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Review of *New Media, Old Regimes* by Lyombe Eko

Lexi Rubow*

I. INTRODUCTION

The international nature of modern communication technologies, particularly the Internet, has turned previously domestic issues into global ones, challenging conceptions of jurisdiction and sovereignty “that were tailor-made for geographical spaces in the real world.”¹ Comparative communication law provides a theoretical lens for interpreting the impact of modern technology in different political and cultural contexts. Although the value of comparative communication law has become more apparent as technology has placed different cultures into direct contact (and sometimes into conflict), Lyombe Eko² notes that the field has not been thoroughly developed. In his book *New Media, Old Regimes*, Eko intends to fill a gap in comparative communication law by compiling his analyses of recent events into one volume, “mapping the terrain” for modern comparative and international legal analysis.³

Eko succeeds in creating an interesting and informative catalogue of case studies, which are described below. These case studies use foundational communication law theories to attain a depth of comparative perspective rarely found in analyses of current events. However, Eko does not provide sufficient continuity between these case studies or synthesize his arguments into a cohesive thesis. The result is a slightly disjointed presentation of interesting analyses that Eko has previously published as individual journal articles.⁴

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1. LYOMBE EKO, *NEW MEDIA, OLD REGIMES* 103 (2012).

2. Eko is Associate Professor and Associate Director for Graduate Studies at the University of Iowa School of Journalism and Mass Communication. He specializes in comparative media law and international communication. Eko has published a number of papers analyzing recent international events through the lens of communication law theory. Lyombe Eko, THE UNIVERSITY OF IOWA, SCHOOL OF JOURNALISM & MASS COMMUNICATION, <http://clas.uiowa.edu/sjmc/people/lyombe-eko> (last visited Oct. 24, 2013).

3. See EKO, *supra* note 1, at 3.

4. See, e.g., Berkowitz, D. & Eko, L., *Blasphemy As Sacred Rite/Right: ‘The Mohammed Cartoons Affair’ and Maintenance of Journalistic Ideology*, 8 *JOURNALISM STUDIES* 779 (2007);

II. SUMMARY

The book begins with several chapters discussing the theoretical underpinnings of comparative and communication law. These chapters, while interesting, rely too heavily on quotes, which is confusing to the uninitiated. Eko discusses the same issues again in each of the case studies, so the introductory chapters are also redundant. The case studies that follow are essentially a repackaging of articles that Eko has separately published in various scholarly publications. The connection between these articles is tenuous at best, and to the extent that the author defines a thesis in the first few chapters, he does not connect the case studies back to any centralized theme. In examining the resulting variety of information, I have reorganized and refocused selected case studies in a way that will hopefully make the underlying themes more clear.

A. *Instrumentalization of the Internet and Networked Social Media in the Arab Spring of 2011 in North Africa*

Unlike past forms of technology, which totalitarian governments could utilize unilaterally to control citizens, the Internet places unprecedented opportunity and power in the hands of the citizens themselves. In this section, Eko explores the instrumentalization of social media and the Internet during the Tunisian, Egyptian, and Libyan revolutions of April 2011.⁵ Instrumentalization involves the transformation of neutral objects or infrastructures into tools to gain power over others.⁶ Eko posits that during the Arab Spring of April 2011, the crumbling regimes and citizens of Tunisia, Egypt, and Libya, as well as international corporate powers, instrumentalized social media and the Internet as offensive and defensive weapons in the struggle to gain or maintain power.⁷

Prior to the Arab Spring, North African governments tightly restricted freedom of expression on the Internet, controlling the flow of data between their nations and the outside world and censoring content through ownership of national Internet Service Providers (ISPs).⁸

A Tunisian man initiated the Arab Spring in December 2010 when he posted cell phone footage to Facebook showing his cousin self-immolating in protest against the Tunisian authoritarian government.⁹ The video went viral and Al Jazeera soon televised the footage.¹⁰ As anti-government demonstrations

Eko, L., *Bombs and Bombast in the NATO/Yugoslav War of 1999: The Attack on Radio Television Serbia and the Laws of War*, 24 COMM'NS & THE LAW 1 (2002).

5. EKO, *supra* note 1, at 129.

6. *Id.* at 78.

7. *Id.* at 139.

8. *Id.* at 133-38.

9. *Id.* at 130.

