

Soldiers against Orders : A Radical Form of Civil Disobedience ?

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When you think of the long and gloomy history of man, you will find far more, and far more hideous, crimes have been committed in the name of obedience than have ever been committed in the name of rebellion. - - - Charles P. Snow 1961

Soldiers destroy houses, hurt and kill people in a battlefield. At the same time, they also will be attacked and might be killed. Soldiers, who are both assailant and victims, develop original activity based on experience in a battlefield and in the armed forces. There are soldiers choosing absence without leave (AWOL) or desertion that does not come back to their units. There are soldiers who are applying for conscientious objector status and who refuse certain orders (selective objection).

The principle that is important in the armed forces is “an order and obedience”, and a soldier is considered to obey orders of a senior officer. However, soldiers are also human beings and do not always obey an order like a machine. Sometimes they are willing to obey orders, sometimes against their will and sometimes they way disobey. There are various kinds of resistance done by soldiers. They sometimes choose sabotage, or engage in an anti-war movement on holidays. There are soldiers who go to AWOL and become deserters, and there is even a case of “fragging”, killing a senior officer in a battlefield.

After World War II, it becomes obvious among international laws that the right to conscientious objection to military service should be guaranteed. Not only the state should guarantee the right for its citizens not to take arms and join army, but also for active soldiers, who came to feel doubt for use of armed force, the state should offer a choice to do only noncombatant duty or a choice of discharge from military.

However, it is controversial whether a deserter can also be regarded as conscientious objector and whether a selective refusal to a military order should be guaranteed for soldiers. Selective military service refusal is connected to the question of right and duty not to obey illegal or inhumane orders. In theory, according to international laws, if a soldier commits war crimes

by obeying orders, he/she will be punished. Each soldier must judge whether an order is legal or illegal by him/herself and decide to obey or disobey.

By this report, I want to analyze military service refusal by a soldier and AWOL from the idea of civil disobedience.

1. Civil disobedience

Each person should respect orders in a society to which he/she belongs in order to keep the system work. However, how should a person do when a law requires duties which are against his/her sense of justice? With conviction of legitimacy of own act, when he/she breaches the law, it is civil disobedience, while being aware that it is an illegal act. It is a public act in violation of specific law and policy, which can never be accepted by one's conscience. In a democratic system, majority makes political decision but it does not mean that decisions are always right. You cannot obey the law, which you think unjust. Civil disobedience is an act to protest against existing "injustice", and a kind of political participation.

Civil disobedience emerges at the limit of law. There are following three points, which make civil disobedience different from simple illegal act.

1. 1. Feature of Civil Disobedience

Breaking a law is an inevitable part of civil disobedience. People who act civil disobedience respect legal order and show their loyalty to laws. They do not aim at a revolution and an anarchistic riot. They respect the legal system as a whole. They recognize what they do will be punished under the current law system, and accept penalty. They cannot obey the law even though they will be punished. Their aim is to make clear unjust character of the certain law by breaking it openly.

An act of civil disobedience must have public character. Because it is an act of protest for the sake of public interest, not for the sake of personal profit. It is necessary for an act of civil disobedience to be performed openly, in order to inform public that serious unjust is performed and to gain their support. It is sure that deep personal faith is a necessary condition of an act of disobedience, but it is not a sufficient condition, because it is found in the most wicked action and aim. It is important to show people that the action is right for the whole society.

An act of civil disobedience must be nonviolent. Nonviolence is the most important character of this kind of act, in order to gain public support (Terashima, 1992, 15.).

1. 2. Justification grounds of Civil Disobedience

An act of civil disobedience violates laws and can be devastating to the legal order. How can an act of civil disobedience be justified?

Every law must be applied to everybody equally. This is one of the fundamental principles of constitutionalism. What will the grounds to permit a person to refuse to work in military? War is one of the serious state policies, which affects national policy. It may lower the morale in the society and it can possibly jeopardize national existence. Ernst Wolfgang Bockenfelde, one of the leading German constitutionalists says, guarantee of right to conscientious objection verifies legitimacy of a state. In other words, a state can ask its people to fight for itself, only when it guarantees right to conscientious objection. If you were asked to fight for a state, you would question why you must run a risk of your own life. You ask seriously, whether the state is worth for that sacrifice. A state, which really respects each individual, even at the time of war, is an answer for the question.

