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# **Blowing the Whistle on the Iraq War: Conscientious Moral Objection and the Duty to Obey the Law**

Laura Burke

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## **Abstract**

This article explores whether there exists a duty to obey the law of a reasonably just state, even when doing so would violate an individual's moral beliefs. There has been extensive discussion of legitimate authority, political obligation, civil disobedience, and the duty to obey over the past century. However, given the nature and scope of these topics, little clarity exists regarding the extent of any duty to obey the law and what protection the law should offer to conscientious objectors. Using the contentious case of Katharine Gun, a translator at the Government Communication Headquarters who in 2003 leaked a confidential memo related to the Iraq invasion, the article interrogates whether moral obligation is ever a legitimate justification for legal disobedience. The circumstances under which Gun engaged in whistle-blowing force the society of the reasonably just state to consider whether, in some circumstances, moral conviction should be a valid legal defence against breaking some laws. Gun's case highlights the jurisprudential problems arising from imposing an absolute philosophical duty to obey the law. First, the article engages with the notion of a duty to obey, proposing that, whilst there is often good reason to do so, there is no absolute moral duty to obey the law. Second, it examines theories of conscientious objection and civil disobedience, establishing that, whilst there is no absolute right to conscientious objection, there exists scope for increased legal protection for those that disobey the law for moral reasons. Finally, it assesses the current state of law and policy in the United Kingdom on conscientious objection, offering proposals for reform.

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## 1 Introduction

‘There comes a time when silence is betrayal.’

— Martin Luther King Jr<sup>1</sup>

Obedience to law in cases of moral conflict is one of the most morally complex and pertinent discourses in legal philosophy. It cuts to the core of questions as to why we obey the law, whether we owe reasonably just states our obedience, and how far that obedience should extend. Conscientious objection and civil disobedience have been employed by civil society actors throughout political history as tools through which to challenge injustice, to invoke the public conscience, and to trigger legal reform. This article utilises the case of Katharine Gun as a lens through which to consider these concerns.

The case of Katharine Gun provides a politically charged example of the tension between legal obedience and moral obligation.<sup>2</sup> Gun worked as a translator for the Government Communication Headquarters (GCHQ) from 2001 to 2003, when she received a highly confidential memo revealing that the USA was working with the UK to collect sensitive information on members of the United Nations Security Council (UNSC), in order to illegally pressure states into supporting the Iraq invasion.<sup>3</sup> Gun's decision to leak the memo led to widespread

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<sup>1</sup> Martin Luther King Jr, ‘Beyond Vietnam’ (The Martin Luther King Jr Research and Education Institute, 4 April 1967) <<https://kinginstitute.stanford.edu/king-papers/documents/beyond-vietnam>> accessed 1 May 2020.

<sup>2</sup> Paul Wood, ‘Katharine Gun: The Spy Who Tried to Stop the Iraq War’ *The Spectator* (London, 14 September 2019).

<sup>3</sup> Martin Bright and Ed Vulliamy, ‘15 Years Later: How U.K. Whistleblower Katharine Gun Risked Everything to Leak Damning Iraq War Memo’ (*Democracy Now*, 19 July 2019) <[https://www.democracynow.org/2019/7/19/15\\_years\\_later\\_how\\_uk\\_whistleblower](https://www.democracynow.org/2019/7/19/15_years_later_how_uk_whistleblower)> accessed 8 May 2021.

public outcry over the government's actions.<sup>4</sup> On 13 November 2003, she was charged with violating Section 1 of the Official Secrets Act 1989, which government employees dealing with sensitive matters agree to abide by upon commencement of their employment. Her trial brought the conflict between the citizen's legal and moral duties back into the heart of public and academic discourse. The legal case against Gun was ultimately dropped. The director of public prosecutions at the time, Sir Ken Macdonald, indicated that her prosecution would require the revelation of confidential government documents that would threaten national security.<sup>5</sup> As the case was not brought to trial, no definitive answer was provided as to the legality of Gun's position, and particularly the defence of necessity, which her legal team intended to argue at trial. Gun's case reignited the debate as to whether the citizen's first duty should be to the law or to personal morality. It forces us to consider if, even in a reasonably just state, certain moral compulsions can justify breaking laws.

Employing a jurisprudential lens, this article analyses conscientious moral objection in the context of Gun's case. Utilising legal theory on the duty to obey the law and conscientious moral objection, it re-examines the current legal position of contemporary conscientious moral objectors. Whilst rejecting the argument that there is an absolute right to conscientiously disobey law, it will conclude that disobedience to law can have significant and compelling moral and practical justification. The article then argues that, if disobedience can be justified, then there must be a presumption in favour of giving it some form of legal recognition. Finally, the article offers a view as to what form that legal recognition should take, favouring acknowledgement of a defence of necessity.

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<sup>4</sup> Tim Adams, 'Iraq War Whistle-Blower Katharine Gun "Truth Always Matters"' *The Guardian* (London, 22 September 2019).

<sup>5</sup> Mark Townsend, 'Iraq War Whistle-Blower's Trial Was Halted Due to National Security Threat' *The Guardian* (London, 1 September 2019).

## 2 The Existence and Scope of a Duty to the Obey the Law

In western legal philosophy, the debate as to whether there is a prima facie moral obligation to obey the law dates back to 360 BC, with Plato's discussion of Socrates in *Crito*.<sup>6</sup> Socrates refuses to flee Athens when faced with the death penalty because it would be morally wrong to forego the punishment imposed upon him by law, because he is morally obliged to abide with Athenian law as a citizen of Athens. Such a conclusion, that there exists a prima facie moral obligation to obey the law simply because it is the law, remains much debated in contemporary jurisprudence.<sup>7</sup>

To assess the relationship between conscientious moral objection and legal obedience, the article first engages with the contested existence of a prima facie moral obligation to obey the law. It concludes that, whilst there is often good reason to obey the law, those reasons cannot justify the claim that every citizen is duty-bound to obey every law, because such a moral duty does not exist.

### 2.1 The Concept of a Moral Obligation

The concept of a moral obligation to obey the law is such that, 'in cases where the law requires X to do Y, it would be prima facie morally wrong for X not to do Y simply because the law requires it'.<sup>8</sup> This article will follow Simmons, Hart, and Rawls in adopting Brandt's paradigmatic use of the terms of 'obligation' and 'duty', treating the terms as broadly synonymous.<sup>9</sup> In the context of obedience to the law, these terms refer to 'moral requirements to act in certain ways in matters

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<sup>6</sup> Ernest J Weinrib, 'Obedience to the Law in Plato's *Crito*' (1982) 27 *Am J Juris* 85.

<sup>7</sup> Nicholas J McBride and Sandy Steel, *Jurisprudence* (Palgrave 2014) 132.

<sup>8</sup> *ibid* 133.

