

# Inbetwixt legal and illegal

## A philosophical approach to the rights of urban poor

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### Abstract

The predominantly European constitutional tradition of city planning is based on the assumption that urban development has to be controlled by legal means. But factually extralegal forces are gaining in importance not only where informal settlements and markets in mega cities are concerned. Because of operating in a diffuse space between legality and illegality, the basic rights of the poor are not protected under constitutional law. The dilemma to justify illegal activities in a constitutional state calls for a reflection on the implementation of ethical criteria. What kind of ethical principles are applicable to the informal production of urban space? Where are the boundaries? Deriving from the discourse on “civil disobedience” that also operates in an extralegal context this paper lays one track on one of the key problems of ethical containment of the worlds cities: the destruction of informal settlements and informal economies by law.

## 1 The torn down of informal housing and economy

The International Labour Organisation ILO (2003, p.19) reckons that around the turn of the millennium 50 to 70 percent of the people in less developed countries who were not engaged in agriculture were active in the informal sector. In terms of the worldwide production of housing space, informal settlements also rank at the top. UN-Habitat (2003) reports that in global terms the poor are the most significant producers of housing space. The informal sector often provides the only survival option for an impoverished urban population. The fact that the population of informal settlements do not enjoy legal, durable and protected status makes them highly vulnerable to potential expulsion and dispossession.

UN-Habitat mentions security of tenure as a fundamental to the progressive integration of the urban poor. Security of tenure is an essential step to the realization of housing rights. It guarantees legal protection against forced eviction and leads to improved living standards. The granting of secure tenure is, therefore, one of the most important catalysts in stabilizing communities, improving shelter conditions, reducing social exclusion, improving access to urban services, leveraging corporate and individual investment and improving the urban environment. Securing people's access to land and housing is one main condition to fulfil the Millenium Development Goal 7, Target 11 to improve, by 2020, the lives of at least 100 million slum dwellers. (UN-Habitat 2005, p 17)

The Center on Housing Rights and Eviction COHRE (2006, p 5ff) estimates, during the past 3 years 4,3 million of slum-dwellers had been evicted by force. Although international law has repeatedly declared forced evictions as a violation of human rights, governments continue to use forced evictions as a tool of development.

## 2 The paradox of the constitutional state

References to positive law and the illegality in informal settlements refers mainly to conformity with planning and constructing norms and the tenure of situations (Durand-Lasserve, p2) Can or must right be enforced even if and when there are justified grounds for defying the law? From an ethical point of view, the answer to the question is simple: the basic human rights are inviolable. However, seen from the standpoint of the philosophy of law we face a dilemma. Can the state tolerate illegal action when its own constitutional premises are based on the validity of the reigning legal order?

Since the Second World War a philosophical debate has been going on, centring on David Henry Thoreau's (1971) concept, coined in 1849, of civil disobedience as a non-violent but illegal form of political resistance. The question whether illegal action in a democratic and constitutional state is under certain circumstances warranted could prove prolific in terms of justifying the existence of the informal sector, either as a whole or parts thereof.

## 3 Civil disobedience in the constitutional state

Civil disobedience, defined by John Rawls as "a public, non-violent, conscientiously determined, but illegal act which is usually meant to cause a change in the laws or the policy of the government" (Rawls, 1972) re-entered the debate in 1983 through the work of the German philosopher Jürgen Habermas. The new political culture that developed in the late 70s in the context of the Peace, Environmental and Feminist Movements often relied on actions of civil disobedience in calling attention to occurrences of gross injustice. The highly politicised legal debate soon became strongly polarized. The advocates of legal positivism argued that civil disobedience was undermining the constitutional state that is based on the indefeasible principle of democratic legal order.

Habermas (1985, p.102) countered with an argument previously advocated by John Rawls and Ronald Dworkin, maintaining that a true hallmark of the democratic constitutional state lay in its potential to forbear from demanding unconditional obedience to the law. "Whatever one's position toward these moral theories, a democratic constitutional state can demand of its citizens not an unconditional, but rather only a qualified obedience to the law, because it does not ground its legitimacy in sheer legality."

