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Book review: *The Legal Challenges of Social Media*

David Mangan and Lorna E. Gillies (eds.)
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*Reviewed by Michael Peter Kalule**



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The Legal Challenges of Social Media is the outcome of a research collaboration led by Lorna Gillies and David Mangan at Leicester University's School of Law in December 2013. Broadly, the research topics in this collection cover contemporary problems of social media that intersect with law, politics, and policy. As the editors note, the aim of the book is not to provide an overview of the law but to sketch different interpretational frameworks for readers to engage with challenging issues pertaining to: 1) social media and law; 2) public order in a virtual space; 3) private law responses to social media; and 4) questions concerning cross-border regulation of virtual space.

In Chapter 2, which opens this collection, Andrew D Murray is concerned with developing a framework that maps the rule of law online. According to Murray, rather than analysing questions of regulation from a micro-level perspective, we should view them also from a macro-level perspective — if we are to address wider questions pertaining to culture, morality and values in a global networked context. Subsequently, in addressing the key question of this article as to what the rule of law is, Murray outlines an outward picture of jurisprudence from a globalised perspective. Using examples from extradition case studies and the principle of extraterritorial effects, Murray poses the question of whether or not individuals in one jurisdiction, say, the UK, may be criminally liable for crimes in another jurisdiction such as Nigeria or Thailand. In doing so, he unravels a fundamental flaw in the rule of law online especially with regard to practical legal questions such as legitimacy, foreseeability, interpretation and adjudication. Indeed for Murray, and for the readers, there remains an irresolvable conflict of laws (i.e., internal/external extra-territorial effects), where rule of law is replaced by an overlapping and counter-contradictory rule of laws. This seems to be the result of a tenuous grounding of the notion of the rule of law in sovereign-statist and liberal-positivist thought that requires a commonality of moral cultural experience.

Jacob Rowbottom's discusses in Chapter 3 whether legal controls leave enough space for freedom of expression. He is particularly concerned with how criminal law should respond to digital communications that facilitate harassment, bullying, racism, and sexism. Through an analysis of existing Public Order legal provisions such as section 5 of the Public Order Act 1986 (which makes it an offence to use threatening or abusive words or behaviour) and section 4A of the Public Order Act 1986 Act (which proscribes an intent to cause harassment alarm and distress), Rowbottom is concerned that the catch-all nature of the offences in these provisions is overreaching, as it covers a wider scope than public law in the offline world. As such, these provisions have a tendency to disproportionately truncate the free speech rights, which should afford protection to words that offend, shock, or disturb. In trying to get to the bottom of the courts' reluctance to give freedom of speech its due salience, Rowbottom suggests that the casual, private, and temporal nature of communication on the internet (as opposed to say, real-time, "public" communication in a café) is what profoundly complicates where the line is to be drawn when it comes to online communication. For Rowbottom, a way forward involves moving away from criminal sanctions and adopting more proportionate regulatory approaches such as the right to be forgotten.

In Chapter 4, Ian Walden considers the question of press regulation in a "messy" converging environment. For Walden, an analysis of contemporaneous press regulation must grapple with an understanding of both the traditional printed press and the use of social media by the press. The new press, social media, however, presents challenges with regard to the structure that dislodge traditional regulatory processes. For instance, the emergence of dynamic on-demand audio-visual television-like services coupled with unprecedented ways of receiving and imparting information transnationally has generated areas of uncertainty that cannot be adequately captured by the same regulatory

structures and boundaries that cover the traditional press. Walden thus asks: How then are we to regulate the press in a converged environment? In answering this question, the notion of technology neutrality is proposed. However, even with such an approach, online media services would have to be treated differently, forms of regulatory oversight for example would have to negate statist forms. At any rate, for Walden, online services and social media would have to be governed by a divergent regulatory regime.

In Chapter 5, Daithí Mac Síthigh explores the issue of contempt of court and new media by looking at how the use of the internet and social media has complicated the law of contempt, which relates to the interference with or undermining of the administration of justice. Through an analysis of cases involving high profile public figures, Mac Síthigh shows how the instantaneous, unstoppable publication (by contempt of images and commentary) online via social media can be prejudicial to the accused persons and their convictions. He suggests that the representations of the special nature of the internet in relation to the law of contempt has been exaggerated or dismissed altogether and what is needed is a nuanced/compromised view that recognises the substantial challenges that the internet presents for contempt.

In Chapter 6, Lorna Woods directs the readers' attention to human rights beyond the scope of Article 10 of the European Convention on Human Rights namely the right to freedom of expression. For Woods, Article 10 does not adequately reflect some aspects of social media use. Thus, more attention should be paid to the role of Article 8, (which provides a right to respect for one's private and family life, his home and his correspondence) if we are to provide a coherent framework for the protection of individual rights online. A lot of Wood's reasoning is based on the fact that Article 8 is: 1) related to the development of one's personality and (communal) identity; and 2) broad in scope covering issues such as data protection, private life, family life, home and correspondence.

However, inasmuch as Wood's arguments are compelling, it seems to me that her conceptualisation of freedom of expression and human rights generally is limited and conservative. Arguably, a reconceptualisation of digital rights that seeks to overturn the limits of Article 10 and yet still works within the general liberal human rights framework will inevitably carry with it an inherent, contradictory statist violence (i.e., a liberal-statist-“what-do-we-expect-states-to-do” hierarchisation of humanhood or the human within human rights) that perplexes and limits our conceptualisation of freedom and rights in a global-networked context.