<sup>9</sup> RB Brandt, 'The Concepts of Obligation and Duty' (1964) 73(291) *Mind* 374.

relating to law and politics'.<sup>10</sup> What distinguishes the specialised use of these terms is the coercive moral bond that an obligation places on an action. Simmons clarifies the important distinction between 'moral' and 'positional' duties.<sup>11</sup> Simply put, something is a moral duty if it would be *ipso facto* morally wrong not to fulfil that duty. Rawls terms these 'natural duties' that 'apply equally to all individuals irrespective of status'.<sup>12</sup> Positional duties, by contrast, arise from roles or positions that the individual undertakes. The following analysis is concerned not with a positional duty to obey the law but with a moral one.

In this context, the question of duty refers to whether law is morally authoritative and whether its subjects are morally obliged to comply because of its status as law. Crucially, a moral obligation is distinct from a coercive obligation, whereby X has authority over Y because X is capable of coercing Y to comply by punishing Y for non-compliance. In the case of coercion, punishment might give Y reason to comply, but this does not mean that there would be anything morally deficient about Y's refusal.<sup>13</sup> This is illustrated in the debates between Hart and Austin. The 'imperative theory of the state', as espoused by Austin, dictates that human law is conceived of commands given by a political superior and enforced by coercive sanctions.<sup>14</sup> Under this theory, the law is authoritative because it has been created by a superior capable of imposing sanctions. Austin claimed that '[c]ommand, duty and sanction are inseparably connected': a duty exists because of the command of the state, and such a duty is reinforced by the power to impose coercive sanctions.<sup>15</sup> However, Hart, in his seminal work, rejects this command model as failing to account for the internal thought processes of citizens

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<sup>10</sup> A John Simmons, *Moral Principles and Political Obligations* (first published 1979, Princeton UP 2010) 12.

<sup>11</sup> *ibid.*

<sup>12</sup> John Rawls, *A Theory of Justice* (Harvard UP 1971).

<sup>13</sup> Daniel Mark, 'The Failure of Joseph Raz's Account of Legal Obligation' (2016) 61(2) *Am J Juris* 217, 218.

<sup>14</sup> John Austin, *The Province of Jurisprudence Determined* (first published 1832, Prometheus 2000) 9–14.

<sup>15</sup> *ibid* 17.

who act out of a belief in a ‘moral duty to obey the law’ as opposed to being obliged by coercion.<sup>16</sup> An individual in the position to impose sanctions can indeed compel obedience, but Austin fails to address whether such authority is just and legitimate. Hart's rejection of command theory revolutionised the contemporary study of jurisprudence.<sup>17</sup> Hart demonstrates that the command model does not sufficiently account for the law's content and function, and instead frames the debate in terms of whether a moral obligation to obey exists, from where it derives its authority, and whether it is binding on the citizen. For this reason, the ‘duty to obey the law’ as examined here focusses not on whether political authority can coerce behaviour via punishment but on whether the law of a reasonably just state has moral authority over its citizens, which in turn imposes a moral duty to obey the law.

## 2.2 Raz and the Duty to Obey

The debate around a duty to obey the law has received significant academic scrutiny in recent decades. Joseph Raz's seminal work supported the conclusion that there is never an absolute moral duty to obey the law.<sup>18</sup> He persuasively questions the necessity, and the existence, of an absolute duty to obey, arguing that its existence depends on factors other than whether the law is just and sensible. His article convincingly concludes that any obligation is a *prima facie* one that can be overridden by a variety of countervailing considerations.<sup>19</sup> Raz's position is not that one never has any moral reason to account for the existence of the law but rather that the extent of the obligation to obey varies depending on factors such as the expertise or beliefs of the citizen, or the circumstance of the violation. The law affects an individual's moral obligations but does not bind them.

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<sup>16</sup> HLA Hart, *The Concept of Law* (first published 1961, Clarendon Press 2012) 6.

<sup>17</sup> Mark (n 13) 218.

<sup>18</sup> Joseph Raz, ‘The Obligation to Obey: Revision and Tradition’ (1984) 1 *Notre Dame J L Ethics & Pub Pol'y* 139, 140.

<sup>19</sup> *ibid* 147.

He opens his article by stating that political and moral theorists generally hold that each citizen has a prima facie moral duty to obey the laws of a reasonably just state. Several conditions for this theory of obedience require examination. There is an argument that the obligation to obey is unjustifiable on the grounds that no state can be truly just. If obligation to obedience is dependent on the certainty of justice, and this guarantee is impossible, then no absolute obligation can be imposed.<sup>20</sup> Raz, however, proposes the ‘paradox of just law’, arguing that the presence of justice in fact diminishes the need for an absolute duty to obey. He argues that the more just and valuable the law is, the more reason the citizen has to conform to it and the less the need for a duty to obey becomes.<sup>21</sup> Since the law is just, the reasons that establish its justice should be the reasons for obedience. Individuals do not obey the law because of legal obligation but instead conform to the same doctrine of justice to which the law itself conforms. Since it is established that there only exists a duty to obey when the law is just, the duty to obey the law becomes redundant.<sup>22</sup>

One of the most persuasive aspects of Raz's paradox theory is its application to the law on murder. The theory explains that society expects people to refrain from morally reprehensible actions regardless of whether they are legally forbidden, for reasons unrelated to the law.<sup>23</sup> If someone claimed that they do not murder because of the law, society would find that morally unacceptable. This raises the question of whether there can be a moral obligation to perform an action, if to take the existence of an obligation as the justification for the action would be morally wrong. Raz proposes that, because the existence of a ‘duty to obey the law’ does not strengthen the moral duty not to murder, then, in philosophical terms, a moral duty to obey is somewhat redundant.<sup>24</sup> The laws prohibiting murder, rape, and torture are central to the legal

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<sup>20</sup> Robert Wolff, *In Defence of Anarchism* (first published 1970, University of California Press 1998) 18.

<sup>21</sup> Raz (n 18) 141.

<sup>22</sup> Raz (n 18) 141.

<sup>23</sup> Raz (n 18) 139, 141.

<sup>24</sup> Raz (n 18) 140.



systems of all just states. If these laws make little difference to our pre-existing moral obligations, then it logically follows that there is no absolute obligation to obey law on the basis that it is law.

