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The Elephant in the Room: The Regulation of Social Media

(Pierre Trudel, *Droits, libertés et risques des médias*, Presses de l'Université Laval, Québec, 2022)

Pierre Trudel's book recently published at Presses de l'Université Laval tackles the difficult (but continuously relevant) issue of freedom and rights in the field of media. To this classical approach, Trudel felicitously adds the question of involved risks when it comes to the elaboration and diffusion of messages by media outlets. After a brief introduction, Trudel's work is organized in two parts. On the one hand, he focuses on freedom, rights and on the principles involved in the (juridical) assessment of media content. On the other hand, he is interested in discussing the numerous risks concerning both the process of information gathering and the process of information dissemination. Also, this effort is continued by an examination of the suitable ways of action after the fact, namely after the situation of disseminating controversial pieces of information.

Even if Trudel concentrates his approach on the Quebec area, in particular, and on Canada, in general, we appreciated the fact that his book also referenced American and European legislation. In this respect, his work constitutes a useful platform for the juridical perspective on media communication. Since the introduction, Trudel acknowledges the growing importance of online media and of the way the Internet shapes the entire media ecosystem. Thus, the author senses that there is more just one form of normativity involved in the digital media game. Beyond the norms which result directly from the law, Trudel thinks that a suitable analysis of this phenomenon must also include the pressure exerted by the market, the ever-present social norms, and the subsequent technological constraints. First, the configuration of the devices and of the social networks introduces a set of rules and regulations. These stem directly from the algorithmic logic, which is not just a structuring element, but

also a way of producing value. Second, the aggregation of individual choices and behaviors leads to a separate form of normativity, namely market normativity. Third, there is an emergence of social norms (more often than not, we are dealing with norms that are not created locally, but globally) that overlap with the existing ones.

Considering that the author acknowledges the importance of these dramatic changes brought by the Internet, we would have expected more in-depth and updated analyses on this matter in his work. At the crossroad between the field of communication laws and online media, the hottest topic today is the regulation of the Internet and especially of the social media. Pierre Trudel shows again his prowess in terms of the juridical analysis of the old mainstream media. The conceptual investigation is complemented with suggestive case studies. But the book partially misses the nowadays significant conversation. This subject is an extremely intricate one, and in the majority of countries there is an ongoing debate concerning the best choices for the regulation of the Internet. This is the very reason why we need competent and experienced authors to shed more light on these matters. In this respect, the dilemma of online regulation remains, in our opinion, the silent elephant in the book. Without question, our research interest in new media constitutes the lens through which we have read Trudel's book and the approach that we will develop further.

It is important to mention that the Internet use passed through several phases since its beginning. At first, the Internet was seen as a "place" for freedom of speech, as an alternative to traditional media; within this space, censorship was supposedly kept to a minimum, and restricted to basic rules of cohabitation. The advent of several phenomena (fake news, conspiracy theories, radical groups that threaten democracy, deepfake) made people rethink this issue, now many voices requesting a firmer grip of the law for the cyberspace. In this vein, we noticed a contradiction with shared technological "imaginary" of the early stages of the Internet (Flichy 2001), where freedom of speech, anonymity, open access were the main ideas. At present, some reports annually released (such as *Freedom on the Net*) indicate a decrease in the degree of freedom and free expression in the online environment and draw various suggestions in order to maintain the equilibrium between big tech companies and the states, between rules and online human rights. As Gibbons (1997) tried to synthesize at the beginnings of these discussions, there are three big ways of conceiving the cyberspace: as a genuine free, unregulated space; as a controlled space by government regulation; as a

self-regulated space. Any variant has problems in terms of costs versus benefits, risks versus gains.

The need for regulation is astutely perceived now not because social media and the Internet are just another communication option on our list. In fact, we may need innovative ways of ethical and juridical thinking in order to cope with this multifarious experience. The Internet and all its subsequent media applications brought about an ecological change (Postman 1993), an actual revolutionary transformation: many of the new facts and events cannot be simply explained away by using old arguments and old logical schemata. Some laws could be also ineffective or even redundant due to the technological speed, just as certain legislative loopholes can be (creatively) used by people or firms. Technology, communication models, users' behaviors are transforming, and the effect of different regulatory proposals are remodeled as well. Also, the process of convergence between old media and digital media is at stake, blurring the traditional boundaries between the entities involved in the act of regulating the Internet. Not only governments or companies are the stakeholders involved in developing policies, but also the civil society. At the same time, the virtual nature of the Internet raises a serious problem concerning the regulation, given that the various national institutions should be able to address not only their internal online use, but also a transversal, global use.

For Trudel, when it comes to Internet regulation, the trick is to find a balance between the rights of the individual and those of the intermediaries, namely those who share online content without being the ones who decide whether that particular content will be online or not, at the very beginning. Such an example can be a media website that includes content taken from a third party. Nevertheless, juridical responsibility may apply to intermediaries, as well. Trudel seems interested in the concept of editorial control, emphasizing the fact that the greater responsibility should be on the shoulders of the person who decides to put online a certain piece of information. Citing a court case, *Vaillancourt vs. Lagacé*, he indicates that the judge needs strong arguments to conclude that "real" control was exerted in the case of wrongful content, and this is done by following the known schemata of civil responsibility (p. 248). This question of who has actual control on the Internet remains, thus, a difficult one to answer.

