *Guidelines on Freedom of Peaceful Assembly* (second edition, 2010), para 17.

the aspects and limits of sit-ins that need to be taken into account for the sit-in to be permissible.

Regarding the permissibility of sit-ins, this section focuses on the jurisdiction of the German Federal Constitutional Court, the *Bundesverfassungsgericht*, in the so-called *Sitzblockadenurteilen* – “sit-in-judgments”. As these judgments focus on two aspects (whether sit-ins amount to force; and whether they are covered under the right to freedom of assembly that is protected under Article 8 of the Basic Law for the Federal Republic of Germany, also known as *Grundgesetz*), it is firstly explained how those aspects are interrelated.

According to German criminal law,²⁵ one can be prosecuted for coercion when using “force” to coerce someone to do or abstain from doing something. This law, however, does not apply if the use of force is not ‘reprehensible’ within the meaning of section 240 of the German Criminal Code.²⁶ To judge whether the German Criminal Court was right to prosecute participants in sit-ins for coercion, the *Bundesverfassungsgericht* examined in its judgments the term of “force” and whether those sit-ins were reprehensible, which is only the case if the specific sit-in is covered by Article 8 of *Grundgesetz*.²⁷

Sit-ins constituting force

In terms of force, the *Bundesverfassungsgericht* ruled that force only covers the “bodily application of force on part of the offender”.²⁸ With this ruling, the *Bundesverfassungsgericht* turned away from applying the definition of “spiritualized force”, which covers not only physical burdens, but also psychological ones.²⁹ This ruling, however, was circumvented to a certain point by the criminal courts which stated that in cases where a sit-in forces a car to stop, only the first car was stopped by spiritualized force, whereas subsequent cars that stop because of presence before them of the first car amounts to physical force by the sit-in participants.³⁰ These so called *second row* judgments mean that, according to the criminal courts, participants in sit-ins could be prosecuted for coercion in every case where a second car is forced to stop because of the first stopping car. The *Bundesverfassungsgericht* confirmed the legality of these rulings in 2011.³¹

Even though the *Bundesverfassungsgericht* has confirmed the legality of the *second row* judgments, this memorandum suggests that this approach should not be adopted by other States. If a sit-in constitutes force as soon as more than one car must stop, almost any sit-in would do so since the main purpose of this kind of protest is to prevent people and cars from accessing a certain area. This would completely undermine the notion of non-violent sit-ins by creating a disproportionate limitation on the scope of civil disobedience not constituting force. Although the *second row* judgments could be justified by the fact that a sit-in still needs to be reprehensible to create a criminal liability, it would send a wrong message of sit-ins hardly ever being non-violent. Therefore, it is not advisable to adopt the strategy of the *second row* judgments.

Sit-ins covered by the right to freedom of assembly

According to the *Bundesverfassungsgericht*, sit-ins are within the general area of the right to freedom of assembly.³² This has not only been recognized by the *Bundesverfassungsgericht*

²⁵ Section 240, German Criminal Code.

²⁶ Ibid.

²⁷ Quint, op cit.

²⁸ *Sitzblockade II* [1995] BVerfG 1 BvR 718/89; 1 BvR 719/89; 1 BvR 722/89; 1 BvR 723/89.

²⁹ *Sitzblockade I* [1986] BVerfG 1 BvR 713/83, 921, 1190/84 u. 333, 248, 306, 497/85.

³⁰ Quint, op cit.

³¹ *BVerfG, 07.03.2011 - 1 BvR 388/05* [2011] BVerfG 1 BvR 388/05.

³² *Sitzblockade I* (n 27).

but also other courts, such as the U.S. Supreme Court,³³ which acknowledge that sit-ins are clearly covered by the right to protest. Notwithstanding that there is agreement among many countries that sit-ins in general are covered by the right to freedom of assembly, such forms of demonstration have to meet several conditions.

First, the sit-in must be peaceful.³⁴ This does not mean that any sit-in considered as "force" is not covered, but there must not be violence against third persons or other participants in the sit-in caused by rioting or dangerous actions.³⁵ In other words, a sit-in can be considered peaceful if the act of violence has only been committed by a single person and has affected the overall peaceful mood of the sit-in.³⁶

The sit-in must also be primarily directed towards influencing public opinion instead of enforcing own interests, since only "persuasive" forms of civil disobedience are covered by the freedom of assembly.³⁷

Furthermore, it is the duty of the State to remain neutral towards the substantive position of the protestors.³⁸ A State cannot prohibit any sit-in simply because it disagrees with its intention.