### 2.3 Consent Theory

Arguably the most prominent justification for a duty to obey the law is consent theory. In the eighteenth century, Rousseau highlighted the value of the social contract as the act that constitutes civil society, and the notion of consent to the state has become popular as a justification for a duty to obey the law, as it aligns better with the principles of natural law.<sup>25</sup> The central doctrine of consent theory is that no individual is obligated to comply with any political power unless they have consented to its authority.<sup>26</sup> Raz agreed that '[c]onsent to obey the law of a relatively just government indeed establishes a prima facie obligation to obey the law'.<sup>27</sup> However, valid consent to obey requires a deliberate action, such as the oath taken in national military service, and in order to be binding it must be voluntarily undertaken. The central difficulty with consent as the general foundation of political authority and, by extension, a duty to obey is that many people living under a state's laws have never performed any such action. Many theorists instead argue in favour of the implicit social contract — that individuals give their consent to obey implicitly by belonging to the state, accepting its benefits, and refraining from opposing the state.<sup>28</sup> However, the main problem with implicit consent as a justification for imposing a duty to obey the law is that valid consent requires a reasonable way of opting out. Implicit social contract theory utilises the acceptance of the benefits of the state as justification for a duty, yet these perceived benefits are given to a citizen regardless of whether they want them and, for many individuals, there is no reasonable way of opting out.<sup>29</sup> Therefore,

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<sup>25</sup> Jean-Jacques Rousseau, *The Social Contract* (first published 1762, Everyman 1950); Raz (n 18) 153.

<sup>26</sup> John Locke, *Two Treatises of Government* (first published 1689, CUP 1960).

<sup>27</sup> Joseph Raz, 'Authority and Consent' (1981) 67 *Va L Rev* 103.

<sup>28</sup> Michael Huemer, *The Problem of Political Authority* (Palgrave Macmillan 2013) 22.

<sup>29</sup> *ibid* 24.

neither theory accounts for full and valid consent from all citizens, and so a blanket obligation to obey cannot be imposed on the grounds of consent.

Other theorists have argued that an obligation to obey the law can arise from belonging to or identifying with a country or community as a form of consent.<sup>30</sup> However, whilst communal loyalty is a valuable aspect of a strong state, it is not obligatory. There is no ‘moral duty to feel a sense of belonging to a country or community’; a feeling of loyalty that may trigger obedience to the state differs sharply from a binding duty of loyalty to the state.<sup>31</sup> Raz argues that the law and government are ‘organs of the community’; if they accurately and justly represent the community, then an inclination to obey the law will arise.<sup>32</sup> This is what Raz refers to as ‘respect for law’, a condition distinct from obligation. The notion of respect represents a desire to uphold a system based on a belief in that system. This is incongruous with obligation, which is a requirement placed upon the individual.<sup>33</sup> Obeying the law in this context is a way of expressing confidence in the state and trust in its justice. However, respect-based obedience does not derive from consent to the state — it develops because of belief in the state.<sup>34</sup>

An obligation to obey due to loyalty to the state is a semi-voluntary obligation because it is a belief one has developed — an individual does not have a moral duty to identify with their community. Raz clarifies that ‘vindicating the existence of a sense of duty based on loyalty does not establish a general obligation to obey’.<sup>35</sup> The argument of voluntary consent to obey the laws of a state based on the communal value of that state can be used to explain compliance, but does not prove the existence of a *prima facie* moral obligation to obey. The community-based rationale fails to show that obedience to the law is an absolute

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<sup>30</sup> Raz, ‘The Obligation to Obey: Revision and Tradition’ (n 18) 153.

<sup>31</sup> Raz, ‘The Obligation to Obey: Revision and Tradition’ (n 18) 154.

<sup>32</sup> Raz, ‘The Obligation to Obey: Revision and Tradition’ (n 18) 154.

<sup>33</sup> Simmons (n 10) 7.

<sup>34</sup> Raz, ‘The Obligation to Obey: Revision and Tradition’ (n 18) 154.

<sup>35</sup> Raz, ‘The Obligation to Obey: Revision and Tradition’ (n 18) 155.

duty, but rather drives the alternate argument that it is a trust-based inclination. This argument suggests that the perception of justice is correlated with an inclination to obey. It follows that, if a citizen were to identify reason to distrust in the state and observe its injustice, that inclination towards respect-based obedience would diminish.

## 2.4 Finnis, Rawls, and the Duty to Obey

Finnis disputes Raz's claim that compliance with the law is dependent on a variety of factors. He writes in favour of a significant duty to obey the law. Finnis's central claim is that the 'law is a seamless web: its subjects are not allowed to pick and choose'.<sup>36</sup> Similarly, Rawls favours a natural duty to support just and efficient institutions, justified by reference to his social contract doctrine. He provides two main reasons why individuals should comply with just social arrangements. First, 'we have a natural duty not to oppose the establishment of just and efficient institutions'.<sup>37</sup> Second, if we knowingly accept the state's benefits and expect others to, we are obliged to 'do our share' to maintain the social contract.<sup>38</sup> Echoing Finnis's notion of law as a 'seamless web', he states that '[t]he injustice of a singular law is not a sufficient ground for non-compliance any more than the legal validity of legislation is always a sufficient ground for obedience'.<sup>39</sup> He adds, 'justice binds us to a just constitution and the unjust laws that may be enacted in precisely the same way that it binds us to any other social arrangement'.<sup>40</sup> Even in a relatively just society, Rawls contends, we cannot frame a procedure in which only just legislation is enacted. We must accept the risk of suffering injustice, providing it does not exceed certain limits, for the existence of a relatively just and efficient system.

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<sup>36</sup> John Finnis, 'The Authority of Law in the Predicament of Contemporary Social Theory' (1984) 1 *Notre Dame J L Ethics & Pub Pol'y* 115.

<sup>37</sup> John Rawls, 'The Justification of Civil Disobedience in Jail' in Aileen Kavanagh and John Oberdiek (eds), *Arguing about Law* (Routledge 2009) 244.

<sup>38</sup> *ibid* 244.

<sup>39</sup> *ibid* 246.

<sup>40</sup> *ibid* 247.

However, Raz highlights that the fairness argument does not apply convincingly to all forms of disobedience to law. Even where it is unfair not to obey the law in some circumstances, it cannot be unfair to perform innocuous acts that do not impede the public good.<sup>41</sup> Many violations of law are innocuous acts; therefore, the argument of fairness cannot be used to justify a generalised obligation to obey. Whilst Rawls explains that the law is a way of achieving coordination and a relatively just system, he fails to demonstrate that such coordination requires the existence of an obligation to obey.<sup>42</sup> Equally, Raz refutes Finnis's proposal as incomplete because its justification for a duty to obey the law presupposes such a duty. The conception of the law as a 'seamless web that citizens cannot pick and choose between' only holds logical authority if there first exists a justified and absolute *prima facie* duty to obey. It does not justify the duty *ipso facto*. One cannot presuppose that we have a duty to obey in order to provide the reason for that duty. This illustrates that the conception of the law as a seamless web is a personal belief; it is not a coherent theory that convincingly establishes a binding moral duty to obey.

Finnis further argues that the only way to ensure that individuals fulfil their moral duties is to enforce upon them a moral duty to obey the law.<sup>43</sup> He presents the following example: '[a] farmer has a duty not to pollute the river, but the individual farmer may dispute this, so the logical way to get the collective to fulfil their moral duty is to create a law and enforce a consequent moral duty to obey that law'.<sup>44</sup> Raz persuasively contends that this only constitutes a coherent argument in favour of a general obligation to obey if the lawmakers are definitively less likely to make mistakes than the farmers on all issues of law and morality. He explains that a generalised obligation to obey the law cannot ground its moral superiority in singular cases, because 'what is

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<sup>41</sup> Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 152.