Therefore it is possible to consider illegal action as justified, i.e. legitimate as long as it is based on the foundations that legitimatise the constitutional state, for example the protection of basic human rights. Still, Habermas (1985, p.106) continues, the constitutional state will not be able to accept civil disobedience as legal action, because the right to the illegal action of civil disobedience "must remain suspended between legitimacy a legality; only then does it signal the fact that the democratic constitutional state with its legitimating constitutional principles reaches beyond their positive-legal embodiment." On the strength of this argument Habermas solves this paradox by propagating the distinction between legality and legitimacy as one of the hallmarks of the democratic constitutional state. Anyone who breaks the law by using legitimate means and with a legitimate motive has to reckon with punishment. However, since the "deed" can be justified as being legitimate it should be sanctioned – in the sense of extenuating circumstances – by the most lenient as possible form of punishment.

Needless to say Habermas (1985, p.100) imposes a number of criteria on the "right" to civil disobedience. Apart from the prerequisite of non-violence, Habermas demands that, prior to an act of civil disobedience, all means of redress have to be exhausted and that the legal system can only be challenged as a means to an end, but not as a whole. Furthermore it demands moral justification, the foundation of which is lodged on its part in the field of basic human rights.

The brief discussion on civil disobedience has shown that, from the point of view of the constitutional state, the authoritarian enforcement of law is not mandatory, and that under certain circumstances a certain amount of leeway is left. Does this also apply to the informal sector? And if yes, which fields of the informal sector qualify as justified and acceptable and which do not?

## 4 Subsidiary disobedience

Unlike political groups fighting against a “grand injustice” with the use of illegal, non-violent and symbolic means, substantial parts of slum-dwelling populations that are forced to operate in the informal sector are themselves facing a “grand injustice”. Under these circumstances, disobedience becomes an imperative of subsistence and survival.

I should like call this kind of action subsidiary disobedience. Characteristic of this form of disobedience is that the sole motive for contravening the law lies in the necessity to meet the basic needs of either an individual or a community. It is distinguishable from, and stands against, more general justifications of the informal sector. Informal modes of settlement and economic enterprise are only then legitimate if they meet the following criteria. The same criteria form the justification of acts of civil disobedience.

- Non legal action is geared solely to the basic functions of existence (subsistence).
- All means of redress have to be exhausted, revealing that under the prevailing conditions the state cannot provide or safeguard elementary basic rights.
- Non legal action occurs without resort to violence, neither physical nor structural.
- The established legal order is not challenged as such.

Thus subsidiary disobedience is to be understood as all forms of illegal but non-violent action that do not challenge the established legal order and which serve to meet basic needs, which the state – for whatever reasons – is not able or willing to satisfy.

The informal sector, which is hallmarked mainly by economic criteria, does not make a clear distinction between justified and unjustified illegality. However, the concept of subsidiary disobedience as defined above in the listed criteria makes it possible to exclude those fields of action within the informal sector that are driven by mere criminal motivation and thus are non-legitimate.

## 5 Conclusion

I have attempted here to apply the criteria of civil disobedience as a legitimate form of political resistance to the issue of the justified existence of informal settlements. The criteria I elicited could be extended to include further fields of illegal, but legitimate action. One example that is being hotly discussed these days is the new American immigration law that increasingly criminalises subsidiary illegal action.

Let us return to the initial question whether, under the conditions of the constitutional state, the people inhabiting informal settlements are legally entitled to protection. From an ethical point and with reference to the recognition of basic human rights the question can be answered in the affirmative, but from the viewpoint of the philosophy of law the issue is definitely more complex. The recognition of a legitimate claim demands restraint on part of the enforcement of the law. From the debate on civil disobedience the legal protection of an illegal condition is not directly inferable. In contrast, enforced eviction is not absolutely justified by established law. If the criteria of subsidiary disobedience are fulfilled, informal settlements have to be accepted as legitimate.

A third level of the present discussion has practical political relevance. The concept of subsidiary disobedience provides the necessary framework within which active resistance against enforced eviction by using means of civil disobedience is justified. This means that help-organisations too have a legitimate claim to disobedience as a means of political action. The opportunity to broaden the basis of political pressure would at the same time strengthen the position of the poor, boost their right to accommodation and level their path to legal status.

## Literature review

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