Can the law effectively regulate social media? Should it?

Just as the twentieth century came to be defined by the nuclear family hunkered down in front of a television set, the twenty-first century’s embodiment is the individual scrolling through an infinite succession of social media posts. From bringing the Arab Spring into full bloom to playing a more controversial role in the 2016 United States presidential elections, social media has come to dominate our lives and to shape the course of history. When any network of social interaction and information dissemination achieves such magnitudes as social media, with Facebook alone counting 2.2 billion active users, serious questions over its wide-reaching effects and strategies to manage them arise. As it stands, social media threatens individual wellbeing, democracy and national security. Nevertheless, neither self-regulation, national or international law alone are viable solutions.

Social media companies, whose services cause diagnosable disorders and who actively engineer user addiction, endanger individual wellbeing, obligating us to seek regulative legislation to protect private citizens. First and foremost, social media is a service provided by profit-oriented companies, whose revenues directly correlate with increased consumption. To this end, social media companies employ intermittent variable rewards to “maximize addictiveness” that jeopardize our human agency to opt out, as Tristan Harris, ex-Google designer, explains. The basic duty of any democratic government is to guarantee the pursuit of “life, liberty and happiness”, which is impossible when citizens are under the spell of a singular addiction. So harmful is internet addiction to individual wellbeing that the condition demonstrates an 86% comorbidity with other DSM-IV diagnoses. Unlike other businesses, like the heavily legislated tobacco industry, social media companies are free of any clear expectations defined by the “government and law”, which constitute the pillars of corporate social responsibility, giving them free reign to maintain unethical relations with consumers.

Current social media dynamics also jeopardize democracy by diminishing social cohesion and permitting foreign governments to influence elections, compelling us to pursue legislative remedies. A 2016 study published in the National Academy of Sciences concluded that “social media facilitates the aggregation of people around common interests, worldviews, and narratives” leading to the creation of echo chambers to the detriment of social cohesion. In its 2011 Forum for Democracy, the Council of Europe established “social cohesion to be essential for the fulfillment of the Organisation’s three core values: human rights, democracy and the rule of law”. Despite 61% of Millennials receiving their news from Facebook, not to mention other social media, the social networking service remains adamant that it is not a news source, while openly acknowledging that its algorithms reinforce user interests. Even more troubling than social media’s self-professed irresponsibility to the public is its absolute legal unaccountability for the content it publishes under Section 230 of the Communications Decency Act in the U.S. and similar statutes in other Western democracies. This legal unaccountability, born of legislative deficiencies, gave carte blanche to Russian agents to influence the 2016 U.S. presidential elections, including activities such as funding protestors and purchasing political advertisements on social media under the names of U.S. persons – an action expressly illegal under the Federal Election Campaign Act. Without legal regulatory remedies to its unaccountability towards society and exemption from basic law, social media poses a grave threat to the functioning of democracy.

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Social media, in its presently unregulated state, also threatens national security by spreading large volumes of terrorist propaganda, compelling us to explore regulation by the law. Islamic State’s (IS) adoption of social media is well documented. A 2015 report from the British House of Commons Defense Committee put IS’s social media traffic at 90,000 messages per day. And the results are astounding; Soufan Group estimates that, by 2015, 27,000-31,000 fighters from at least 86 nations had travelled to join Islamic State, pointing out that recruitment within the United States and other Western countries “has been mostly reliant on social media”, and that the 20-30% return rate of fighters represents a “significant challenge to security and law”. The perpetrator of the New York City lorry attack in 2017, Sayfullo Saipov, admitted that the 90 IS propaganda videos that he acquired largely through social media inspired his crime; exemplifying the influence of social media on terrorist attacks around the world.

In fact, according to a study by Gabriel Weimann from the University of Haifa, 90% of internet terrorism is organized via social media. As with aforementioned issues, existing social media dynamics represent a threat to national security primarily due to a lack of effective legislation which, as will be shown below, cannot come from any single source.

