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Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

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DISCUSSION RESPONSE

Whom to Obey? The incongruence of obedience to the state and its consequences for civil disobedience

BEN WAGNER — 1 October, 2014



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A reply to Theresa Züger

Theresa Züger argues compellingly for using political philosophy to understand civil disobedience in the context of international law. She identifies two key types of civil disobedience, transversal and epistemic. Transversal implies that civil disobedience has long gone beyond the nation state and increasingly focuses on multi-level governance

structures and both public and private actors while epistemic attempts to challenge existing power structures by divulging 'secret' information to global publics. Both of these phenomena are a sign of (globalised) times, suggesting that civil disobedience has both modernised as a concept and adapted to a globalised world. Notably all of the cases suggested by Theresa Züger are Internet-related, where clear and well-functioning legal regimes are particularly hard to find. However these cases also pose a particular challenge for civil disobedience: how do you obey and whom do you obey? And in contrast, how do you disobey in an emerging Internet regulatory regime when the legal norms are unclear?

How to obey? The incongruence of obedience on the Internet

Being an 'obedient citizen' on the Internet can be harder than you think. Your typically unencrypted Internet connection crosses multiple legal jurisdictions before it reaches its goal. Whether sending an email or visiting a website, you are almost constantly unwittingly traversing multiple legal domains. Basic human interaction can in this context very quickly lead to strong repressive responses without a clear line of what is and isn't illegal. Want to watch a video that has been discussed extensively on the news? If you do so in the UK then the Metropolitan police believe they can use this against you. Want to have a conversation with an old school friend who lives in China? Probably not a good idea to mention anything too politically sensitive in your emails or his Internet connection is likely to stop working for a while, all thanks to an automated censorship system. Then again, downloading copyrighted material online without permission is so incredibly common that it is

hard to consider it intentional civil disobedience in the classical sense. This is not to say that mass disregard for the law could not be considered civil disobedience, but rather that political intent, which is typically absent from many forms of illegal downloading. Then again, the largest file-sharing site in the world the Pirate Bay spawned an entire political movement known as the Pirate Party, so it would be unreasonable to say that file-sharing and illegally downloading copyrighted material are unpolitical acts per se, regardless whether the pursuit of copyright violations is in line with European human rights law.

Then there are a mess of End-user license agreements (EULA) that are barely intelligible to end-users. So much so, that entire websites like <https://tosdr.org/> have been setup to explain what these agreements actually mean. Of course, none of this advice on everyday contracts constantly signed by Internet users is binding, but infractions can be punished heavily depending on the jurisdiction. Here the most famous case is that of Aaron Schwartz, who was “charged [...] with two counts of wire fraud and 11 violations of the Computer Fraud and Abuse Act,[12] carrying a cumulative maximum penalty of \$1 million in fines, 35 years in prison”, And yet, while Facebook’s licensing agreement only permits over 13-year olds to join the platform, more the half of 12-year olds in the U.S. are currently on Facebook. So should all 5th Graders in the United States be put on trial or asked to pay contractual damages for breaching Facebook’s EULAs? Or should Facebook be put on trial for massively violating the Children’s Online Privacy Protection Act of 1998 (COPPA) and showing advertising to millions of under 13-year olds? In all of these contexts it is almost impossible to know how the state will respond before acting, as both actual state responses and potential jurisdiction deviate wildly.

The Moody Leviathan & Virtual public order

So how do you enforce the law fairly and equitably in an area in which infractions are constant and common? This is a challenge state agencies are well-versed from dealing with public order policing. When faced with constant 'violations' in many different areas, state actors are limited to making examples of a small set of individuals as a warning to others. This rather problematic concept is nevertheless relatively common in many aspects of public order policing and is – interestingly – applicable to both non-digitally mediated demonstrations and those on the Internet alike.

For citizens this understandably makes the decisions of the state seem unbalanced and often also highly politicised. There is no easy way out of this dilemma for the state, or in the words of Thomes Hobbes the Leviathan. If the Leviathan wishes to be seen to restore 'public order.' While this dilemma is influenced by public perception of civil disobedience and the media strategies employed, it still exists irrespective of both. The end result is a moody Leviathan who has little idea how to respond effectively at any given time and whose governing power is split across multiple private and public actors.

Protesting in a world with little law but lots of governance

However this provides considerable challenges for civic disobedience strategies. Citizens who wish to engage in forms of civil disobedience that involves breaking the law would still hope to know where the line of legality is. In a globalised digital public sphere demarcating that line is extraordinarily difficult and the responses of a 'moody Leviathan' are at best uncertain.

Moreover much of the regulation of digital protest takes place not through public and transparent legal processes which can be documented and accounted for, but within a quasi-public sphere in which decision are rarely documented and less still contestable. Thus citizens engaging in civil disobedience are faced with risking either:

1. A massive and completely disproportionate response as in a few select cases or
2. if not their action can be stymied by a completely unaccountable online platform with little interest in guaranteeing free speech or
3. transgressing a legal norm that in any event is not considered relevant because breaching it is so common.

Such problems are not uncommon in a globalised world. Indeed it is much harder to 'transgress' in a world where global governance provides constant examples of multi-level governance, unclear legal regimes and jurisdictions as well as associated legal grey areas where broad discretionary decisions at the norm.

Challenges for Protestors on the Internet & beyond

If it's unclear what it means to obey, how do you transgress? Many of these examples suggest that that actual transgression of legal norms on the Internet is more complex than it seems. A mess of law and politics strews past online law making across the world and makes it very difficult for individuals to ascertain what the response to transgression is likely to be. Admittedly this is a challenge for civil disobedience in many different contexts beyond digital mediation alone, but as civil disobedience moves online it is likely to be increasingly common.

Ben Wagner runs the Centre for Internet & Human Rights at European University Viadrina. He recently completed a PhD on the global regulation of freedom of expression online at European University Institute in Florence and his current research focuses on Internet disconnection, mass surveillance and the governance of algorithms.

Tags: *Civil Disobedience, Internet Law*



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