<sup>42</sup> Rawls, 'The Justification of Civil Disobedience in Jail' (n 37) 245.

<sup>43</sup> Finnis (n 36) 134–37.

<sup>44</sup> Finnis (n 36) 134.

achieved in pollution could be lost in other areas of the law such as the treatment of the elderly or mentally ill'.<sup>45</sup> Finnis illustrates a way in which the law can do good and uses this as justification for obliging obedience to the law. However, Raz does not dispute that, when the law can do good, it should be obeyed. Finnis's argument in favour of an obligation to obey does not logically refute Raz's scepticism of its existence.

Raz refutes the proposition that there is a moral danger in people deciding for themselves, such that a duty to obey is necessary. Raz agrees that 'human judgment fails; it is distorted by temptations, error and bias'.<sup>46</sup> This should, Raz agrees, colour the debate, but it should not necessarily incline in favour of an absolute duty to obey since '[p]oliticians, governments and lawmakers are not exempt from human error'.<sup>47</sup> By extension, human law is not exempt from problems and so its power to demand obedience should not be absolute. He adds that, 'too often in the past, the fallibility of human judgment has led to submission to authority from a misguided sense of duty where this was a morally reprehensible attitude'.<sup>48</sup> As long as there exists no conviction that the decision of the state will always be correct, or moral, an absolute duty would be not only misguided but, if its purpose were to enhance civil society, also redundant. Raz raises the only persuasive answer to this conundrum, and to the fallibility of human law — that the existence of a duty to obey is conditional.

This article supports Raz's conclusion that 'there are risks, moral and other, in uncritical acceptance of authority'.<sup>49</sup> Raz persuasively demonstrates that imposing an absolute duty prevents the citizen from being able to critically assess the law and its moral facets, make rational decisions based on circumstance, and utilise agency. He convincingly dismantles other scholars' arguments and presents a logical and

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<sup>45</sup> Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.

<sup>46</sup> Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.

<sup>47</sup> Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.

<sup>48</sup> Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.

<sup>49</sup> Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.

coherent case in opposition to a duty to obey the law. This article therefore argues that, if the proposition in favour of a prima facie duty to obey presupposes that obeying the law is the morally right thing to do, its existence should vary between circumstances and be dependent on the laws in question, the consequences of obedience, and the knowledge of the citizen.<sup>50</sup> In some situations the correct choice requires submission to authority, and in others it leads to denial of authority.<sup>51</sup> Enforcing an absolute duty to obey would oversimplify the complexity of the relationship between law and morality, and, as Raz notes, there is no conclusive evidence that it would aid society.

Raz concludes his article by arguing that there is a clear orthodoxy of modern legal and political theory, which claims that, if there is an obligation to obey the law, it exists because it is voluntarily undertaken.<sup>52</sup> Since any obligation that is voluntarily undertaken cannot be absolute, the duty to obey the law is conditional and does not morally bind the citizen. That is the view that Raz defended and that this article supports.

### 3 Obedience to the Law in Cases of Moral Conflict

Changes in societal perspectives in the twentieth century led to a rise in protests, activism, and conscientious objection. This encouraged a process of legal reform that changed the face of law in the United Kingdom and gave rise to a wave of theorists arguing in favour of the citizen's right to dissent against laws that they find morally objectionable. Wolff's *In Defence of Anarchism* set a precedent for this school of thought. Wolff proposed that a law being passed is 'never a reason which deserves to be given any particular weight in our deliberations'.<sup>53</sup> Equally, Simmons urges the citizen not to regard a legal requirement as the sole reason to act, arguing that the simple fact

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<sup>50</sup> Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.

<sup>51</sup> Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 151.

<sup>52</sup> Raz, 'The Obligation to Obey: Revision and Tradition' (n 18) 155.

<sup>53</sup> Wolff (n 20).

that conduct is required or forbidden by law is irrelevant to its moral status. He suggests that, even within relatively just states, citizens should consider the morality of an action on independent grounds.<sup>54</sup> Whilst the majority of theorists disagree with Wolff's claim that law *never* provides a valid reason for acting, his argument shapes the belief that the law is not *always* a good reason for acting and so by extension is non-binding on the citizen's moral choices.<sup>55</sup> Thus, theories of conscientious objection began to gain popularity in modern political theory.

These theories of conscientious objection borrow concepts from the Thomist tradition of natural law. This theory centres on a twofold contention: first, that there are certain inalienable principles of true morality and, second, that man-made laws that conflict with these principles are invalid law, '*lex iniusta non est lex*'.<sup>56</sup> This Latin motto, originating from St Augustine and used by St Thomas Aquinas, was popularised by Martin Luther King Jr during the civil rights movement and used as a way to articulate the justification of conscientious disobedience.<sup>57</sup> The argument against a duty to obey does not propagate the natural law theory that laws that conflict with certain fundamental principles of morality are not law at all. Rather, it establishes that the existence of something in law does not morally bind an individual to action. The concept of conscientious moral objection in this context is that, if the law is in fundamental conflict with an individual's moral beliefs, then this moral objection justifies disobedience.

In order to assess the position of conscientious whistle-blowers like Katharine Gun, it is first necessary to critically analyse the concept of conscientious disobedience and the legal and philosophical validity of the claim that moral objection is a justifiable reason to break the law.

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<sup>54</sup> Simmons (n 10) 8.

<sup>55</sup> Patrick Durning, 'Joseph Raz and The Instrumental Justification of a Duty to Obey the Law' (2003) 22 L & Phil 597.

<sup>56</sup> Hart (n 16) 156.

<sup>57</sup> Martin Luther King Jr, 'Letter from Birmingham Jail' in Aileen Kavanagh and John Oberdiek (eds), *Arguing about Law* (Routledge 2009).

This section examines civil disobedience and conscientious objection through a jurisprudential lens, arguing that the legal system of the relatively just state should provide some form of legal protection to those who conscientiously disobey law.

### 3.1 Examining a Moral Duty to Disobey

The question of the obligation to obey laws that one morally opposes extends beyond the issue of whether there is a prima facie moral obligation to obey the law and also addresses the moral justification for disobedience. Smith asserts that “[a] person (S) has a prima facie obligation to do an act (X) if there is a moral reason for S to do X”.<sup>58</sup> The fact that the act is law could be such a moral reason. Smith continues that, ‘unless [they have] a moral reason not to do so at least as strong as [their] reason to do so, failure to do X is wrong’.<sup>59</sup> This argument posits that, even if a law does provide a moral obligation to act, failure to obey this obligation is only wrong insofar as one lacks sufficient moral justification for disobedience. Raising the concept of proportionality, he suggests that disobedience to law is morally acceptable insofar as the moral consideration is sufficient to render disobedience to law a proportionate act.