People have a right and duty to resist against tyranny and unjust use of political power. An act of civil disobedience exercises this right. When the original purpose of a state is supposed to secure people's natural rights, according to the social contract theory, people should exercise the right to resist the government, when it breaks the contract and does not guarantee personal rights. The natural right theory is used to show the illegality of the law and justified the act of disobedience. A Government which does not secure people and just asks for sacrifice lacks ethical legitimacy (Spitz, 1954, 393). It is rare that right of resistance is specified in a constitution, and usually procedure of this right is not legislated.

Under a democratic system, laws are legislated by majority in a parliament. But this way of decision-making is provisional and adequacy of the laws should be examined by discussion in the society constantly. Generosity for a different way of thinking is the premise that a democratic system functions. For the legitimacy of a democratic system, decision by majority must not interfere conscience of each person (Nishihara, 1995, 380). Judgment whether an individual law is constitutional or not should be reserved by a citizen. Citizens should examine a political system constantly.

2. International Recognition of the idea of Civil Disobedience

2. 1. Right to Conscientious Objection

Right to refuse military service because of one's conscience has been recognized after the world wars. Conscientious objection has been a special concern of the United Nations for many

years. The United Nations has adopted a progressive interpretation of conscientious objection, which led finally to its unequivocal recognition as a human right in 1989 by the Human Rights Commission and the Human Rights Committee in 1993. The Council of Europe has addressed the issue of conscientious objection in two resolutions in 1967 and 1977. The Council also stated in 1987 that the right to conscientious objection “shall be regarded as deriving logically from the fundamental rights of the individual [to freedom of conscience and religion]... guaranteed in Article 9 of the European Convention on Human Rights”. The European Parliament passed a resolution in 1983 noting “freedom of conscience implies the right to refuse to carry out armed military service and to withdraw from such service on ground of conscience”. The fact that people existed who refused military duty in spite of harsh persecution for a long period especially during two world wars brought this right approved widely. What those people have done is act of civil disobedience.

2. 2. Duty to refuse illegal/inhuman orders

In a modern army, a soldier should not think by him/herself and just obey without putting doubt into in an order of a senior officer. However, after experiencing an unprecedented scale of brutality, people began to think that the illegal act under international laws must be punished. International law faced the problem how to cope with the German soldiers who violated international laws during the World War I. After the World Wars, right to conscientious objection to military service was established. At the same time, each person has a duty not to follow an order, which violates international law.

Tokyo tribunal regulations that pursued Japanese war criminal made clear that the fact a person acted in a position in the state affairs or in accordance with orders does not exempt that person from responsibility. In the Nuernberg war crime court that judged Nazis Germany, both a plea of a national act and a senior officer order were denied, and it was assumed that a soldier had responsibility not to obey unlawful orders. The Nuernberg principles reaffirmed in General Assembly resolution in 1946, make the individual personally responsible for certain actions contrary to international law, whether or not he/she has taken part in the decision-making process. The Convention on the Prevention and Punishment of the Crime of Genocide in 1948 prohibits destructive act that are directed against a national, ethnic, racial or religious group by any person, and makes genocide a crime under international law. In this case, the individual is not only entitled, for reasons of conscience, to refuse to participate in genocide ; he/she is even obliged to abstain from such participation, since he/she is criminally liable under article IV of the Convention, whether he/she is a constitutionally responsible ruler, public official, or private

individual.

The idea to prosecute individual strictly that appeared at Nurnberg and Tokyo trial is inherited in international laws. The international law committee (ILC) of the United Nations assumed in 1951, that order of a senior officer did not immune from responsibility of a performer when ethical choice was possible. Ethical choice means whether it is possible to act against an order of a senior officer. According to ILC, an order that violates international law has no binding force (Matthei, 1980, 265).

International Criminal Court (ICC) installed in 2003 has jurisdiction about war crimes, genocide and a crime against humanity. ICC rule Article 33 stipulates on superior orders and prescription of law as follows. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless : (a) person was under a legal obligation to obey orders of the Government or the superior in question ; (b) person did not know that the order was unlawful ; and (c) order was not manifestly unlawful.

