Free Speech, Privacy and Media
Free Speech, Privacy and Media
Comparative Perspectives

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Social Media and Fair Trial

I. Introduction: Social Media and Its Interaction with the Judicial Process

On both sides of the Atlantic scores of book and hundreds of scholarly articles have been published in the last four decades delving into all the various aspects of “trial by media”. The bearings are sufficiently clear, and once again highlight the European/United States divide, the former focused on protection of human dignity and the presumption of innocence; the latter on freedom of expression as a cornerstone of the constitutional building.¹

Here the examination will be centered on the interaction of “social media” with the judicial process. This paper will assume that the experienced reader is familiar with the issues surrounding the relationship between media and the judicial process, in particular media in trial and trial by media.

In order to simplify and clarify I will use the term “social media” (SM) to indicate those forms of communication, conveyed through telecommunication networks, by individuals who one would not ordinarily qualify as media professionals or enterprises. There is—as always—a gray zone, that of so-called “bloggers,” who manage digital space as a business, generally collecting advertising fees and selling data.

I will attempt to present various factual situations, leaving the more elaborate legal analysis to the second part of the paper.

II. Social Media

a) Social Media Use as a Surrogate to Judicial Inquiry

Social media are a common form of media used to put pressure on judicial institutions so that they may proceed with an inquest. This happens most commonly when the media are used by public concern groups (typically environmentalist) in order to document, mostly through images, situations that may be qualified as crimes, or evidence in a criminal investigation. Social media plays an advocacy role that previously was entrusted to petitioning or “open letters” published by traditional media.

b) Social Media Use as Platform of Support to Victims

Frequently, social media are created in order to arouse support for a specific victim of a crime (e.g. “Justice for…”). In this case a criminal inquiry often has not yet begun. If such an inquiry has commenced, the social media is used to keep the pressure up in order to avoid its dismissal. Parents and relatives of the victim and ad hoc support groups use the social media not to provide—as in the first case—useful evidence, but rather to convey the message that public authorities are under an obligation to investigate, to clarify the facts and proceed with prosecution.2

c) Social Media Use as Defense Committee

Less frequently, SM are used to organize, support and finance the defense of individuals accused of crimes and, generally, imprisoned. The common case involves activists engaging in political action for those who have incurred some judicial mishap. The typical slogan is, “Freedom for…” The difference from the previous cases is that here social media do not support but are instead vibrantly opposed to the judiciary.3

2. New technologies are used to collect evidence: see R.J. Hamilton, User-Generated Evidence (available on SSRN-id3124409.pdf).

3. I will not consider the case—more relevant in the field of civil litigation in the United States, where often huge amounts of money are at stake—when social media are used to raise funds for a trial: see. M. Elliot, Trial by Social-Media: The Rise of Litigation Crowdfunding, 84 U. Cincinnati L. Rev. 529 (2016).
d) Social Media Use by the Parties of a Trial or of a Litigation

Parties to a criminal trial or to a private litigation use SM in order to strengthen their position, to disseminate their positions, to gain support. In these cases, the judicial proceedings are ongoing and SM are a supplement to their defence strategy. The most distinctive feature—which renders them different from a), b) and c)—is the direct relationship with the defence counsel. Clearly the communication cannot contradict the position held in the investigation or in the trial, and is aimed at amplifying it. It becomes one of the defense skills. One of its main objectives is that of neutralizing, belittling or even disparaging the position of the opposite party and of its witnesses.4

4. In the United States these kinds of defense strategies are regulated by the ABA Model Rules of Professional Responsibility at para. 3.6 according to which: “a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
   (b) Notwithstanding paragraph (a), a lawyer may state:
   (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
   (2) information contained in a public record;
   (3) that an investigation of a matter is in progress;
   (4) the scheduling or result of any step in litigation;
   (5) a request for assistance in obtaining evidence and information necessary thereto;
   (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
   (7) in a criminal case, in addition to subparagraphs (1) through (6):
      (i) the identity, residence, occupation and family status of the accused;
      (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
      (iii) the fact, time and place of arrest; and
      (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
   (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
   (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).”
e) Social Media Use by Investigators

SM have become as essential tool to collect information, evidence, or to search for witnesses that may be useful in a police or a judicial investigation. The authorities—and not individuals—use the potentialities of the internet in order to direct a flow of communications that would otherwise be impossible to detect and promote. This kind of action can become permanent and institutionalized, in the sense that SM are used by police and judicial authorities in the same way as other public entities that wish to be constantly in contact with their community of reference. (For reasons that will be clarified further on, I will not analyse this kind of SM use, although it is extremely relevant.)

f) Social Media Use by the Actors in a Judicial Proceeding

Finally, one can consider the interaction between the public actors of a judicial proceeding (prosecutors, judges, jurors) and social media.5

The cases that have been summarized are only a few of many examples that exist. One can see them as a replica of what we have been seeing at least for the last two centuries, since daily newspapers started to report trials providing sensationalist coverage. The differences, however, are significant, with sociological and legal aspects inextricably inter-twined.