Even sit-ins that fulfil all these requirements face certain limits. The most important is the legally-protected interests of third persons or the community.³⁹ In some cases, an interference with interests of third persons or the community can be justified as far as it is limited to a socially acceptable side-effect of the demonstration, but the balancing of the countervailing interests should be taken into account in every case.⁴⁰ This includes the intensity and duration of the demonstration, the relation between the topic and the persons affected, the possibility to get around the protest, etc.⁴¹

As can be seen, civil disobedience in the form of sit-ins is generally covered by the freedom of assembly, but several requirements need to be respected by the protesters as well as by the State.

The requirements of the State, for instance to protect sit-ins and to disperse them if they become unlawful, are not considered here as those duties are not unique to civil disobedience but apply to all forms of protest.

Activities against threats to the constitutional order

"All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available".

This statement comes from Article 20(4) of the *Grundgesetz* (the Basic Law). It gives people the right to unlawful resistance if anyone tries to overthrow the constitutional order and no other redress is possible. This right applies only in extreme or emergency cases and is designed to protect civil disobedience only in case of an imminent danger to the constitutional order but not for other acts of civil disobedience that address single issues.⁴² It applies only to situations where the democratic system is not intact, where peaceful protest

³³ *Hamm v City of Rock Hill* [1964] US Supreme Court 379 U.S. 306.

³⁴ *Sitzblockade III* [2001] BVerfG 1 BvR 1190/90; 1 BvR 2173/93; 1 BvR 433/96.

³⁵ *Ibid.*

³⁶ Dirk Ehlers, Michael Fehling and Hermann Pünder, *Besonderes Verwaltungsrecht: Band 3: Kommunalrecht, Haushalts- und Abgabenrecht, Ordnungsrecht, Sozialrecht, Bildungsrecht, Recht des öffentlichen Dienstes* (CF Müller GmbH 2013), 562.

³⁷ Quint, *op cit*, 254.

³⁸ *Ibid.*

³⁹ *Sitzblockade III*, *op cit*.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Sandra Schmid, 'Das Recht Auf Widerstand Zum Schutz Der Verfassung' (*Deutscher Bundestag*), available at URL <https://www.bundestag.de/dokumente/textarchiv/2013/47878421_kw50_grundgesetz_20/214054> (accessed 21 March 2017).

has not been successful and all other means to resist abolishment of the constitutional order has failed.⁴³

Unfortunately, there is no clear definition of what forms of civil disobedience are covered by Article 20(4) apart from the negation for civil disobedience against single actions. Still, there is agreement among German legal professionals about some minimum standards regarding the definition. There is, for instance, consensus that any kind of resistance, even an unlawful one, is covered.⁴⁴ Furthermore, the right to resistance can be exerted individually or in groups and includes active as well as passive and violent as well as non-violent actions if the requirements of necessity are fulfilled.⁴⁵

Looking at these comments, the requirements for the act of resistance are very vague. Regarding Germany's history, it is to be expected that most, if not all, kinds of resistance during Hitler's regime would have been covered by the right to resistance since Article 20 was inserted in the Basic Law to prevent the rise of another dictator. Such forms of resistance would, for example, include the distribution of leaflets as it was done by the White Rose.⁴⁶ It is, however, highly questionable whether an attempted assassination of a person overthrowing the constitutional order would be covered as well or whether there will always be a less far-reaching means.

All things considered, Article 20(4) constitutes more of a symbolic law since, so long as there is still a court to judge on it, there will usually be less far-reaching means. And if the court is part of the system that the protest is directed against, it would not apply the law. The right to resistance is more seen as a means to encourage people to resist. It will at a maximum be adduced after the regime that it hostile to the democracy has been defeated.⁴⁷ Still, it is an important provision as it encourages people to show resistance and defend democracy and shows the importance of democratic principles to the State, here Germany. For this reason, States should also be encouraged to implement similar provisions in their constitutions.