Each soldier has to judge illegality of an order of a senior officer. Personal conscience finally takes this responsibility. Even though you act as a national institution, you have your duty to act in accordance with your own conscience. This idea can be best seen in the concept of “Buerger in Uniform/Citizen in uniform” in the German federal army. In principle, a soldier should have rights and duties that are same as citizens and they are limited by need of their tasks. Each soldier should have a sense of responsibility as a free citizen. A soldier should act with his/her own responsibility, in spite of order of a senior officer. Unconditional obedience is not required from an individual soldier.

Nevertheless, soldiers are required obedience to an order. What the state guarantees is the right to conscientious objection, only when a person denies any kind of war or use of violence. There are no armed forces, which guarantee the right to selective objection. No State lets a soldier to judge illegality of each war or order.

3 . Actual Cases of Civil Disobedience

3 . 1 . Selective objection

There are people who are in active duty and at the same time, refuse to take part in a certain war or to follow a certain order, which they think as unlawful or injustice. This kind of refusal is called selective objection. Different from conscientious objection to all wars, a soldier who wants selective objection, judges illegality of each order. This kind of objection is not accepted

in any armed forces. However on the other hand, as I mentioned before, each individual has right and duty not to obey illegal or inhuman orders, according to international laws, Therefore, theoretically speaking, a soldier can be punished afterward, when he/she follows an illegal order.

You can see examples of selective objection in Israel. Both men and women are conscripted to Israel Defense Forces. Most of the Israeli people support Israel Defense Forces and many of male citizens serve for a month every year as reservist. Israel often exchanges the war with neighboring countries. Some people think that occupation by Israel Defense Forces makes Palestinian life desperate and that cause bomb attack on Israelis by Palestinians. So they declare that they would refuse any duties for occupation, while willing to serve for the duty of national defense.

The first refusal movement was against the occupation of the West bank and Gaza by Israel after Six-Day War in June 1967. In 1970, a group of high school students addressed a letter to the then prime minister and declared that they believe the occupation policy will not bring peace and therefore they will refuse military duty in the occupied area, though they are ready for military service. There was a letter, which resembled this in 1978 collected 100 signature of high school students. They declared that they wouldn't serve to defend the Jewish settlement in the occupied area. During the Lebanese War that began in June 1982, approximately 3 refused service in Lebanon every month and were taken to trial. By the war end 143 soldiers were prosecuted.

In that time, many civil groups proposed civil disobedience. A group, which we should pay attention to, is "Yesh Gvul" which supports conscientious objectors by the people concerned. Yesh Gvul means, "there is a limit". They want to say that there is a limit to the territory and also to their obedience. To support this, signatures of a reservist including 1,470 officers have gathered within one year. Yesh Gvul appeals to soldiers that each of them is responsible for their act, even if they just obey orders. This claim conforms to a decision by a court martial of the Israel Defense Forces. A military court convicted the soldiers guilty, who killed 50 people in an Arab village, because soldiers must not follow an order, when it is apparently illegal.

Another letter by high school students before enrollment came out in August 2001. 215 students signed it by September 2002. The letter condemned that the actual state of occupation breaches international laws and criticized that the occupation aggravates security. The letter created a sensation in Israeli society and caused an intense argument in Knesset of February 2002. Several hundred reservists joined Yesh Gvul.

Peretz Kidron, a founder of Yesh Gvul regards selective objection as a peace movement, which applies civil disobedience by Gandhi and M. L. King into army. He thinks each soldier

should decide which order he/she obeys and by doing so, an anti-war movement within the armed force is possible.

3.2. Desertion

Conscientious objection has been legalized and many armed forces have some provisions for soldiers to be exempted from combat duty or to be discharged as conscientious objector. However, this is not for everybody. It is not easy to be recognized as conscientious objector by the military. In order to fill application form and write your reason why you should be regarded as conscientious objector, you need to be highly educated. In a sense, this system is for elite. For non-elite, desertion is an alternative way, though it is illegal.

Since fall 2003, Pentagon records show at least 8,000 members of all-volunteer U.S. military have deserted. 4,387 Army soldiers, 3,454 Navy sailors and 82 Air Force personal have deserted. 1,455 Marines in desertion status last September. Majority of them remain in U.S. and some flee to Canada. Among them several deserters came to public and explain openly, why they deserted in order to persuade people of illegality of war in Iraq. They apply for refugee status in Canada with support of War Resisters Support Campaign, which is founded in 2004, to help Jeremy Hinzman who fled from U.S. Military and came to Canada in January 2004.