III. The Actors

Although the role the media play may seem the same as that performed in the past, the actors are significantly different, and therefore the result changes. A journalist may interview a number of common people to collect their opinions on an investigation or a trial. Those views, however, are inevitably filtered, “mediated” and set into a context. With SM we may have hundreds of unfiltered comments often reacting to or approving previous comments. The

Nothing similar can be found in the “Charter of core principles of the European legal profession and Code of conduct for European Lawyers” issued by the Councils of Bars and Law Societies of Europe (CCBE).

5. In this field, literature, especially in the United States, is extensive. For some recent references, see N.S. Marder, *Jurors and Social Media: Is a Fair Trial Still Possible?*, 67 Southern Methodist University L. Rev. 617 (2014); Note, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 Fordham L. Rev. 367 (2015).
outcome may be a cacophony of the most varied voices, or a uniform chorus that, with different tonalities and pitches, goes in only one direction (generally against the accused). Those who express themselves on SM are not reporting news, they are—or would like to make—the news. They are not bound by a contract to a publisher; by constraints of printing space; by professional rules and ethics. Furthermore, their single voice may be of little importance. What we look at is the crowd that voices its opinion. Millions remain silent, do not express their views (even if they have one) but their silence is irrelevant. Those who use SM are not “professionals” in the legal sense of term, but often are “professionals” in the use of the web. Many of these individuals spend hours of their day posting comments. There is no selection or filter, and rarely is someone excluded for being a “troll.” From few clearly identified actors we have moved to a multitude of actors, often anonymous and ubiquitous, with no rules except, in a few cases, those of a self-imposed restraint.6

It is the task of sociologists to measure—if possible—the impact of such vocal expressions of views on judicial proceedings. One cannot automatically conclude that a multitude of individuals is more effective than a few qualified interventions. Probably it is more prudent to verify on a case-by-case basis, which takes into account all the various factors, including the jurisdiction in which the judicial process is activated.

IV. The Medium

SM are structurally different from traditional media. Not only the communications they convey are not referable to a specific media business, but are open to everybody, they generally ignore editing and editorial processes (starting from time and space constraints), and are ubiquitous. It is sufficient to bear in mind one of the fundamental principles set out by Marshall McLuhan, i.e. that the medium is the message. The message that is disseminated over SM in the field relating to judicial matters is different from other fields because it tends to raise the tones of the discussion and to polarize views. It is quite im-

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6. Therefore, one can have doubts that the Council of Europe “Recommendation Rec (2003) 13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings” adopted on 10 July 2003 applies to individuals, who cannot be considered as “media.” Or that the EU Directive 2016/343 of 9 March 2016 “on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings” (in particular its Recital 16) can apply to “social media.”
possible—not due to some intrinsic evil of the participants, but because of the nature of the medium—that the discourse be kept on a doubtful, moderate, and specialized level. SM are the instrument to transfer individual “truths”—non-debatable points of view—and to confront, often violently, opposing “truths.”

A lawyer knows from experience—which is “only” two millennia old—that judicial proceedings are immersed in doubts, first of all of those who must make decisions (the judges), but also of the parties and of the by-standers. And lawyers also know that “judicial truth” does not necessarily correspond (or should correspond) to “historical truth.”7 SM are structurally and ontologically incompatible with a judicial process, at least as we have painstakingly developed it in the Western legal tradition. If “trial by media” strains our perception of justice, “trial on social media” subverts it.

V. The Context

The role SM have—or may have—in judicial proceedings depends significantly from the context in which they operate. The phase— inquiry or trial—is relevant. One should not forget that in the former the accused—if there is one—is cautious—his lawyers are cautious—because he/she does not yet know if and what elements the prosecutors have in their files. Silence is often a necessitated strategy. The communication field is in the hands of only one player: SM. This is well known by anybody has experience of criminal proceedings and of the relationship with the traditional media: the defense counsel is focused on the multiple aspects—substantive and procedural—of the proceeding. They are not—and should not be—media and social-media experts or activists. This determines a one-sided effect against the suspected person, which leaves permanent consequences on his/her public image. During the trial, instead, the defense strategy is—or should be—defined and therefore it is possible to react through the same or different media.