Simmons argues that, if society does not accept obligation as a justification for behaviour that violates our fundamental morality, then we cannot justifiably impose an obligation to obey the law regardless of countervailing moral considerations, as to do so would be contradictory. Simmons notes that we are ‘unmoved by the Nazi Officer's pleas, even if we acknowledge that he did have a form of obligation to obey his superior's commands to kill innocent people’.<sup>60</sup> The reason for this lack of sympathy is a collective recognition of the

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<sup>58</sup> MBE Smith, ‘Is There a Prima Facie Obligation to Obey the Law?’ (1973) 82(5) Yale LJ 950, 951.

<sup>59</sup> *ibid.*

<sup>60</sup> Simmons (n 10) 10.



fact that duties and obligations do not give conclusive reasons for acting — there is a moral facet to the decision to carry out these orders.<sup>61</sup> If the duty to obey the law is a moral obligation, as its proponents would suggest, then it appears illogical that an individual would recognise the law's moral claim over their actions without also acknowledging that this claim is overridden by many more substantial moral considerations.<sup>62</sup> This argument convincingly illustrates that some factors take moral precedence above legal duty. This is the purpose of conscientious moral objection and represents the grounds on which a legal recognition of moral considerations would rest.

In the context of political obligations, this demonstrates that to identify that an individual has an obligation is not to say that they ought to, or are in any moral sense bound to, discharge that obligation.<sup>63</sup> To hold an absolute duty on the grounds of moral obligation would be contradictory if the same obligation bound individuals to deny countervailing moral considerations. It follows from this conclusion that, if it is not the case that the legality of an action exempts it from all moral scrutiny, then the illegality of an action does not render it the morally wrong choice.<sup>64</sup>

It is important to distinguish conscientious moral objection from civil disobedience. For the purposes of this analysis, Raz's definitions will be employed. Civil disobedience refers to a 'politically motivated breach of law designed to contribute directly to a change of law or public policy, or to express one's protest against a law or public policy'.<sup>65</sup> Conscientious moral objection is a personal breach of the law because the agent is morally prohibited to obey it.<sup>66</sup> The two often overlap — for instance, an individual can protest against a law in the hope of policy reform because they are personally morally prohibited from obeying

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<sup>61</sup> Simmons (n 10) 10.

<sup>62</sup> James K Mish'alani, 'Duty, Obligation and Ought' (1969) 30(2) *Analysis* 33.

<sup>63</sup> Simmons (n 10) 11.

<sup>64</sup> JW Harris, *Legal Philosophies* (first published 1997, OUP 2004) 226.

<sup>65</sup> Joseph Raz, *The Authority of Law* (first published 1979, OUP 2009) 263.

<sup>66</sup> *ibid.*

that law. Both forms of conscientious objection share the characteristic belief that obeying the law would be a greater moral wrong than disobeying.

### 3.2 Is There a Right to Dissent?

Raz suggests that a right to conscientious disobedience would include within it the right to do something that the law dictates should not be done, because that individual sincerely holds opposing moral views. Take the example of military service — even if the military service can be morally justified, an individual would be allowed to opt out because they ardently believe it is wrong for them. The argument proposes that, ‘even if performing the action would, disregarding the agent's attitude towards it, be morally obligatory, it may not be so once their attitude is accounted for’.<sup>67</sup> This suggests that, in a liberal society, the moral beliefs of the agent add a moral facet to obliging them to act, even if the act itself is otherwise morally positive or morally neutral. The agent's personal moral beliefs may tip the balance. The legal protection of those who disobey the law for moral reasons, if it were to exist, would rest on respect for the individual's moral beliefs and the seriousness of these beliefs in situations of moral complexity.

However, the legal acknowledgement of the gravity of the individual's moral beliefs in situations of moral complexity does not automatically equate to the proposition of an absolute right to dissent. In his discussion of civil disobedience, Raz distinguishes between the assertion that civil disobedience is an individual's absolute right and the claim that, under certain conditions, civil disobedience is a morally right choice.<sup>68</sup> A characteristic of rights is that a right contains within it the protection of the freedom to do what one ought not to do. For example, the right to freedom of expression (subject to a small number

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<sup>67</sup> *ibid* 278.

<sup>68</sup> *ibid* 267.

of restrictions) extends to the right to say what one ought not to say.<sup>69</sup> Raz identifies that this cannot logically extend to conscientious disobedience, as to have a right to conscientiously disobey when one ought not to do so would be to contradict the very definition of conscientious disobedience, which is dependent on the moral conditions of the disobedience. To say that there is a *right* to conscientiously disobey law is to suggest that the legitimacy of conscientious disobedience is not dependent on the rightness of one's cause.<sup>70</sup>

This position does not mean that civil disobedience and conscientious moral objection are never justified, but that it would be inaccurate to assume that disobedience on the grounds of conscience is an absolute right. Instead, it proposes that, because the liberal state has the capacity to contain bad and iniquitous laws, sometimes it will be morally right to engage in a form of conscientious disobedience to protest against them. Conscientious objection and civil disobedience are, by their characteristics, exceptional: they go beyond the bounds of the law and so extend beyond the protected right to political action.<sup>71</sup> Hence, this article proposes that conscientious disobedience is a form of political action to which no one has an absolute moral right but to which individuals may have sufficient moral justification. It therefore argues in favour of a legal defence of necessity that acknowledges at trial the moral seriousness of the conscientious objector's decision to disobey. It does not equate this to an absolute philosophical right to disobey, as this would be incompatible with the nature and purpose of civil disobedience and conscientious objection.

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<sup>69</sup> HLA Hart, 'Bentham and Legal Rights' in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (OUP 1973).

<sup>70</sup> Raz, *The Authority of Law* (n 65) 268.

<sup>71</sup> Raz, *The Authority of Law* (n 65) 275.

### 3.3 A Defence of Civil Disobedience

Even if we accept that there is no absolute right to civil disobedience, it remains a concept worthy of recognition. In *Taking Rights Seriously*, Dworkin emphasises the importance of distinguishing between civil disobedience and lawlessness.<sup>72</sup> He identifies the common argument in favour of treating the conscientious moral objector in the same way as the *prima facie* offender. This argument is based on the apparent truism that the law must be enforced because it is the law and so, even if disobedience to the law is morally justified, it cannot be legally justified.<sup>73</sup> He identifies Erwin Griswold's statement, during a speech given in his capacity as solicitor-general, that:

‘It is the essence of law that it is equally applied to all, that it binds all alike, irrespective of personal motive. For this reason, one who contemplates civil disobedience should not be surprised if a criminal conviction ensues.’<sup>74</sup>

Griswold adds that ‘organised society cannot endure on any other basis’.<sup>75</sup> Dworkin analyses the two main arguments raised by this position: first, that ‘society cannot endure’ if it tolerates all disobedience. He notes that, whilst this may be the case, this argument has little weight in opposition to civil disobedience in particular, because there is no evidence to suggest that society will collapse if it tolerates *some* disobedience. Dworkin states that there are many ‘good reasons’ that a prosecutor considers when deciding not to prosecute an individual for an offence. Such reasons suggest that society does, to an extent, tolerate some disobedience. There are *prima facie* good reasons for not prosecuting those who disobey laws based on questions of conscience. There is an argument that society would suffer if it prosecuted moral, loyal, and normally law-abiding citizens who

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<sup>72</sup> Ronald Dworkin, *Taking Rights Seriously* (first published 1977, Duckworth 1978) 206.