Jeffrey House, the lawyer who represents deserters from U.S. Military thinks that illegality of the war is the main issue to be considered (Condon, 2005). He himself came to Canada during the Vietnam War to escape from the draft. According to him, invasion to Iraq is illegal in an international law. It is highly provable to commit war crimes, like the cases in Ab Graib or Haditha, when soldiers have to do their duties in Iraq. It is a natural right for soldiers to refuse to be deployed in Iraq and forced to do such illegal act. If a person is prosecuted because he/she refuses to go to Iraq, in order not to fall into such devastating situation that can be seen as persecution by the state. U.S. deserters will face court martial and punished in the United States. Therefore they should be granted as refugee in Canada. The United Nations General Assembly also called upon Member States to grant asylum or safe transit to persons compelled to leave their country because of conscientious objection in 1978.

In March 2006 the Federal Court dismissed Hinzman's appeal. The illegality of the invasion was ruled "irrelevant" to their refugee claims. Justice Anne Mactavish said that "mere foot soldiers" they had no role in planning the invasion, and therefore had no risk of being prosecuted for the crime of aggression. But she certified a "serious question of general importance" so that they can appeal her ruling to the Federal Court of Appeal.

In the United States, more and more people support conscientious objectors who came to public and explain their decision not to participate in the war in Iraq. Some people think the war in Iraq is wrong. Others think those conscientious objectors showed personal courage to act for their conscience. On the other hand, deserters are often criticized that they break the contract with the military and blamed them as cowards or betrayers. But we should notice that there are many soldiers who just do not know about conscientious objection and how to apply for it. They lack information of the system and actual experience of conscientious objectors. For those people, desertion may be the only option, not to be deployed in Iraq. Desertion can be an act of civil disobedience. Conscientious objection has been generally done by elites. We should be careful that we enhance military value by praising only “strong men”, who can stand up and explain their conscience. It is interesting to see that not a few conscientious objectors emphasize that they are patriotic and proud of being a good soldier.

AWOL or desertion can be and should be regarded as a radical form of civil disobedience. This kind of disobedience is done in the forefront of carrying out state policies, namely in the army. Not a citizen, but a soldier, whose rights are thought to be limited in the military, does this kind of disobedience. And this could lead a dispute on selective objection, which is really controversial for the military and the state. Because the military is where “obedience to superiors” is one of the most important principles, and military person should obey what civilians decide.

Bibliography

- Condon, Gerry, Jeremy Hinzman leads way for US war resisters in Canada, <http://www.notinourname.net/troops/hinzman20-apr05.htm>, June 9 2005
- Edward C. Corrigan, Edward Kiernan, *Refusal to Perform Military Service as A Basis for Refugee Claims in Canada, Eight Immigration Law Reports* (3d). pp.272-286 Revised version of a paper presented at The Refugee Lawyers Association Seminar, Tronto, on March 19, 1999
- Detter, Ingrid, *The Law of War*, second edition, Cambridge University Press, 2000
- Hirano, Hitohiko, Shiminteki fufukujyu kenkyu shosetsu (1), *Hogaku ronso*, Vol.111, No.3.
- Matthei, Dieter, Befehlsverweigerung aus humanitaeren Gruenden, *RDPMDG*, 1980
- Nishihara, Hiroshi, Ryousin no jiyu no hoteki hoshu, *Ho no Riron 16*, Seibun-do, 1997
- Snow, Charles P., either-or, *The Progressive*, February 1961
- Spitz, David, Democracy and the Problem of Civil Disobedience, *American Political Science Review*, June, 1954
- Terashima, Toshiho, *Shiminteki fufukujyu*, Fuko-sha, 2004
- 2001 Kein Asyl fuer verfolgte Kriegsdienstverweiger, <http://www.kl-medien.de/ina/top.php>, June 29 2005

軍人による不服従

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二つの大戦を経験した世界は、一般の兵士や官吏が、幾多の残虐行為を命令に従って遂行していたことに衝撃をうけた。戦後、国際法上は、違法なあるいは非人道的な命令には従わない権利のみならず義務が、個々人にあるとされるようになった。軍隊では、命令服従関係が基本的な原理である。軍隊内という国家の政策が執行される最先端での不服従は、国内法上は違法とされている。本稿では、軍人による「急進的な」不服従について、市民的不服従の理念から位置づける。