Can the law effectively regulate social media? Should it?

By substantially lowering the barriers to entry for everyone to be an information consumer, disseminator and even publisher, social media platforms such as Facebook and YouTube have decentralized how information and opinions are shared in society. This has brought tremendous public benefits, such as freedom of speech and enabling access to education. However, it also allows individuals to spread hate speech, extremist ideas, and fake content, which may threaten national security and social harmony. Media laws have existed for a long time, but they are not completely transferable to social media, and current application and enforcement are of limited effectiveness. Moreover, should governments impose such laws, which inherently undermine the fundamental human right of freedom of expression, in the name of protecting public welfare? To what extent social media should be regulated, and who should have the authority to regulate it are all questions need to be addressed. In this essay, I will first discuss the legal deficiencies of the existing social media laws, namely, broader grey areas and ambiguity, difficulties in justifying extended legal liability, and competing interests to protect. Then, I will move on to argue that the law should be in place, but it should adopt a co-regulation approach with private social media platforms to strike the delicate balance between regulation and freedom of speech.

Immediacy and casualness characterize social media platforms. The fact that almost anyone can talk about anything at anywhere blurs the line between public and private settings and the line between jokes and libel. Speech on social media generally possesses a more intimate quality: speeches can be made in speakers’ homes, targeting at a small group of people, about intimate and trivial issues. Also, the sense of casualness results in people paying less attention to the accuracy, truthfulness and appropriate choice of words in their expressions.

As a result, broader grey areas manifest when we directly apply laws written traditional mass media on social media, increasing the difficulty of reaching a fair decision. No matter where you make the speech or how casual and intimate it is, even the relatively minor slanders which might take place in conversations between acquaintances have the potential to spill over into a broader audience, breaching the defamation law. The BBC reports 653 people were criminally prosecuted in England and Wales in 2012 in connection with comments on Twitter or Facebook. In the workplace, though employers can include provisions in employment contracts imposing restrictions making disparaging remarks to defame the company, and such contracts are generally protected by laws, the demarcation between simple complaints and deliberate devaluations remains a challenge. When it comes to summary dismissal jurisdiction, employers need to prove that the misconduct resulted in serious damage to the company’s reputation. However, this high burden of evidence makes it difficult if not impossible for prosecutors to win convictions, and thus greatly limits the effectiveness of laws regulating social media.

The ease of republication is another distinct feature of social media. Influential sites like Twitter and Facebook permit users to ‘retweet’ or ‘share’ other users’ posts so that the harms can be caused in more complex ways. In particular, harm can arise from the aggregate effects of multiple messages. In some cases, none of the individual messages taken alone cross the threshold to warrant criminal prosecution, but the overall effect of all

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2 Ibid.
5 George, Patrick.
6 Ibid.
the messages can constitute a form of harassment and bullying and have a severe impact on the person’s life\(^7\). In other words, the chain of offenses becomes longer and more convoluted.

This feature raises complex questions of liability. Take the law of defamation as an example. If the expressions are found defamatory, each person who publishes or participates in the publication of defamatory matter may be held liable if it is proven that he/she has consented to the formal form of the publication\(^8\). However, proving liability requires subjective considerations of context and interpretation of the meaning of the expression, undermining consistent enforcement of the laws.

Furthermore, determining whether online intermediaries should be held liable for defamatory material authored by their users has become a vexing problem. In January 2016, the widow of a military contractor killed in an ISIS attack sued Twitter, accusing it of sharing responsibility for her husband’s death by allowing terrorists to radicalize potential recruits, and spread propaganda on the platform\(^9\). However, Facebook and Twitter correctly characterised themselves as private communication companies rather than publishers, and they were therefore granted immunity. The disputes over liability leave the public free to exploit loopholes in laws, and the disdain for this law erodes public respect for the rule of law.

As mentioned above, since social media provide opportunities for individuals to connect and to communicate in novel and hitherto unprecedented ways, they complicate the legislative situations and often leads to more stakeholders with competing interests.