Here a significant ethical issue arises concerning the media role that lawyers from one side or the other may play. Lawyers not only thrust themselves to the forefront to gain notoriousness, but also present to the public—often before they are examined in court—pieces of evidence, witnesses, documents, recon-

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8. Press reports (see the AP report at https://www.apnews.com/19477af4a5f64623b2ed0246a2db5e3b) of the April 26, 2019 hearing tell us that Judge Burke decided that the trial should be held behind closed doors as “the only means available to avoid the tainting of the jury pool.”

VI. Naming Is Shamming, Tweeting Is Lynching

When the dust will have settled and one will be able to look at things at a distance, it will be possible to analyze more appropriately the use of SM in the Harvey Weinstein case. This case can be used as a typical illustration of interaction between media, social media and an accused individual.

The facts surrounding the case are well known. The film producer was accused by traditional media of having raped, sexually aggressed, or harassed dozens of women, mostly in the entertainment business. This raised a violent campaign on the SM, whose best-known epilogue is the #MeToo movement. Weinstein was dismissed from his company, which subsequently was put into liquidation. He was expelled from the Motion Picture Academy and other professional associations.

Clearly, the issue is not that of questioning the base and despicable conduct of someone who is taking advantage of his condition by violating women’s dignity and the fundamental right of sexual freedom. The problem—for a lawyer—arises because Mr. Weinstein, although accused in legal fora by several women, has only very recently been formally charged, arrested, and released under bail. At any rate, the trial has only started and the accused is the world-wide renowned “male chauvinist pig” and there is little chance of presenting his arguments in court. The case highlights how SM may reach a nearly immediate and non-reversible verdict without any judicial procedure or simply by announcing it.8

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8. Press reports (see the AP report at https://www.apnews.com/19477af4a5f64623b2ed0246a2db5e3b) of the April 26, 2019 hearing tell us that Judge Burke decided that the trial should be held behind closed doors as “the only means available to avoid the tainting of the jury pool.”
The obvious question is if the end—to name, shame and ban Weinstein—justifies the means used. The technique easily can be used against others: it is sufficient to qualify one’s reasons (political, moral, or ideological) as paramount to circumvent the whole judicial procedure. A lawyer is forced to remind others, however, that by empowering courts and judges, civilized Western societies have removed self-remedies (first of all, private vengeance) from their hands and handed it to the judicial process with its guarantees and measured and proportionate sanctions. What is further troubling is the fact that through the SM not only is the controversy removed from the courts in a one-to-one confrontation, but it becomes the political campaign of a group representing a multitude—whatever the merits of its action—against one single individual. In two words—already expressed 70 years ago—it would be like “Mob Justice.”

One can easily transfer this modus operandi from the Weinstein case to others in which the victims of violent and heinous crimes ask for justice, but outside the courts, and much before any judgment. To make things even clearer, procedural guarantees have not been painstakingly forged to protect innocent people, but exist especially for those who appear guilty, at least in the eyes of the prosecution, and need to fight for their case.

VII. Democracy and Fair Trial

As mentioned in the opening of this paper, there are scores of books and hundreds of articles concerning the relationship between trial and media. While the books and articles are mostly very negative on how this relationship has developed and how it tends to subvert the ordinary course of justice, one cannot help pointing out that this academic sweat of the brow has produced insignificant effects: the media have continued unfettered in their practices, and the courts—never on the Western side of the Atlantic, and in an insignificant number of cases on its Eastern side—have sanctioned such conduct. This

10. Not surprisingly there are many views against this approach: see e.g. L. Wexler, Jr. Robbennolt, C. Murphy, #MeToo, Time’s Up, and Theories of Justice (available at SSRN-id3135442.pdf) who see the #MeToo movement as a form of restorative justice. Cass R. Sunstein, in Growing Outrage (available at SSRN-id3097224.pdf) sees the phenomenon from a social norms perspective and qualifies the #MeToo movement as the expression of outrage that people had previously suppressed, or of an outrage that they had not previously felt. See also the special issue of 22 Richmond Pub. Int. L. Rev. 1 (2019) devoted to may legal aspects raised by the #MeToo movement.
ascertainment opens a much wider issue on the (ir)relevance of legal thinking in contemporary times and on the hiatus between the Temples of professors and the Palaces of Justice. One can therefore expect that these few pages will be subject to the same fate. There is however a more profound issue which goes beyond the already mighty combat between social media and fair trial, in which the latter has little chance of surviving.

