

October 2008/CONOR GEARTY ON THE MORALITY OF DIRECT ACTION IN A DEMOCRACY

In the mid 1980s a group of anti-nuclear protestors whom I knew were being regularly charged and prosecuted for criminal damage: their 'Snowball' campaign involved the concerted cutting of the fences of US nuclear bases in East Anglia. Like most of the criminal law, to commit criminal damage you need a guilty mind (*mens rea*) and if you can show you do not have this – for whatever reason – you are entitled to be acquitted. The protestors argued they had a lawful excuse to do what they did because they honestly (albeit some would say unreasonably) believed that this small action was necessary to protect their homes and family from nuclear attack. The beauty of the defence was that it turned their dedication (some might say fanaticism) into a strength not a weakness, making credible a story that would be otherwise quite unbelievable.

The protestors rarely managed to make it work; the charges were usually for less damage than led to a jury trial, and on one occasion I remember a very stern stipendiary coming down from London, scattering the local magistrates and doing his grim work with cold correctness. But the defence has continued to turn up now and again, allowing the occasional jury or even magistrate to connect the law with their own sense of right and wrong. Five protestors were acquitted of damaging a US plane at Ireland's Shannon Airport in 2003 despite the fact of their obvious involvement in just such an assault, and last month six environmental protestors were found not guilty of causing £30,000 worth of damage to a power station whose 200-metre stack they had undeniably scaled and painted on, thereby causing the station to be temporarily shut down. This kind of defiance of the law has occurred in other fields as well, a famous example being that of Clive Ponting, a senior official whose passing of confidential information to an MP about the sinking of a ship during the Falkland war led to a seemingly impossible acquittal on charges brought under the Official Secrets Act.

In all these cases, the acquittals were bonuses for men and women who had already mentally taken a step into criminality for what to them were entirely ethical reasons. Thomas Aquinas appears to have accepted that it was in certain circumstances morally right to disobey an unjust law, and Martin Luther King's famous *Letter from Birmingham Jail* is emphatic that an unjust law (of the sort which he and his fellow Black Americans had to endure) was no law at all. Henry David Thoreau's *Resistance to Civil Government* in 1849 and Mahatma Gandhi's non-violent resistance to law (*Satyagrahi*) are reminders of quite how deeply-rooted and universal these ideas are. Other now honoured leaders, like Nelson Mandela and (even) George Washington, took their disregard of the law to the point where they were prepared to kill rather than to obey.

But while the Pontings and the environmental activists and their ilk may have history on their side, how relevant are the arguments of these inspirational forbears to the democratic conditions that subsist today? The whole point of our current form of government is that we have joined together as a community to enact the laws of our choice, with the rules that emerge from this legislative process being by definition just – not on account of any objective test of right and wrong that they happen to have passed but simply because of the way in which they have been made. On this account, the Washingtons, the Mandelas, the Kings and the Gandhis were like the Levellers, the Chartists and the Suffragettes, fighting to achieve a right to participate, whereas in stark contrast to these heroes today's ethical lawbreakers are little more than lazy democratic queue-jumpers, using strong-arm tactics to force their issue onto centre-stage, and pushing past decent law-abiding (and therefore quieter) campaigners in order to do so.

How valid is this critique of what used to be called civil disobedience and what increasingly these days is known as 'direct action'? The activists laugh at the very idea that they live in a free society where fair democratic decisions can be made: to such sceptics elections change nothing. Parliamentarians who have fought and won elections and who know that thousands of people have voted for them and who perceive themselves as daily involved in change naturally see things differently. To them – and particularly the particularly successful democrats among them who achieve places in government – the system is a fair one and there should be no alternative to democratic participation: the tree-huggers and eco-warriors should be pounding the streets like they are, arguing, persuading, cajoling, and (yes if necessary) compromising, not blaring from a metaphorical tannoy into an empty media space at a cost to others of money and grave inconvenience. This instinct to believe in a system under which its members have succeeded leads all governments, whether left or right, to be sceptical of and inclined to clamp down on public protest as an unnecessary distraction from what they see as proper democratic debate.

The tension between these two perspectives is an inevitable aspect of any properly functioning democratic system; indeed it is an entirely healthy one. Politicians may be right that their zone is the only one in which the issues of the day can be properly considered, debated and acted upon. But what constitutes the 'issue of the day'? Where does it emerge from? What sustains it, gives it the political traction to endure long enough to impact on law-makers? This is where the value of political protest, of civil disobedience and even of direct action becomes apparent – for the agenda will usually be set by those with money and power, manifested in their capacity to buy-up newspapers, to fund political parties, to hire lobbyists, to pay for access to ministers and so on. The march, the mass protest, the 'sit-in', the willingness to break the law through acts of civil disobedience are the various ways in which those without means can fight back, forcing their ideas into the public space, elbowing not the ordinary person but power and wealth out of the way.

Of course there is a balance that needs to be maintained here, but in a democracy with decent access to information the general public has a collective knack of separating the sensible wheat from the outlandish chaff: the environmentalists are saying something we should notice; the Fathers-4-Justice crowd are not as altruist as they say; the animal rights people have gone too far; and so on. Whether the law-breaker is a hero and martyr or common criminal depends on whether the general public share his or her view of the morality of the action: in a democracy the justice of even an extra-parliamentary action ultimately depends, and rightly depends, on the wisdom of the crowd.