This leads us to my last but not least point about the limitations of current social media law in this essay—the courts often fail to account for harm to others’ interests when there are competing interests of different stakeholders, because current content laws may not be specific enough to give clear guidance in every situation. Difficult issues of judicial discretion can arise. Take a legal dispute over privacy as an example. From the point of the rule of law, individual privacy can be intruded upon in the name of the greater good. The higher the degree of the interest of the “greater party,” the greater the degree of intrusion permitted.\(^10\) However, the court may face difficult issues of discretion when it tries to determine whose interests should prevail. The facts of Author of a Blog v. Times Newspapers Ltd\(^11\) sufficiently illustrate the point. A blogger who was a serving police officer published information concerning his police work and his opinions on the police. He attempted to conceal his identity by blogging under a pseudonym. A journalist for the Times identified the claimant, and the claimant sued the journalist. The claimant argued that revealing his identity infringed his rights to freedom of expressions under Article 10 and invaded his privacy under Article 8\(^12\). The court rejected his claim because his online activities breached The Police (Conduct) Regulations\(^13\), harming the higher interests of society. However, it can also be argued that this verdict will have a chilling effect on free speech of the general public. Furthermore, the journalist was also unsatisfied with the injunction because he wanted to advance free speech on political matters and therefore support the freedom of press, not limit it. Whose interests should prevail then? When it comes to a general application, the scope for ad hoc discretionary judgements is widened and thereby undermining the uniformity and objectivity of the law, limiting its effectiveness.

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\(^7\) Rowbottom, 57.
\(^8\) George, Patrick.
\(^12\) George, Patrick.
Now, I shall continue to discuss whether the law should regulate social media. Firstly, some will argue that we should not have rules as any form of regulations will undermine the freedom of expressions – a fundamental human right cherished in every democracy. However, given that targeted defamations and incitements to racist violence can easily go viral on social media platforms, I believe anti-regulation approach neglects public interests. The consequences to personal wellbeing and national security could be irreversible. The question is how we strike a balance between encouraging free speech and protecting public interests. Should we let private social media companies self-regulate, which is the status quo, or let the laws imposed by local authorities to manage social media? Despite all the limited effectiveness of current social media law I discussed above, I will argue that the law should be in place, but I will propose an approach that combines government-imposed laws with rules set by the private companies, because the combination would be more effective than either option alone.

If we depend solely on the rule of law, laws may be more enforceable and trustworthy, but they are also more rigid. Private companies may overreact and would have incentives to err on the side of caution and restrict even fully protected speech to avoid any chance of liability. Legislation might also stifle companies that have created thousands of jobs, as well as extremely useful tools. Consequently, freedom of expression can be severely compromised.

On the other hand, private companies can balance free speech with ensuring a safe online environment via regulations more precisely, because both are in line with their interests. Social media platforms have an incentive to ensure that their platforms are associated with accurate information, well-protected personal data, and the absence of hate speech, thereby attracting increased traffic. Facebook, Twitter, and Google have all committed to voluntarily implementing measures to enforce more stringent rules.

However, we cannot solely rely on private social media companies’ self-regulation due to their profit-making business nature. Recent headlines about the Facebook Cambridge Analytica Scandal has proved my point. Facebook was accused of leaking 87 million users’ personal data to Cambridge Analytica without users’ consent, and it might have ties to the 2016 election campaign of Donald Trump. Big social media platforms have few safeguards to prevent the deliberate manipulation of information and leaking of information, but they also have financial interests in maintaining the status quo. Unfettered flows of information and unlimited advertising revenue are critical to their tremendously profitable business models. Wall Street analysts predicted Facebook’s post-tax profits this year would reach more than $21 billion, almost all from advertising. Vigilance about security and privacy and controls on speech might take a backseat to profits. Although Mark Zuckerberg promised during a Senate hearing that Facebook would tighten its regulations on misinformation and data protection, the company cannot fully solve the problem without fundamentally changing its business model—making profits from the flow of information. Zuckerberg said on November 1, 2017, that Facebook’s new security features to counter fake news would have a “significant impact on our profitability.”

Therefore, a combination of the law imposed by local governments and rules set by the private companies will be a better choice. For example, a more strict minimal content

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15 George, Patrick.
18 Ibid.
19 "Facebook, Inc. (FB) Third Quarter 2017 Results Conference Call." Accessed April 21, 2018.
standard should be determined by the local legislators who will take both public interests and special local context into considerations. And companies can interpret and operationalise content laws, because they can tackle cases more delicately and flexibly and therefore may be more able to the challenges I mentioned above due to complex social media legal issues. Admittedly, they are more powerful than those governments, in that the reach of social media platforms extends beyond borders.

Recent incidents have proven that current laws are of limited effectiveness and we need more specific and more stringent regulations. Government involvement is critical to keep private companies in check. Despite significant room for improvement, I believe laws can effectively regulate social media, and they should, by collaborating closely with the various social media platforms.