10. *Id.*

erupted in Tunisia, Egypt, and Libya, revolutionary citizens continued to use social media to mobilize and inspire protestors, posting footage of their respective governments' violent attempts to suppress the uprising.¹¹ The Tunisian government responded by blacking out a number of websites that were broadcasting information and attempting to hack the Facebook and Twitter accounts of dissidents.¹² The Egyptian and Libyan governments completely severed their countries' Internet connection to the rest of the world.¹³

As the protests gained international publicity, various international and third-party organizations began instrumentalizing social media to assist the protesters. The "hacktivist" group Anonymous launched "denial of service" attacks on Tunisian government websites.¹⁴ Facebook increased security around Tunisian citizen accounts, allowing them to continue utilizing social media as a tool of resistance.¹⁵ Google developed a "speak-to-tweet" service, a phone number that would instantly tweet voicemails from Egyptian citizens, using the hashtag "#egypt."¹⁶

Eko uses the Arab Spring case study to demonstrate that the instrumentalization possibilities inherent in modern media are significantly different from older media forms.¹⁷ Although North African governments modeled their strict top-down regulation and Internet censorship on past media control strategies, the activists and hacktivists of the Arab Spring demonstrate that both sides of a power struggle can instrumentalize new media. Eko therefore posits that it is much more difficult to use the Internet as a tool for suppressing dissent than it was to use older media forms.¹⁸

B. Propaganda and the Laws of War in the NATO/Yugoslav Conflict of 1999

The instrumentalization of modern media and its potentially momentous impact on power struggles raises important questions of international humanitarian law, as traditionally civilian institutions are now engaged in warfare. Eko uses the Yugoslavian case study to discuss whether the NATO bombing of the state-run Radio Television Serbia building violated international humanitarian law. Despite the devastation caused by the state-run Serbian propaganda campaign, Eko concludes that all media producers were and continue to be civilians and should be protected.¹⁹

11. *Id.* at 130-31.

12. *Id.* at 144.

13. *Id.* at 145.

14. *Id.* at 151.

15. *Id.* at 153.

16. *Id.* at 152.

17. *Id.* at 154.

18. *Id.*

19. *Id.* at 400.

In the 1990s, Serbian President Slobodan Milosevic attempted to maintain power in the crumbling Socialist Federal Republic of Yugoslavia through a campaign of ethnic cleansing and heavy propaganda.²⁰ He eliminated the private press and used the state-run Radio Television Serbia to “fan[] the flames of nationalism and ethnocentrism.”²¹ In response, NATO embarked on its own “information war” with the goal of using NATO propaganda to counteract Milosevic’s attempted brainwashing.²² When the Serbian citizenry did not respond to NATO’s propaganda by rising up against Milosevic, NATO bombed the Radio Television Serbia building and most of the rest of Yugoslavia’s communications infrastructure.²³ Eko sees this strategy as highly controversial because international law generally forbids attacks on civilians.²⁴

Unfortunately, as Eko points out, international judicial bodies never satisfactorily determined whether such action runs afoul of international humanitarian law. Although the surviving relatives of Radio Television Serbia employees brought suit under the International Court of Justice and the European Court of Human Rights, both suits were dismissed on jurisdictional grounds.²⁵ While Eko concedes that Milosevic did use the broadcasting facility to devastating military effect, he contends that NATO’s actions violated multiple international laws of war designed to protect civilians, journalists, and cultural institutions.²⁶ Eko urges the international community “to review and update international humanitarian law” so that future military actions against media institutions do not avoid legal challenge on technicalities.²⁷

In seeking more protection for media outlets, state-controlled or otherwise, Eko fails to acknowledge that laws classifying creators of media as civilians may need to be revised to exclude the use of communication technology to facilitate atrocities such as ethnic cleansing. New communication technologies require a reassessment of values, balancing the importance of a healthy press in times of war with the value of lives lost if the media is instigating violence. Perhaps in this case the distinction lies in the fact that Radio Television Serbia was a government-owned broadcasting station. Whatever the answer, this ideological tension demands more discussion than is provided in this case study. In fact, Eko’s automatic and rigid application of older international humanitarian law regimes seems in conflict with one of the overarching theses of the volume: evolving technology requires a reassessment of old legal strategies.

20. *Id.* at 382.

21. *Id.* at 387-88.

22. *Id.* at 390.

23. *Id.* at 393.

24. *Id.* at 397.

25. *Id.* at 399-400.

26. *Id.* at 400.

27. *Id.* at 403-04.