While self-regulation presents itself as the most enticing prospect for mitigating the individual, societal, and national harm caused by social media, companies cannot be relied upon to responsibly self-regulate without legislative pressure. The eternal pitfall of consumer relationships is that they are guided not by morality but by profit, and profit maximizing behavior often does harm, necessitating regulation. A Chicago Booth article argues that market forces are alive, citing research that shows user disengagement on Facebook correlating with dissatisfaction from misinformation, incentivizing Facebook to act. However, according to a Stanford study conducted on students, only 82% could identify fake news, shrinking Chicago Booth’s purported incentive to the point where it may be more profitable for social media to risk some user disengagement while increasing the volume of fake news. No accurate statistics on social media’s profits from fake news exist, but a BuzzFeed News analysis of the 2016 U.S. elections revealed that, on Facebook, fake news outperformed stories from 19 major news outlets, generating more engagement and therefore more revenue. Hence, social media has a strong business interest in promulgating fake news and pursuing other aforementioned harmful profit-oriented practices, calling into serious question the viability of self-regulation.

Though social media regulation is necessary, unilateral national legislation is ineffective as it strengthens authoritarian countries’ hold over their populations, leads to equivocal censorship and the passing of quickly outdated laws. Soon after Germany’s social media regulations had been drafted in late 2017, the Russian Duma introduced a near identical bill, ratified immediately upon proposal, which will compel social media sites to remove “unlawful” content within 24 hours once it enters into effect. A 2015 study by the Social Science Research Network analyzing the role of social media in the Arab Spring concluded that “social media helped spread democratic ideas across international borders”. In a world where the laws of many countries are authoritarian, heavily censoring media and criminalizing freedom of expression, unilateral social media legislation would stymie one of the last avenues for global democracy. Even in Germany, the country’s social media legislation, leaving no opportunity for consultation between government, business and society, has turned “private companies into overzealous censors to avoid steep fines, leaving users with no judicial oversight or right to appeal” according to
Wenzel Michalski of Human Rights Watch. Moreover, sidelining private entities is also erroneous because it not only ignores their regulative potential, but leaves legislators blind to constant changes and innovations within social media, rendering any laws ineffectual even before they are passed.

Similarly to national legislation, international legal efforts to regulate social media are also doomed to dysfunctionality owing to collective action problems, baseline definition issues and lack of expertise. For regulatory purposes, it is convenient to view social media as what Susan J. Buck terms ‘global commons’ – areas and resources falling beyond the jurisdiction of any one state. While simplistic and flawed due to the presence of private actors, the global commons approach allows us to identify collective action problems as a fatal obstacle in the way of a purely international regulatory approach. International social media legislation would inevitably boil over into “the exploitation of the great by the small” as all individual actors seek to maximize benefits by free-riding on regulatory obligations, leading to the eventual collapse of the entire system when all try to free-ride. Another critical problem is the discrepancy in national laws that obviate any chance of laying down baseline definitions. For example, reconciling the United States’ First Amendment toleration of hate speech with the European Union’s tighter restrictions and Turkey’s criminalization of government criticism in any kind of international framework poses an insurmountable obstacle. Not to mention continued failures to define something as obvious as terrorism in international law. Finally, as with national legislation alone, excluding social media companies deprives legislators of crucial expertise. This is not to say that international bodies have no place in social media regulation, but the role where they can be most effective is coordination rather than legislation.

Social media is one of the many emerging global stratums about which we can truly say “we are all in it together”. As with any shared resource, it is all of our responsibility to transform social media into a force for democracy, equality, and empowerment. To this end, both national and international legislation alone are insufficient regulative measures to effectively remedy social media’s threats to democracy, national security, and individual wellbeing. Neither can we leave regulation solely in the hands of profit-oriented businesses. Rather, we should stimulate continuous consultation between the legislature, civil society, and business, strengthening any resulting laws with educational and norm-shaping programs. As such, social media’s nature – free or censored, truthful or propagandistic, empowering or controlling – will not be decided by any single law, but every institution and user uniting behind a worldwide culture of democracy written in code, legislation, and individual action.


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