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

conscientiously object, as this would alienate those individuals and reduce the collective belief in the justice of that state.<sup>76</sup>

Second, Dworkin addresses the equal treatment argument Griswold raises, that the law applies equally to all, meaning it is unfair to make exception for those who morally disagree. Dworkin identifies the critical flaw in this argument: it contains the hidden assumption that dissenters are knowingly breaking a valid law and that they assert an unfair privilege to do so. Dworkin convincingly argues that proponents of this view fail to see the complexity of the connection between legal and moral issues. This reasoning distorts the crucial fact that the substantive validity of the law may be doubtful or debated, even if it is enacted in a procedurally legitimate manner. Government officials may believe that the law is substantively valid, and dissenters may believe it is invalid, and both may have legitimate legal and philosophical justifications informing their positions.<sup>77</sup> It is reductionist to suggest that all legal issues have a singular valid moral standpoint. Since the question of the law's substantive validity in these circumstances is debatable, the fairness argument is irrelevant, given that it rests upon the certainty of valid law.

Dworkin illustrates the positive benefits that society gains from individuals following their own moral judgement. He proposes that an individual operating upon their own legitimate understanding of the law or morality provides a means of testing relevant hypotheses in uncertain areas of legal and moral discourse. He effectively argues that in some areas it is unreasonable to impose a burden of obedience on those who dissent. This includes cases where the law is uncertain, to the extent where lawyers reasonably disagree about what courts ought to decide, or where morality is uncertain, to the extent that citizens can reasonably disagree about what constitutes the moral course of action. Dworkin's article highlights the societal disadvantages of refusing to accept some forms of conscientious disobedience. It convincingly demonstrates that, if society were to force its citizens to accept the status quo when the

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<sup>76</sup> *ibid* 207.

<sup>77</sup> *ibid* 207.

validity or morality of the law is in question, then society would lose its chief vehicle for social progress and ‘over time the law we obeyed would become less fair and just, and the liberty of our citizens would be diminished’.<sup>78</sup> This highlights one of the critical arguments in favour of civil disobedience: that it is a necessary tool for social progress. This argument is exemplified through Katharine Gun's case in the following section.

Despite supporting a general obligation to obey the law of just and efficient systems, Rawls argues that such a duty does not prevent the individual from engaging in civil disobedience. This account is critical because it highlights that the belief in a general obligation to obey is not *prima facie* incompatible with theories of conscientious disobedience. Rawls argues that, ‘[i]f in the individual's judgment the actions of the law, state or majority exceed certain bounds of injustice, then the citizen may consider civil disobedience’.<sup>79</sup> Rawls convincingly dismantles the counterargument that civil disobedience is incompatible with respect for law, proposing that, when civil disobedience is a conscientious, public, and non-violent act based upon a sincere moral conviction, it in fact manifests a principled respect for legal procedures entirely compatible with the values of the liberal state.<sup>80</sup> Similarly, in his ‘Letter from a Birmingham Jail’, Martin Luther King Jr stated that ‘an individual who breaks a law that conscience tells him is unjust [...] in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for the law’.<sup>81</sup> These viewpoints diminish the argument that civil disobedience and respect for the establishment are *ipso facto* incompatible. These arguments persuasively demonstrate that insofar as it satisfies the condition of nonviolence, and where other options of legal obedience or political appeal have been exhausted or are unavailable, then civil disobedience could be justified, even in a relatively just state.

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<sup>78</sup> *ibid* 212.

<sup>79</sup> *ibid* 247.

<sup>80</sup> *ibid* 248.

<sup>81</sup> Martin Luther King Jr, ‘Letter from Birmingham Jail’ (n 57) 258.

The above analysis has outlined the conditions under which legitimate and compelling moral objection to the law may arise. It demonstrates the circumstances in which civil disobedience is not only justified but of genuine and substantial benefit to civil society. It therefore concludes that to prosecute conscientious dissenters to the same extent as the *prima facie* offender would not be a true reflection of culpability.

## **4 Conscientious Objection in the Case of Katharine Gun**

The final section of this article considers the extent to which the legal system of a liberal state should acknowledge the individual's right to break the law for moral reasons. First, it explores the case of Katharine Gun, the circumstances of her conscientious objection, and its contested legitimacy. Gun's case reopened the conversation regarding the citizen's ability to object to actions of the state, even in circumstances where the means of that objection are illegal. Within this, it examines the concept of a 'defence of necessity', which Gun's legal team intended to argue. Second, this section analyses the current legal position in the UK of those who break the law for moral reasons. Using Gun's case, it demonstrates that the law does not provide sufficient protection to individuals in these circumstances and argues in favour of acknowledging the defence of necessity.

### **4.1 The Case of Katharine Gun**

The case of Katharine Gun represents an instance of conscientious disobedience at the interface of civil disobedience and conscientious moral objection. Gun did not disobey the Official Secrets Act because it was *prima facie* morally bad law, nor did she necessarily intend to make legal change. However, her decision to leak the memo to the public, on the grounds that she could not in good conscience remain silent, contravened the Official Secrets Act to which she was bound and

had the potential to derail the legitimacy of the Iraq invasion.<sup>82</sup> Simeck argues that, '[w]histle-blowers are neither "disloyal" nor "heroes" but rather individuals who find themselves at the crux of a moral impasse and are forced to make an ethical decision they can consciously stand by'.<sup>83</sup> Similarly, Delmas argues that, '[g]overnment whistleblowing should be viewed along the lines of civil disobedience as a collective cognition and legitimacy enhancing device'.<sup>84</sup> Gun's actions in these circumstances invoked the collective conscience to question, and by extension enhance, the accountability of government. Not only did Gun's actions give rise to questions regarding the validity of the law that prevented her from whistle-blowing; they also opened a public debate on the legality of the actions of government in the Iraq invasion. Her decision led to a crucial re-examination of the relationship between the citizen and the state and the potential for arbitrary misuse of government power.<sup>85</sup> A growing section of the public supported her decision. Indeed, the information released regarding the potential illegitimacy of the Iraq invasion caused international uproar.<sup>86</sup> The consequences of Gun's decision transcended the legal ramifications facing Gun herself and fuelled the social, political, and legal discourse surrounding the legality of the Iraq War.<sup>87</sup> The disclosure informed the public about an act of government that threatened principles of justice and democracy and led to a rise in public distrust of the government.<sup>88</sup>

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<sup>82</sup> Norman Solomon, 'To Stop War, Do What Katharine Gun Did' (*Consortium News*, 8 March 2018) <<https://consortiumnews.com/2018/03/08/to-stop-war-do-what-katharine-gun-did/>> accessed 8 May 2021.