C. *The Mohammed Cartoons Affair and the Clash of Religious
“Establish(mentalities)” in Denmark and France*

A recurring theme throughout this volume is the idea that freedom of expression is a pluralistic concept and its understanding and application vary depending on political and cultural context. Eko uses the Mohammed cartoon controversy to explore how the national philosophies regarding the establishment of religion in Denmark, France, and the Islamic communities therein affected their interpretation of the conflict.²⁸

In response to what it perceived as anti-secular demands for “universal respect and deference”²⁹ from the Muslim community, a Danish newspaper, *Jyllands-Posten*, published controversial political cartoons of Mohammed.³⁰ The cartoons angered Muslim communities and spurred pockets of violence around the world.³¹

Despite Danish criminal code provisions prohibiting blasphemy and hate speech, Danish public prosecutors decided not to prosecute the newspaper, referencing European Court of Human Rights precedent protecting substantive freedom of expression.³² However, the Director of Public Prosecutions did give the newspaper a slap on the wrist, stating that “the freedom to express opinions about religious subjects [is] not absolute in Denmark.”³³ This course of action reflects Denmark’s desire to give deference the European Court of Human Rights while still expressing its political and cultural background in established Lutheranism.

In contrast, when a French newspaper republished the cartoons in solidarity with *Jyllands-Posten*, the French court used the opportunity to affirm its stance that blasphemy is not a criminal offense but a “sacred right,” and denied French Arab-Islamic groups any injunctive, civil, or criminal legal relief.³⁴ Eko asserts that this response is representative of France’s revolutionary dogma of anti-establishmentarianism, rationalism, and secular republicanism.³⁵

Although the outcomes of the defamation suits in Denmark and France were the same, Eko reminds us that this should not “be allowed to mask major divergence of substance between the different conceptualizations of the rule of law and the place of religion in society.”³⁶ In Denmark, the prosecutor emphasized that the Danish Criminal Code places hard limits on the freedom of

28. *Id.* at 21.

29. *Id.* at 72.

30. *Id.* at 163.

31. *Id.* at 161.

32. *Id.* at 172.

33. *Id.* at 176.

34. *Id.* at 193.

35. *Id.* at 184.

36. *Id.* at 200.

speech.³⁷ On the other hand, the French court asserted its ideology that blasphemy is a “sacred right.”³⁸ Eko urges both nations to review their freedom of expression policies because both have internal inconsistencies. If Denmark does not wish to enforce its anti-blasphemy criminal laws, Eko contends, it should alter its criminal code to be in conformance with both its current application of the law and with the European Court of Human Rights.³⁹ France, on the other hand, needs to resolve the contradiction inherent in its protection of blasphemy but prohibition of hate speech.⁴⁰

While these recommendations are insightful, Eko fails to offer any strategies for resolving the conflicts of establishmentality between European secular or nominally religious nations and Islamic communities, which Eko describes as demanding that deference to Islam prevail over secular considerations of freedom of expression.⁴¹ Harmonization of law in European nations might provide Arab-Islamic minorities in European countries more predictability. It may also serve to deepen the divide between the two groups. Since the conflict of Arab-Islamic and European establishmentalities, not minor variations of European law, was central to the controversy, a lengthier discussion of this conflict would have made for a more robust analysis.

D. Regulation of Child Pornography under International and American Jurisprudence

The pluralistic concept of freedom of expression becomes problematic when attempting to legislate the prohibition of child pornography, since the global nature of the Internet dictates that regulation of media distribution is only as strong as its weakest link. Eko contends that the United States is this weakest link, since its exceptionalist conception of freedom of expression and “zealous application of First Amendment standards” creates a loophole for producers of virtual child pornography.⁴²

The European conception of freedom of expression is based on a “moral philosophical worldview” in which human dignity trumps pure freedom of expression.⁴³ In contrast, in the United States, freedom of expression generally takes precedence over morality and human dignity.⁴⁴ Thus, in attempting to overcome constitutional hurdles, proponents of anti-child pornography legislation had to frame the issue as a public health issue, emphasizing the

37. *Id.* at 176.

38. *Id.* at 199.

39. *Id.* at 200.

40. *Id.* at 202.

41. *Id.* at 72.

42. *Id.* at 325.

43. *Id.* at 326.

44. *Id.* at 339.