Talking about another serious matter, anonymity, the Canadian author notices a very interesting fact: in a modern, pluralistic, and democratic country there are multiple ethics but just one rule of law. Each

ethical vision focuses on certain rights or freedoms, but only the rule of law can really be applied, and that is usually done in a definite situation. Even the limitations of freedoms must follow this contextualized application of the law (p. 251). So, in the case of anonymity, the court may decide to intervene if there is proof of wrongdoing. This can explain, at least partially, why the author focuses a lot on court cases and case law and less on ethical / philosophical grounds. For instance, Trudel discusses *Lehouillier-Dumas vs. Facebook* (pp. 257-258), quite a recent case, to show the complexity of proving guilt when it comes to hosting illicit content on a social media platform. Nevertheless, such a discussion still feels necessary having in mind the massive transformation brought about by the Internet and social media in the past fifteen years. It seems obvious that case law does not suffice when we approach these new realities.

Moreover, the recent juridical developments in Canada testify for the much-needed amplification of the debate. Both bills C-11 (Online Streaming Act) and C-18 (Online News Act) have ignited public opinion, both offline and online. These bills have clearly answered the age-old question “How much regulation is good regulation?” by indicating a strong political will for more. But, of course, not all parties involved would applaud such an initiative. There is an argument to be made that these bills would lead to bigger costs for the consumers (C-11) and to an information-deprived environment (C-18). Meta and Google, for instance, do not seem to want to play this game inside Canadian borders while avoiding it elsewhere. Google has indicated, through authorized voices, that C-18 is not the right way to support journalism and that it defies the way search engine work.

As a major theme, Trudel justly observes the collective relevance of big data (pp. 82-85), the fact that vast amount of data could be used to generate value. He makes a comparison between radio waves and the Internet, and notices a major difference: for the former, the main resource for creating value has been the use of frequencies, while for the latter, the key resource is people’s attention (attention economy). Moreover, if radio programs function according to an hourly grid (which is scheduled in advance), the Internet is dominated by platforms within which producers and users interact in multiple and complex ways. In such context, it becomes obvious that a legislative frame is needed. On the one hand, the regulators must set the conditions for the producers of content. On the other hand, rules and regulations are also needed for share and use of this vast amount of data. It goes without saying that producers and users of the digital content find themselves in a highly competitive environment,

fighting for visibility, notoriety, and feedback. The author observes the fact that the laws concerning personal data are structured to be effective at the individual level, but if we look closely, personal data are rarely completely independent and being the object of strictly individual rights. On the contrary, personal data are part of massive networks, sometimes involving collective authorship. As such, big data can constitute in a justifiable way a national object of interest. Situations such as Cambridge Analytica raise a practical concern about the use of personal data in profiling and influencing major events. In this respect, General Data Protection Regulation, for instance, is a framework built for protecting the individual privacy and for limiting the corporate use of personal data.

Anyhow, we must add that big data comprise not just users generated content, but also an entire set of detailed information recorded by various electronic sensors (smart grids, parking sensors, real-time apps, healthcare devices and so on). Smart cities are algorithmically governed today, increasing the need of understanding, and controlling the effects of this disruptive technological progress. In this vein, we have been witnessing an interesting debate for quite some time about the regulation of the Internet of Things, because it opened a few intricate issues, such as the sensitive problem of the personal consent, or the much-discussed privacy issue (Peppet 2014; Urquart et al. 2019).

If we think to the power of algorithms (Beer 2019), we must assert that an ethical framework is also mandatory. In this vein, the “algorithmic decision-guidance techniques” are just an example of everyday situations that we confront, and that could also be discussed in the Trudel’s configuration of contemporary media rights, freedoms, and risks. Shaping the informational context in which a future decision will be made with the aim of directing it to a predefined one is an algorithmic way of “soft” control that reclaims the stratified normativity presented by the author in the beginning of this book. At the same time, the ads based on profiling represents another intriguing point of debate in our everyday online ecosystem.

Journalists and scholars have pointed out for years that media giants such as Meta or Twitter have an increased power over people’s opinions and that the social media are now structuring the public agenda (of course, situations as digital divide – access or skill gaps – are not involved in this debate) and an important part of the economy infrastructure. Social media contribute to a significant “demotic turn” (Turner 2010), growing the power of the ordinary people’s voice. They filter and order the information for users and many times provide content

which is taken up by the mainstream media. In short, they configure the digital public sphere. Together with the numerous positive characteristics, some online practices are also threatening for the democracy: hate speech, fake news, radicalization of opinions, trolling, cyberbullying and so on (the liability remains a central theme for those behaviors, and in Germany, for instance, there is a law entitled “Network Enforcement Act” which imposes several content liabilities on diverse types of social media services). The echo chambers could also reduce the openness to differences of opinion and sets of arguments. Also, the democratization of content put a lot of pressure on the profession of journalists; they must preserve the journalism’s principles in an era of breaking news. In this respect, establishing online standards for transparency, safety, network neutrality, non-discrimination is never a simple task. As Balkin emphasizes, social media could be regulated “using three policy levers: 1. Antitrust and competition law; 2. Privacy and consumer protection law; 3. Balancing intermediary liability with intermediary immunity” (2021, 90). This is the reason why we need consistent communication law input among different other scientific contributions when we try to create a comprehensive image of this theme.

In conclusion, we believe that Pierre Trudel’s book brings consistent and relevant information in the field of media, particularly when it comes to case law and the rules and regulations that apply to this field. In this vein, beyond the detailed analysis and the careful structuration of the subject-matter, this work also includes the main references that constitute the juridical framework (constitutional texts, international rules, decisions of the Supreme Court and of the Federal Court, decisions of provincial courts, and also the support texts for the law doctrine) for media in Quebec and Canada. From the perspective of our research interests and having in mind the contemporary state of affairs in media, we think this work could be supplemented with a similar in-depth analysis of the recent trends in digital media. Given the fact that the author is a world-renowned academic expert in information technology and law, we are confident that such an intriguing topic will be proficiently investigated. From our point of view, we are eager to read such a contribution.

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