<sup>83</sup> Gabrielle Simeck, 'Five Things Not to Do If You Want to Be a Successful National Security Whistle-Blower' (*Government Accountability Project*, 8 August 2019) <<https://whistleblower.org/blog/five-things-not-to-do-if-you-want-to-be-a-successful-national-security-whistleblower/>> accessed 8 May 2021.

<sup>84</sup> Candice Delmas, 'The Ethics of Government Whistleblowing' (2015) 41(1) *Soc Theory & Prac* 77.

<sup>85</sup> Marcia Mitchell and Thomas Mitchell, *The Spy Who Tried to Stop a War: Katharine Gun and the Secret Plot to Sanction the Iraq Invasion* (Polipoint Press 2008).

<sup>86</sup> Michael Segalov, 'This British Spy Exposed a Devious US Plot to Justify the Iraq War' (*Vice*, 15 October 2019) <[https://www.vice.com/en\\_uk/article/ne8997/official-secrets-true-story-katharine-gun-iraq](https://www.vice.com/en_uk/article/ne8997/official-secrets-true-story-katharine-gun-iraq)> accessed 8 May 2021.

<sup>87</sup> Solomon (n 82).

<sup>88</sup> Adams (n 4).



The social impact of Gun's act of civil disobedience cannot be dismissed as marginal, nor can the moral force that compelled her to act in contravention of the Official Secrets Act. Her case exemplifies Dworkin's theory that civil disobedience can engender social progress and highlights the role of the conscientious objector in enhancing justice within the liberal state. There is, therefore, justification for the proposition that her decision to leak the memo, detailing the decision to place illegal pressure on the UNSC to allow the invasion of Iraq, represented a legitimate, appropriate, and important example of civil disobedience.

The role of a 'political obligation' is defined by Simmons as a special kind of obligation that binds the citizen to the state with specific pressure to perform, distinguishing it in political philosophy from other forms of moral judgement.<sup>89</sup> The special role of such an obligation is most distinct in 'moral dilemmas'.<sup>90</sup> Gun's case is an example where such conflicting obligations arose. Gun had a legal obligation not to disclose the memo on the grounds that it was an official secret and a matter of national security, while disclosure also violated her responsibilities as a GCHQ translator. However, Gun's belief in the seriousness of the humanitarian issue of a potentially illegal war, coupled with the illegality of placing pressure on the UNSC, provided strong moral compulsion not to discharge the obligation to remain silent. Gun believed that the government was acting illegally and that this illegal act could lead to an illegal war, which in consequence could lead to the unjustified deaths of thousands. This was a belief based on legitimate grounds, and the moral weight of this consideration cannot be overlooked.<sup>91</sup> Leaving aside the question of whether she acted rightly or wrongly, there cannot be any doubt that Gun was faced with a moral dilemma. Raz's account of conscientious objection and the capacity to remove oneself from morally contentious dilemmas, discussed below at Section 4.3, therefore does not sufficiently account

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<sup>89</sup> Simmons (n 10) 7; CH Whiteley, 'On Duties' (1952) 53 Proceedings of the Aristotelian Society 95.

<sup>90</sup> EJ Lemmon, 'Moral Dilemmas' (1962) 71(2) Phil Rev 139.

<sup>91</sup> Adams (n 4).

for the complexity of situations such as Gun's. Considering the nature of the moral dilemma, a conclusion that Gun should not have been morally bound to the Official Secrets Act is persuasive. Such a conclusion is justified by reference to theory regarding the legitimacy of civil disobedience and the lack of a compelling argument in favour of an absolute duty to obey in situations of profound moral conflict.

Had her case moved forward, Gun's legal team intended to argue a 'defence of necessity' justifying her decision to act in contravention of the Official Secrets Act. This defence is based on the argument that in situations of profound moral complexity where the agent is compelled to disobey for substantive moral reasons, it is unfair to hold them as culpable as the *prima facie* offender. The nature of this defence aligns with the above theory. Section 2 established that there is no binding moral duty that tied Gun to the Official Secrets Act and proposed that the agent should be able to assess the moral facets of their individual situation when deciding whether or not to obey. Section 3 clarified that there exists no guarantee that legal action is moral action purely on the basis of its legality. It is therefore submitted that the moral considerations outlined in the case of Katharine Gun represent sufficient moral justification as a defence for disobedience. Where moral dilemmas of similar complexity arise in future, such considerations should be acknowledged in a court's assessment of blameworthiness in the legal system of the liberal state. This is explored subsequently.

## **4.2 The Current Legal Status of Conscientious Objection**

Having directly addressed the core questions as to the existence of a moral duty to obey the law and the philosophy of conscientious objection, the article now discusses the current legal status of conscientious objectors in the UK. The UK offers some legislative protection for a right to conscientiously object. This is primarily limited

to areas of moral complexity and discourse within medical law.<sup>92</sup> For example, Section 4(1) of the Abortion Act 1967 protects the right to refuse participation in terminations of pregnancy, other than where it is necessary to save the life of, or prevent grave injury to, the pregnant woman. Similarly, Section 38 of the Human Fertilisation and Embryology Act 1990 prevents any duty being placed on an individual to participate in activity governed by the Act. The basis for these exemptions is a legal acknowledgement that participation in such procedures may violate some individuals' moral beliefs. The law in these instances deems the moral objection to be sufficiently substantive and the area to be sufficiently divisive to refrain from imposing a positive obligation to participate on the medical practitioner. However, there exists no protected 'right to conscientious objection' in British or international law. Article 9(1) of the European Convention on Human Rights, which guarantees the right to freedom of thought, conscience, and religion, does not explicitly refer to a right to conscientious objection.<sup>93</sup> This has been clarified in a number of cases under the Convention, such as *Gandyrath v Germany* and *G.Z v Austria*.<sup>94</sup> In both cases, the applicant appealed to a right to conscientiously object in order to be exempted from military service or substitute civilian service. However, the European Commission of Human Rights held that conscientious objectors did not have an absolute right to exemption from military service on the basis of Article 9 and that each contracting state could decide whether to grant such a right.<sup>95</sup> Article 9 is subject to 'the limitations prescribed necessary by law in a democratic society'.<sup>96</sup> This arrangement is brought into UK domestic law by Article 9 of the

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<sup>92</sup> Editorial, 'Conscientious Objection' (*Medical Defence Union*, 7 February 2020) <<https://www.themdu.com/guidance-and-advice/guides/conscientious-objection>> accessed 10 May 2020.

<sup>93</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 9.