“protection of the physical and psychological well-being of minors.”⁴⁵ This characterization has made legislative harmonization with Europe on the subject of child pornography regulation difficult.⁴⁶ The schism between European and American worldviews became apparent when the United States failed to ratify the 1989 UN Convention on the Rights of the Child.⁴⁷ Eko attributes this failure to the United States’ belief that its domestic regulations regarding child pornography were superior to international laws, distrust of the treaty’s reporting requirements, and rejection of a clause in the treaty which expresses concern with the “living conditions of children in every country, in particular in the developing countries.”⁴⁸

Eko states that the advent of virtual (or animated) child pornography presents potentially the greatest challenge to harmonization of international child pornography regulations because it exposes the differences in scope between the European human dignity approach and the American public health approach. With advancement in technology, children can now be virtually represented in pornography, such that it is sometimes “impossible to determine whether or not real children or photographic models of real children” were used.⁴⁹ Following from their belief that all forms of child pornography, real or virtual, are injurious to the human dignity of children, the European community has expanded its definition of child pornography to include depictions of a “person appearing to be a child.”⁵⁰ However, in *Ashcroft v. Free Speech Coalition*, the United States Supreme Court held that virtual images were not “intrinsically related to the sexual abuse of children.”⁵¹ Since US child pornography laws are based on public health rhetoric, rather than the human dignity approach, the Court reasoned that if no children are actually used in production, there is no danger to public health. Thus, any laws banning virtual child pornography would fail the constitutional strict scrutiny standard required to overcome the First Amendment’s Free Speech Clause.⁵²

Eko asserts that the American public health approach undermines global efforts to eradicate child pornography for the following reasons. First, technology has advanced to the point that it is difficult to tell when children are used in filming and when they are virtually represented.⁵³ Second, Eko disagrees with the idea that participation in the production of pornography is the only aspect of child pornography that is damaging to the physical and psychological

45. *Id.*

46. *Id.* at 340.

47. *Id.*

48. *Id.*

49. *Id.* at 343.

50. *Id.*

51. *Id.* at 344 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 254 (2002)).

52. *Id.*

53. *Id.* at 344-45.

health of children.⁵⁴ For example, he argues that “pedophiles can use images of artificial children indulging in sexual acts with adults to entice real children to participate in sexual acts.”⁵⁵ The limited scope of American regulation of virtual child pornography thus creates a space where virtual child pornography producers can distribute their product with impunity.⁵⁶ For this reason, Eko asserts, it is imperative that the United States harmonize its policy with that of the European community and United Nations.⁵⁷

E. The Internet, Minitel, and Exceptionalist Technology Policy

Eko defines exceptionalism as the philosophy of nations that see themselves as “unique political dispensations” such that “they define themselves in opposition to other countries.”⁵⁸ For Eko, the United States and France are two prime examples of exceptionalist nations. US exceptionalism is characterized by its free market economics and libertarian interpretation of freedom of speech.⁵⁹ France, on the other hand, emphasizes and prioritizes protecting the unique French culture and language.⁶⁰ Through his case study of the Internet and its French counterpart, the Minitel, Eko “explore[s] the impact of exceptionalism” on the development and relative success of the two technologies.⁶¹

France’s rationale for developing the Minitel and its approach to implementation are grounded in its exceptionalist mindset. Historically, France’s approach to managing and maintaining its exceptionalist cultural landscape has been the undertaking of *grand projets*, which Eko defines as “major industrial or cultural projects.”⁶² In this vein, during the 1970s, French scientists Simon Nora and Alain Minc advised the government that it should develop its own telecommunication technology in order to “preserve the country’s political and cultural independence.”⁶³ The resulting Minitel was a telephone-based communication system that allowed users to view static content stored on remote computers using a “dumb terminal” but did not allow users to create or publish information.⁶⁴

The Internet was developed in response to American exceptionalist ideology that the United States was “the epitome of science and technology” and

54. *Id.* at 345.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 20.

59. *Id.* at 213.

60. *Id.* at 212-13.

61. *Id.* at 210-11.

62. *Id.* at 219.

63. *Id.* at 215.

64. *Id.* at 214.

that Soviet technological advancements were “threats to America’s scientific and technological superiority.”⁶⁵ The Department of Defense created the predecessor of the Internet in order to increase efficiency and technological innovation through resource sharing and to distribute the network, thereby protecting it from Soviet attack.⁶⁶ In the wake of particularly strong cultural and political inclinations toward free market economics during the 1980s, the US government privatized the network.⁶⁷ A decade later, Congress sought to encourage even more innovation on the Internet by passing the Communications Decency Act, which shields ISPs from liability for users’ objectionable material.⁶⁸ Around this time, President Clinton lobbied world leaders for minimal regulation of the Internet.⁶⁹