In Chapter 7, Emily Laidlaw looks into the thorny issue of drawing the line between hate speech, offensive or abusive speech, and banter or jokes. The key problem, it appears, is the inherent transposability of speech, namely its ability to take on different subjective incalculable/unprogrammable registers especially in a high-volume cross-cultural digital environment. Regulation of offensive speech would be akin to regulating a slippery slope and it would place an irresolvable burden on social media platforms. Laidlaw argues that we have expected too much from technology companies: We expect them to be socially responsible, culturally sensitive, and yet not too culturally sensitive. For Laidlaw, the challenge (which in my view is a nearly irresolvable one) is for social media companies to innovate delicate governance and regulatory approaches that are effective, context-sensitive, and nuanced, and still allow for one-off remarks.

Robin D. Barnes and Paul Wragg in Chapter 8 address the phenomenon of the troll as a figure who publicly scrutinises, ridicules and probes the (im)morality of public sports figures and personalities. Issues covered here include the privacy-invading and coercive nature of the troll and whether their trolling constitutes a public interest and is thus protected by the freedom to criticise. Indeed, Barnes and Wragg argue that there is a justifiable argument for the troll to interfere with and scrutinise the life of a public figure in politics, arts,

or sports, as a matter of widely shared public interest that outweighs individual privacy concerns. Thus, for sportsmen and public personalities it appears that their individual foibles are fair game.

Edina Harbinja's article in Chapter 9 looks at the issues surrounding the transmission of social media accounts after an individual's death. Generally, a Facebook account is the intellectual property of the service provider, thus neither the Facebook content nor a user's account is the property of the user. Harbinja argues that the law in this area should be updated to allow a dead person's family to acquire IP rights to user content on Facebook without allowing the family access and the use of the actual account. This would preserve post-mortem privacy (presuming that cross-culturally, in a "globalised" context, this is what the deceased person would desire?) allowing them to preserve and control their dignity integrity secrets and memory after death. It remains to be seen whether such post mortem rights are feasible considering that online privacy autonomy and the ownership of IP rights (even of users who are still alive) are still highly contested, and, for the most part, still in the interminable clench of online intermediaries. One thus wonders how/if we can start to look after or think well for our death, if we cannot yet even effectively look after ourselves now, (whilst alive) in the present.

In Chapter 10, David Mangan examines the protection of employers' reputation with regard to communications on social media in the workplace. For Mangan, Social media use presents a troubling scenario for employees who make remarks that the employer deems embarrassing or harmful to their interests. He argues that the punishment of dismissal for such employees' remarks is an extreme measure as in most cases, social media users view the social media space as a distinct place "unconnected to the workplace and analogous to sharing a

beer with friends.”¹ Furthermore, another important argument of Mangan’s is the fact that extreme dismissal and punishment for remarks made by workers can censor whistleblowing and constructive criticism in the workplace. Consequently, for Mangan, the UK needs to develop more nuances in this regard to ensure that social media remains a space that allows for the participation in activities and enhanced discussions of issues of political and general interest.

In Chapter 11, Andrew Scott examines the liability of online intermediaries with regard to defamatory material. Central to Scott’s discussion is the fact that intermediaries (as publishers) are tangentially liable for defamatory content. To this end intermediaries (under threat of legal action) are prompted to act as censors and to take down content regardless of its substance or accuracy. For Scott, treating intermediaries as publishers is a misguided and unnecessary conceptual stretch. It is an “unwholesome layer cake” that curtails (at its diverging intermediary layers/points) the right to freedom of expression and the public knowledge that it facilitates. He suggests a change in defamation law that would allow for a shift in the responsibility of speech adjudication from private parties to public authorities.

In Chapter 12, Lorna E. Gillies seeks to answer the question of how claimants may initiate proceedings to protect their reputation, individual privacy, and human rights in a particular jurisdiction irrespective of where the parties are domiciled. For Gillies the regulation of social media via private international law should progress through a coordinated conceptual approach underpinned by a discourse that allows for a continued balance between the parties’ rights to freedom of expression and fair trial. This approach, in Gillies’s terms, continues to support the relationship between EU and national human

¹ *Groves v. Cargojet Holdings Ltd* [2011] CLAD No 257 (76).

rights laws. Perhaps, rather disappointingly, seeing that we are dealing with issues of a globally-networked/cross-border character, the discussion in this chapter centres mostly on EU law and human rights, as they would apply in the jurisdiction of England and Wales. The reader is left to wonder how Gillies's conceptualisation of private International law (vis-à-vis internet regulation) applies to non-EU-citizens; i.e., whether or not non-EU-citizens would have recourse to rights protection under Gillies' current formulation.

The final chapter by Alex Mills focuses on the question of choice of law. Mills uses defamation law as a departure point. For Mills, the problems of determining choice-of-law questions are multiplied online due to the fact that communications will readily cross borders and complicate issues of choice of rules and jurisdiction. For Mills, these problems are almost inescapable for the reason that the existing law is out-dated for being state-centric and territorial. It is therefore unable to deal with borderless twenty-first century regulatory problems. Mills's discussion arrives at a place where he radically challenges and invites the reader to think beyond statist territorial legal orderings and to incorporate online non-state-centric considerations when grappling with recurring cross-jurisdictional regulatory/legal problems. Perhaps, with his incisive formulation, we can start to think of rights and regulation borderlessly and cross-culturally i.e., beyond the political, territorial, cultural and legal confines of the nation-state.

In conclusion, *The Legal Challenges of Social Media* is a significant collection that offers new and multiple frames within which students, academics, practitioners and policymakers interested in internet law, regulation and policy can think around the contemporary challenges of social media and internet regulation in a global networked context.