<sup>94</sup> *Gandyrath v Germany* App no 2299/64 (Commission Decision, 12 December 1966); *G.Z v Austria* App no 5591/72 (Commission Decision, 2 April 1973).

<sup>95</sup> *ibid* *Gandyrath v Germany*.

<sup>96</sup> ECHR Art 9.

Human Rights Act 1998.<sup>97</sup> This jurisprudence clarifies that the prima facie right to freedom of conscience does not include the right to break the law on the grounds of conscience.

However, the court leaned in favour of the conscientious objector in the more recent European Court of Human Rights (ECtHR) judgment in the case of *Bayatyan v Armenia*.<sup>98</sup> It found that opposition to military service, where it is motivated by ‘a serious and insurmountable conflict between the obligation to serve and a person's conscience or his deeply and genuinely held religious or other beliefs’ constitutes a ‘belief of sufficient cogency, seriousness, cohesion and importance’ to attract the guarantees of Article 9.<sup>99</sup> The ECtHR concluded that the question of whether the conscientious objection falls within the ambit of the provision is a matter that requires assessment of the particular case.<sup>100</sup> Whilst the court maintains that no ‘right to conscientious objection’ is protected, it has leaned in favour of the conscientious objector in cases where the circumstances of the objection and the belief held are of ‘sufficient cogency, seriousness, cohesion and importance’.<sup>101</sup>

The judgment in the *Bayatyan* case demonstrates a positive movement within the ECtHR jurisprudence towards ruling in favour of the conscientious objector under some circumstances. The court acknowledged the seriousness of the moral beliefs held by the conscientious objector and argued that they cannot be dismissed as marginal when obliging the individual to act.<sup>102</sup> The current law on conscientious objection remains uncertain. However, this judgment provides some scope to expand the legal protections afforded to the

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<sup>97</sup> Human Rights Act 1998, sch 1, art 9.

<sup>98</sup> *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011).

<sup>99</sup> Editorial, ‘Factsheet — Conscientious Objection’ (*European Court of Human Rights*, March 2020)

<[https://www.echr.coe.int/Documents/FS\\_Conscientious\\_objection\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Conscientious_objection_ENG.pdf)>  
accessed 8 May 2021.

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.*

<sup>102</sup> *Bayatyan v Armenia* (n 98).

conscientious objector and consequently leaves the law at a crucial turning point for the future of conscientious objection.

This section has identified that there exists no nationally or internationally protected right to conscientiously object, and little defence of such an absolute right in either law or literature.<sup>103</sup> However, there remains considerable force to the argument that conscientious moral objection and civil disobedience is justified in certain circumstances. In the case of Katharine Gun, the particular moral characteristics of the situation, the complexity of her position, and the public outcry it sparked support the strong argument that her actions were justified. In situations of moral dilemma such as these, even if one does not believe that inaction is the morally wrong choice, one cannot morally condemn the choice to act; this is a characteristic of a moral dilemma.<sup>104</sup> Given that there is an argument in favour of the position that breaking some law is morally justifiable, then there remains an argument in favour of a legal defence of this nature.

### 4.3 Conscientious Objection and the Defence of Necessity

If it were to be implemented, the legal recognition of conscientious moral objection rests on acknowledgement of the gravity of the individual's moral considerations in situations of moral complexity. The practical purpose of such a recognition would be for the court to acknowledge the impact of these considerations on the culpability of the conscientious objector. Such a legal recognition would fall under the scope of a 'defence of necessity' and would remove the culpability of the conscientious objector against charges such as Gun's. Although the courts hold the general position that there is no criminal defence of necessity, as exemplified in *R v Dudley and Stephens*, necessity has been acknowledged in piecemeal ways, in judgments and sentences.<sup>105</sup> Whilst it is unclear what specifics Gun's legal team intended to argue, a

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<sup>103</sup> Raz, *The Authority of Law* (n 65) 281.

<sup>104</sup> Lemmon (n 90).

<sup>105</sup> *R v Dudley and Stephens* [1884] EWHC 2 (QB), (1884) 14 QBD 273.

defence of moral necessity in cases of non-violent conscientious disobedience would draw upon the court's piecemeal acknowledgement of the way in which moral necessity alters the culpability of the offender. This would consequently demonstrate that it is unfair to treat the conscientious objector as equally culpable as the *prima facie* offender, given the substantive moral considerations present in their decision to act unlawfully.

Raz raises the following argument against the legal recognition of conscientious objection. He argues that the circumstances that lead to conflict between the law and an individual's moral duty are normally subject to that individual's control. Therefore, if that individual can prevent them, rather than disobey the law, then society is entitled to require the individual to shoulder the burden of their conviction, rather than require society itself to do so.<sup>106</sup> Yet this article proposes that this argument is oversimplistic and fails to acknowledge the nature of certain instances of conscientious objection, such as the complex moral dilemma in Katharine Gun's case. Conscientious moral objection, as Raz defines it, is not merely the case of the agent breaking the law for moral reasons but also extends to the proposition that the agent was morally compelled to disobey because the law itself was wrong.<sup>107</sup> If the law or the act of obeying the law in that context is wrong, and personal morality compels them to protest against such wrongness, it is not a logical moral solution for those individuals to remove themselves from the circumstances of their objection. Moreover, in many cases of conscientious objection, it may be the act of remaining silent or refusing to act in opposition in the face of wrongdoing that the individual finds morally impermissible. Therefore, whilst this article does not support the conclusion that conscientious objection is an absolute right, because such a conclusion is incompatible with the nature of rights, as outlined in Section 3.2, it disagrees with Raz that there are not significant and compelling grounds in favour of legal protection of conscientious objectors — in the form of a defence of necessity.

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<sup>106</sup> Raz, *The Authority of Law* (n 65) 282.

<sup>107</sup> Raz, *The Authority of Law* (n 65) 282.

## **5 Conclusion**

The principal aim of this article was to re-examine the question of the duty to obey the law in cases of moral conflict, through the contemporary lens of whistle-blowing. This article presents the view that, while there exists no absolute duty to obey the law, there is usually good reason to comply with the law. However, in the absence of good reason to comply and in the presence of a morally compelling reason for non-compliance, disobedience to law can be morally justified. This article proposes that the law should acknowledge that some moral considerations are sufficiently substantial to justify breaking the law. It does not defend the concept of a moral 'right to disobey', nor believe this to be philosophically justifiable or practically enforceable. It does, however, take the view that, in cases such as *Gun's*, a 'defence of necessity' should be considered a valid legal defence. Moral considerations should be taken into account by the courts when assessing the culpability of the defendant and the wrongness of their conduct. The evidence and philosophy examined demonstrate that a blanket refusal of the law to consider moral objection or the human conscience as reasons for acting in cases of conscientious disobedience would be an unfair assessment of the culpability of the conscientious objector. Such a refusal would grossly oversimplify and undermine the complex link between legal and moral obligations.