More than 20 years ago the United States Supreme Court quite rightly and foreseeingly qualified the Internet as “the most participatory form of mass speech yet developed.” There is no doubt that now hundreds of millions of people in advanced Western countries are able to inform themselves directly, as well as express and share their views, and participate in a much more active way than that of simply casting a ballot in local or national elections. Democracy is substantially changing through the Internet and SM, particularly if compared with the 20th century. It is quite pointless to express some kind of nostalgia for “the good old times,” which too, in their times, were thoroughly questioned.

This unprecedented empowerment of people changes significantly the way we have imagined a nation ruled by a Constitution since the United States Constitution of 1787. For very good reasons, historical and practical, democracies until the 20th Century have been based on delegation, in which the People were the principals and the institutions—parliament, government, the judiciary—were the agents with a very broad mandate and limited accountability. In shorthand, these were “representative democracies.”

This pyramidal model, typical of pre-digital societies, is gradually being replaced by a horizontal system, typified by platforms based on peer-to-peer relations without an explicit hierarchy. Private platforms are becoming forms of governance, and government must use platforms to perform its tasks.

The change is not only in the fact that SM—and in general the services offered by the Internet—are used to express views and participate in public affairs, but once citizens are on-line they have a different view of their democratic empowerment and how they should relate with public affairs, including the administration of justice.

Seen in this light, the problem appears to be not that of the end of the “fair trial,” as we have theorized it since, at least, the Magna Charta, but rather what

does one mean by “justice” in this new environment, how and by whom should it be administered, and what can be the effective controls on its functioning.\textsuperscript{12}

Maybe the answer to this question has been given 23 centuries ago:

This sort of democracy, which is now a monarch, and no longer under the control of law, seeks to exercise monarchical sway, and grows into a despot; the flatterer is held in honour; this sort of democracy being relatively to other democracies what tyranny is to other forms of monarchy. The spirit of both is the same, and they alike exercise a despotic rule over the better citizens. The decrees of the demos correspond to the edicts of the tyrant; and the demagogue is to the one what the flatterer is to the other. Both have great power; the flatterer with the tyrant, the demagogue with democracies of the kind which we are describing. The demagogues make the decrees of the people override the laws, by referring all things to the popular assembly. And therefore they grow great, because the people have an things in their hands, and they hold in their hands the votes of the people, who are too ready to listen to them. Further, those who have any complaint to bring against the magistrates say, ‘Let the people be judges’; the people are too happy to accept the invitation; and so the authority of every office is undermined. Such a democracy is fairly open to the objection that it is not a constitution at all; for where the laws have no authority, there is no constitution. The law ought to be supreme over all, and the magistracies should judge of particulars, and only this should be considered a constitution. (Aristotle, Politics, Book IV, Ch. 4).\textsuperscript{13}

\textsuperscript{12} In the discussion following the presentation of this paper at the 2018 Luxembourg Free Speech Forum Professor Weaver suggested — if I correctly interpreted his thought — that one might envisage two different fora: the judicial one and the forum of public opinion. One cannot take for granted that what happens in the latter should necessarily conform to the decisions of the former (and vice-versa). Therefore, one can be acquitted by the Court and sentenced by public opinion. The issues raised by this objection are too complex to be analysed in this short article. I would believe that at the end of the day the question is what legitimacy the Courts have (and we want them to have) and how their authority can be preserved in a democracy. For an overview of the political implications of the different views see R.L. Weaver, The Philosophical Foundations of Free Expression, in R.L. Weaver, A. Koltay, M.D. Cole, S.I. Friedland (eds.), Free Speech and Media Law in the 21st Century, Carolina Academic Press, Durham, N.C., 2019, p. 183.

\textsuperscript{13} More recently, A. Garapon, Le Gardien des promesses: Justice et Démocratie (O. Jacob, Paris, 1996), in Chapter III titled “The illusion of direct democracy” (pp. 73 ff.) points out that “The media [today one would say “social media”] awaken the illusion of direct democracy, i.e., the dream of access to truth free from any procedural intermediary” [translation supplied].