What are the Limits of State Coercion when it comes to Regulating Social Media?

Posted on February 17, 2016 in Res Judicata: Contemporary Issues in Administrative and Public Law.

https://resjudicatablog.wordpress.com

By Jamie Fellows (Lecturer in Law at James Cook University)

In the context of social media, the question, '*to what extent can the State exercise legitimate authority in regards to the imposition of regulation?*'[1] is concerned with understanding the limits of State control and law-making capacity in regards to what is considered a legitimate use of regulating the use of social media. In this context, this question represents a contribution to the age-old debate of State control versus personal freedoms and liberty. This investigation is situated within the epistemology that has developed over a long period of time looking at the question of State versus individual freedoms, but differentiates itself by addressing a very contemporary phenomenon.

There are many instances throughout the course of jurisprudential study where those have sought to discover the legitimate extent of State authority; certainly it is a central concern of political philosophy. However, the contemporary context in which the question is raised here, is new and is crucial given the relatively short time that social media has undeniably become one of the defining characteristics of the modern, developed world.

Fundamental to this question therefore, is an understanding of the nature of the alleged harms and the possible existence of an evidential link proving that social media actually *causes* those harms. Without establishing some causal relationship between the two, how can one justify the imposition of regulation by the State? The nature of these harms will be examined with a view to determine whether it is possible to assert with any degree of certainty, that there is a causal relationship between social media and the ills it is alleged to be causing.

Given the rapid growth of social media and the pervasiveness in which the phenomenon now permeates into many facets of society in unique ways, it is very pertinent to understand how the law, through the coercive apparatus of the State, is and should be constructed when applied to social media. These questions can be legitimately placed within the realms of jurisprudence since jurisprudence provides an avenue to explore the philosophical foundations of the existence of the State and

State control. The issue of State dominance has been at the forefront of many jurisprudential questions and many have written on the complex relationship between the citizenry and the State. Jurisprudence, through its disciplinary links to the greater body of philosophy, enables us to explore the meaning of social media and to derive a general understanding of it using those principles. It is only after a consideration of the philosophical is it possible to gain a better understanding of the metanarrative that underlies the foundation of law. Without such an analysis it is fair to assert that all that law is, is an ad hoc system of reactive decisions without a clear sense of direction from whence we came or where we are going. This is why jurisprudence has an extremely valuable part to play in the development of law in relation to this new technology.

Regulation and the Harm Principle

 Putting aside the purported benefits of social media for one moment, there is no shortage of evidence to highlight some of the problems associated with the use of social media.[2] The types of harm that have been alleged to stem from social media can be viewed on a spectrum of minor to major affectation. For instance, behaviours such as inattentiveness, lack of interpersonal skills, deterioration of relationships in the 'physical world', extending to the more severe forms of harm such as cyber-bullying, invasions of privacy, defamation, child exploitation, rape and even murder. Even if one accepts the Millsian conception of State coercion based on the *harm* principle,[3] there are a number of problems with the concept of 'harm' as it applies to social media. The first of these problems relates to a shared understanding as to what actually constitutes 'harm'.

The concept of harm is, to some extent quite elusive and subjective on the basis that what one person considers 'harm' may be different to what another person considers 'harm'. The harm principle is therefore open to a wide interpretation.[4] A second problem that exists relates to who determines what particular 'harms' would be subject to specific regulation. Should this be open for the State to determine? A third problem relates to contested claims that social media does not *cause* harm, and it must be proven that social media causes harm before it becomes the subject of regulation. Rather social media is merely a tool and is not inherently 'harmful' exists in so far as the whether it is appropriate that whether that 'harm' is actually caused by social media in the first place.   There are certainly strong arguments that social

media actually empowers individuals and groups and should be regarded as a platform for immense good within society.

[1] See generally the works of leading liberal theorists such as John Stuart Mill, John Rawls, Joseph Raz and F A Heyak who have attempted to deal with this issue in a range of contexts; specifically see, John Rawls, *Political Liberalism* (Columbia University Press, 1993);Gertrude Himmelfarb (ed), *On Liberty: John Stuart Mill* (Penguin, 1974); Will Kymlicka, *Contemporary Political Philosophy* (Oxford University Press, 1990); F A Hayek, *The Constitution of Liberty*(Routledge & Kegan Paul, 1960);Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985); Joel Feinberg, *Harm To Others* (Oxford University Press, 1984); Frederick Schauer and Walter Sinnott-Armstrong (eds), *The Philosophy of Law* (Harcourt Brace College Publishers, 1996).

[2] Jens Binder, Andrew Howes and Alistair Sutcliffe, 'The problem of conflicting social spheres: effects of network structure on experienced tension in social network sites' (Paper presented at the Proceedings of the 27th international conference on Human factors in computing systems, Boston, MA, USA, 2009); ibid; Michele L. Ybarra and Kimberly J. Mitchell, 'How Risky Are Social Networking Sites? A Comparison of Places Online Where Youth Sexual Solicitation and Harassment Occurs' (2008) 121(2) *Pediatrics* 350; K J Mitchell, J Wolak and D Finkelhor, 'Trends in Youth Reports of Sexual Solicitations, harassment and unwanted exposure to pornography on the Internet' (2007) 40(2) *Journal of Adolescent Health* 116; Cheryl L Coyle and Heather Vaughn, 'Social networking: Communication revolution or evolution?' (2008) 13(2) *Bell Labs Technical Journal* 13; Indeed the academic literature is vast regarding the harmful effects of social media on youth and adults alike. Evidence of the harm associated with social media can be found also in many popular news publications.

[3] See, eg, Grey above n 7.

[4] The ambiguity lies in the lesser consequences of what some might call 'anti-social harms' such as inattentiveness at the interpersonal level or using social media to withdraw from the physical world. Can we label these minor social breaches 'harm' and therefore impose regulation to control such behaviours?