

Towards a Regulatory Framework in the Regulation of Social Media

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In regards to a possible regulatory framework governing computer mediated communication (“CMC”) and social networking sites (“SNS”), Perritt proposes what he terms as a ‘hybrid regulatory scheme for the internet’.^[1] According to Perritt, such a scheme would consist of, among other things, extended tort-based theories of public nuisance and intentional interference.^[2] The strength of this argument seems to be directed at corporations and would rely on a process of private regulation between each corporate entity. There are obvious limitations with this approach, especially where the potential for harm lies with individuals as opposed to corporations; especially individuals with varying levels of legal capacity to bring an action against perpetrators in tort.

A further issue arises where the government is attempting to regulate the activities of groups looking to distribute possible sensitive information. Tort law would on the whole appear insufficient in addressing matters that are essentially public law. It is submitted that there is a substantial deficiency in legal discourse regarding a possible framework to regulate such matters and it is therefore beneficial to carry out this research in order to better address this shortfall.

As this technology gains greater acceptance, various types of consequences, both positive and deleterious that are directly attributable to this technology. The genesis of the problem between social media and State regulation can be seen as an issue relating to competing rights – on the one hand the rights of users to use this technology unfettered from State interference and on the other, the right of society to be protected from the myriad of harms that are alleged to stem from the use of social media.

Philosophical problems arise with regulating social media due to the conflict which exists within liberal democracies with regards to regulating what society can and cannot do in relation to social media. This is concerned with possible infringements upon an individual’s freedom to express one’s self unfettered by restrictions from the

State. It is this notion of freedom or liberty that is at the cornerstone of liberal democracy and that which creates the greatest conflict for the State. On the one hand there exists the idea that an individual should be free to use social media while at the same time the State has a responsibility to ensure that society is free from the socially destructive elements that have been attributed to social media.

The challenge for the State lies at the realms of understanding the nature or the role of the State in an environment so heavily characterised by rapid developments in social media technology. The only way to fully understand this role is to engage the issues at a fundamental level which takes into consideration a range of philosophical positions. Otherwise all that can be achieved is ad hoc solutions that attempt to patch the symptoms of the problem rather than address the core of the issue.

The apparent discord between the pace of the development and take-up of social media and our legal understanding of the phenomena at a jurisprudential level is evident by the lack of sophisticated discourse and engagement by the legal profession and the State. In achieving a better understanding of the way law operates with social media, it is submitted that the primary discord between the current use of this technology and our own understanding of how the law does and should interact with it, can be attributed to the fact that there is little understanding on a theoretical level, at least, of the law's function in regulating this sort of technology.

Any regulation must take into account a range of attributes that can be applied against a theoretical framework in order to determine the legitimacy (or illegitimacy as the case may be) of creating a legislative regime for social media. In the absence of engaging in such a process, law is created void of any philosophical basis for its justification, other than its own existence being used to justify it in a positivist sense; that is, it exists, therefore it is valid. To date, there has been very little research undertaken at the theoretical level that looks at the various attributes which form part of the social networking media phenomena and the advantage of doing so now represents opportunities to assist law makers.

[1] Graeme Turner, *Making it National: Nationalism and Australian Popular Culture* (Allen & Unwin, 1994)215.

[2] Ibid, 215-16.