Actions against companies and corporations

Civil disobedience is often exercised against companies and corporations, for example by activists such as Greenpeace or Sea Shepherd. This section explores the permissibility and boundaries of such actions while mainly referring to Greenpeace in general and the case *Greenpeace v Shell Netherlands*⁴⁸ in particular. As the name already states, actions against companies and corporations are directed against companies and corporations rather than the State. Since companies and corporations are more vulnerable (since a State does not have to accept or tolerate civil disobedience against it), it is recommended to impose more stringent requirements upon activists for such actions. This does not mean that actions can be completely prohibited in advance simply because they are damaging to the affected company.⁴⁹ It rather means that activists should adhere to certain rules during and in preparation of their actions. Prohibiting any damaging action would limit the possible actions disproportionately, as most actions will cause at least minor damages to the company affected by them.

⁴³ Ibid.

⁴⁴ Hans D Jarass and Bodo Pieroth, *Grundgesetz Für Die Bundesrepublik Deutschland: GG* (11th edn, CHBeck, 2011), 539.

⁴⁵ Ingo von Münch and Philip Kunig, *Grundgesetz-Kommentar: GG, Band 1* (6th edn, CHBeck, 2012), 1446.

⁴⁶ Inge Scholl, *The White Rose: Munich, 1942–1943* (Wesleyan University Press, 2011).

⁴⁷ Von Münch and Kunig, op cit.

⁴⁸ *Shell v Greenpeace* [2012] District Court of Amsterdam 525686/KG ZA 12-1250 and 526023 / KG ZA 12-1271 HJ/JWR.

⁴⁹ Ibid.

Special requirement for actions against companies and corporations

In *Shell v Greenpeace*, the District Court of Amsterdam provided Greenpeace with a list of measures that Greenpeace should inform Shell of in advance and in writing.⁵⁰ Those measures include: the purpose and duration of the action; performance of the action; security measures; and contact details of the person(s) responsible of the action.⁵¹

It could be argued that notification in the form of a webpage or newsletter of the activist group is already sufficient to meet the criteria of providing information about the action. Sea Shepherd, for instance, provides videos, articles and updates on their various operations from their very start on their homepage.⁵² While this can be helpful for the affected companies to inform themselves further about the method, duration and performance of the action, this does not account to providing advanced information to the company. Companies cannot be expected to check the homepages of various activist groups just in case one of them is planning to take action against the company. This memorandum therefore supports the approach of the District Court of Amsterdam that there is a need to provide the company with written notification in advance. This is also helpful if the civil disobedience has legal consequences, as it provides both sides with a verification about the planned action and duration and whether the activist group has adhered to it. Still, other activist groups should consider adopting Sea Shepherd's approach of providing comprehensive information about their actions in advance on their websites and not only after the action. Particularly useful also is their approach of video documentation of such action.

Activists may also create their own guidelines regarding planned actions. For activists that have a "Code of Conduct", many do not explain principles regarding their own actions, which could be helpful not only for the affected companies to predict what they will be facing, but also for themselves to make sure that their actions are in accordance with international standards and therefore likely to be permissible. Greenpeace Germany, on the other hand, has in their Code of Conduct a section dealing with its contact with the public.⁵³ According to this section, Greenpeace commits itself to strict non-violence and appropriate behaviour during public actions.⁵⁴ It is stated that opponents should be treated with respect and, except in cases of *rapid response*, be given the opportunity to remedy their environmental grievance before action is taken against them.⁵⁵ Although this section contains more of a minimum standard, rather than comprehensive guidelines, this can be seen as a good starting point for other activist organisations to implement similar or more comprehensive measures in their Codes of Conduct. At the very least, however, those measures should contain the guidance of the District Court of Amsterdam on informing the affected company.

General requirements for actions against companies and corporations

Additional to the specific conditions set out above, the Dutch Court also outlined some general requirements that need to be taken into account when judging the permissibility of an action against a company or corporation. Those general requirements include, among others: the compliance of the organisation with the principles of proportionality; and subsidiarity of the conduct.⁵⁶ Proportionality is defined as the use of conduct that, at the very least, does not cause substantial damage.⁵⁷ Subsidiarity means that the activist group must

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² 'Campaigns' (*Sea Shepherd Global*), at URL <<http://www.seashepherdglobal.org/campaigns/campaigns.html>> (accessed 24 March 2017).

⁵³ 'Greenpeace Germany Code of Conduct (2011)', at URL <https://www.greenpeace.de/sites/www.greenpeace.de/files/2011_Greenpeace_Germany_Code_of_Conduct_0.pdf> (accessed 22 March 2017).

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ *Shell v Greenpeace*, op cit.

⁵⁷ Ibid.

have attempted to use less far-reaching means to achieve the intended result before resorting to the action.⁵⁸ Additionally, the emphasis of the action must be on drawing public attention to the situation, rather than enforcing own interests, and the interests need to be weighed against each other on the basis of the specific facts and circumstances of the case.⁵⁹ Overall, these requirements are similar to those set out above applying to sit-ins and are therefore not examined further at this point.

Legal consequences

To this point, it has been examined to what extent civil disobedience is permissible and what specific conditions should be considered by the various parties, especially by the participants in the action. Even though this will help ensure the permissibility of civil disobedience actions, there will always be some unlawful actions of civil disobedience. This section will examine how the State should handle those actions as far as it concerns the permissible legal consequences for the persons undertaking acts of civil disobedience.

As stated, the willingness to accept legal consequences is an important condition of civil disobedience.⁶⁰ Still, breaking the law is not the main purpose of civil disobedience but rather a by-effect; civil disobedience wants to challenge the legality of a certain law but not break it for one's own advantage. Courts should therefore aim to achieve a proportionate judgment that takes the civil disobedience into consideration as a mitigating circumstance. To this end, the German *Bundesverfassungsgericht* advised in *Sitzblockade III* that the criminal courts should take into positive account in their judgments if people exercised their right to freedom of assembly.⁶¹ Many authors support this, claiming that the respective motive should be taken into account and that democratic motives, as it is the case with civil disobedience, should result in no more than nominal penalties.⁶² This line of argumentation is worthy of support. The right to freedom of assembly can be subject to limitations, including penalties if those are being disregarded. Still, those penalties must be proportionate. The willingness of protesters to accept legal consequences for their civil disobedience is no justification for punishing them at a maximum. This would constitute a disproportional weighing of their motives. In particular, the penalty should not be increased because of the expressive nature of the civil disobedience. Even if this approach might not appeal to every State, it should be pointed out to States that they need to ensure their punishments are proportionate.

Looking at Russia, it can be criticised that Russian courts have in part chosen too severe punishments regarding acts of civil disobedience simply because of their expressive nature. Members of the Pussy Riots, for example, were sentenced by the Khamovnicheskii District Court of Moscow to two years imprisonment for their protest in a church.⁶³ The women of Pussy Riot insisted during their trial that their protest was political and apologized for any offense they might have caused to Orthodox believers since this hadn't been their intent.⁶⁴ They claimed that the protest was intended to criticise the church's playing a leading role in Russia's political and public life.⁶⁵ Still, the judge found them guilty, stating that the action was motivated by religious hatred and that the political comments had been inserted in the video later.⁶⁶ Admittedly, the court did not explicitly punish the message of civil disobedience, but it punished at a maximum the concrete form of their protest. It moreover decided to

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Freeman, op cit, 246.

⁶¹ *Sitzblockade III*, op cit.

⁶² Freeman, op cit, 247.

⁶³ Volha Kananovich, "Execute Not Pardon": The Pussy Riot Case, Political Speech, and Blasphemy in Russian Law' (2015) 20 *Communication Law and Policy* 343, 345.

⁶⁴ Dustin Koenig, 'Pussy Riot and the First Amendment: Consequences for the Rule of Law in Russia Note' (2014) 89 *New York University Law Review* 666, 673.

⁶⁵ Kananovich, op cit.

⁶⁶ Koenig, op cit.

punish Pussy Riot for the act of breaking the law without considering their will to engage in political discussions and their right to freedom of expression and freedom of assembly. The expressive nature of their action was described as religious hate, not as political protest, and reduced to the fact that it offended Orthodox believers. The possibility of the protest to be political was barely considered by the court. Even worse, the court denied Pussy Riot any political claim, arguing that they did not mention any names of politicians.⁶⁷ The political nature of a protest should, however, not depend on the explicit statements made during this protest. Instead, the overall staging of the protest needs to be examined to decide whether the protest contains a political message. By failing to do so, the Khamovnicheskii District Court of Moscow resulted in making a disproportionate judgment.

This disproportionality, which leads to a violation of the right to freedom of assembly, has also been criticised widely by international human rights mechanisms and NGOs. For instance, the Special Rapporteur in the field of cultural rights expressed her concerns about the prosecution and conviction of artists, especially of those whose art relate to the Russian Orthodox Church.⁶⁸ According to the Special Rapporteur, the right to participate in cultural life includes the right to challenge and discuss religious symbols and dominant values through artistic expressions.⁶⁹ This is similar to the criticism raised by the OSCE Representative on freedom of the media, who reminded Russia that charges of hooliganism should not be abused to cut the right to freedom of expression and that speech should under no circumstances lead to imprisonment.⁷⁰

Several NGOs also used the 16th session of the Universal Periodic Review as an opportunity to criticise the "Pussy Riot" judgment. Civicus, Citizens' Watch and Golos Association⁷¹ as well as Pen International⁷² and others stated that the Pussy Riot case represents part of a systematic attempt by Russia to shut down dissenting opinions and suppress those who are speaking in support of political opposition.

Overall, punishments for actions of civil disobedience should be proportionate, meaning that it be minor compared to punishments for actions undertaken for a personal benefit. Judges should in this regard consider whether the action was meant to be an expression of the right to protest and if the offence was committed for rather democratic motives.

Conclusion

Civil disobedience is as interesting as it is a complicated form of protest. Still, there are several conditions upon which civil disobedience actions are to be protected by human rights standards. This is particularly the case if the act of civil disobedience is non-violent and does not affect, or rarely affects, the rights of third parties. In terms of permissibility and the handling of civil disobedience activities by State authorities, the following recommendations are made:

⁶⁷ Kananovich, op cit.

⁶⁸ 'Preliminary Conclusions and Observations by the Special Rapporteur in the Field of Cultural Rights at the End of the Visit to the Russian Federation, 16-26 April 2012', at URL <<http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12084&LangID=E>> (accessed 24 April 2017).

⁶⁹ *ibid.*

⁷⁰ 'Freedom of Expression at Stake, Warns OSCE Media Freedom Representative Following Pussy Riot Verdict | OSCE' at URL <<http://www.osce.org/fom/92939>> accessed 25 April 2017.

⁷¹ 'CIVICUS Citizens' Watch and Golos' UPR Joint Submission on Russia 16th Session' at URL <http://www.civicus.org/images/CIVICUS_Citizens_Watch_and_Golos_UPR_Submission_on_Russia_16th_session.pdf> (accessed 25 April 2017).

⁷² 'Russia PEN International: Contribution to the 16th session of the Working Group of the Universal Periodic Review, Submission on the Russian Federation' at URL <<http://www.pen-international.org/what-we-do-2/policy-advocacy/freedom-of-expression/the-un-universal-periodic-review-upr/russia/>> (accessed 25 April 2017).

For persons undertaking acts of civil disobedience:

1. Civil disobedience activities must be peaceful. This means that there must not be violence against third persons or other persons participating in the civil disobedience.
2. Civil disobedience activities must be proportional (as between the cause being advanced and the impact of the activities), subsidiary (requiring other alternatives to be first pursued) and consider interests of third persons and the community.
3. The action must be aimed at influencing the public opinion rather than enforcing or advancing own interests.
4. Action against companies and corporations should adhere to certain conditions, such as giving written notification in advance to the affected company as to purpose, duration and performance of the action and security measures undertaken. Activist groups should also set out provisions for measures regarding actions in their Codes of Conduct.

For States:

5. Civil disobedience activities must not be prohibited only because they might cause non-significant damages, such as minor economic damages.
6. States must be neutral towards the respective position of the protestors. The issue that is the subject-matter of the civil disobedience should not affect its permissibility.
7. The punishment of civil disobedience offences should take into consideration, as a mitigating factor in sentencing, that the persons involved exercised their right to freedom of assembly and therefore had democratic motives for their actions.
8. Even if it constitutes more of a symbolic law, States should strengthen their democracy by implementing laws allowing for civil disobedience in case of a threat to the constitutional order.
9. As far as civil disobedience is protected by the right to freedom of assembly, the State has the same positive duty to protect it.