Ultimately, the Internet developed more rapidly, both in terms of technology and economics, and ousted Minitel from the market, even in France.⁷⁰ While the United States’ decision to privatize the Internet has led to other problems, such as the issue of net neutrality, Eko concludes that the Minitel’s demise was due to France “treating rapidly evolving, innovative information and communication technologies like static cultural artifacts.”⁷¹

F. American and French Exceptionalism and Harmonization of Intellectual Property Law

In the international context, national exceptionalism can create barriers to policy harmonization. In this case study, Eko further explores the exceptionalist ideologies of the United States and France in the intellectual property context, investigating the “legislative balancing acts” of each nation in harmonizing their domestic regimes with the international intellectual property regime.⁷²

Copyright law in the United States originated in the utilitarian Copyright Clause of the Constitution, which seeks “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁷³ The French equivalent to copyright reflects France’s exceptionalist culture: the protection of authors’ rights is viewed as protection of “the integrity and cultural heritage of the nation.”⁷⁴ The “[a]uthor’s right,” contains two components: the economic

65. *Id.* at 222.

66. *Id.* at 222-23.

67. *Id.* at 226.

68. *Id.* at 228.

69. *Id.* at 228-29.

70. *Id.* at 231-33.

71. *Id.* at 235.

72. *Id.* at 302.

73. *Id.* at 282; U.S. CONST. art. I, § 8, cl. 8.

74. EKO, *supra* note 1, at 287.

right, and the moral right of the author to protect his works against alteration and mutilation.⁷⁵

The Berne Convention of 1886, an attempt to harmonize international intellectual property law, was heavily influenced by the French intellectual property regime. The United States refused to participate, finding the Convention's moral rights framework to be at odds with its utilitarian copyright philosophy and commitment to freedom of contract.⁷⁶ In 1989, almost one hundred years later, the United States recognized that it needed to protect its artistic works abroad and ratified the Convention, but only after it made numerous reservations.⁷⁷ For example, the United States still does not recognize or follow the moral rights provisions of the Berne Convention.⁷⁸

However, the advent of the Internet and the proliferation of American media intensified France's exceptionalist cultural protectionism.⁷⁹ Whereas the Berne Convention, modeled after the French tradition, posed little threat to French exceptionalism, France's transposition of the World Intellectual Property Organization (WIPO) treaties of 1996 into domestic law was "an acrimonious, time-consuming affair."⁸⁰ France was particularly opposed to the treaties' authorization of iTunes' Digital Rights Management (DRM) tools.⁸¹ Although DRM protected the economic rights of artists from peer-to-peer pirating networks, media purchased through the iTunes store could not be played with any other program and, as such, Apple came to dominate online media distribution.⁸² France viewed this domination as "a threat to international cultural diversity, French cultural independence, and the French exception."⁸³ Ultimately, the domestic French version of the WIPO treaties allowed DRM, but required that companies using DRM provide other manufacturers access to their DRM software.⁸⁴

Eko concludes the case study by noting that French and American responses to harmonization efforts are contextualized by their exceptionalist ideologies.⁸⁵ He states that France and the United States should be forced to harmonize, so that their reticence does not "get in the way of technological innovations that lead to the betterment of mankind."⁸⁶ However, in concluding

75. *Id.*

76. *Id.* at 291-92.

77. *Id.* at 292-93.

78. *Id.* at 293.

79. *Id.* at 303.

80. *Id.* at 304.

81. *Id.* at 306.

82. *Id.*

83. *Id.*

84. *Id.* at 310.

85. *Id.* at 315.

86. *Id.*

on this note, Eko seems to miss the evolving power dynamics between France and the United States as dominant players in intellectual property. The Berne Convention was promulgated when France dominated the international cultural landscape. The WIPO treaties, on the other hand, were enacted during American cultural domination. If he had focused on this changing global context, rather than offering a mere blanket directive for harmonization, Eko could have explored harmonization frameworks that would avoid capitulation and cultural dilution at the hands of the current dominant technological and cultural superpower.

III. DISCUSSION

On the whole, the strength of this volume is not in what it adds to the traditional international and comparative law frameworks, but rather in what these frameworks reveal about a variety of current events and the evolution of communication technology. Using these frameworks, Eko is able to analyze current events in their native political and cultural context and thereby gain perspective and understanding. This insight is most compelling where Eko is able to draw conclusions from his analysis that give direction to national and international leaders, such as his finding that the United States needs to expand its conceptualization of child pornography if international efforts are to gain any traction. The book tends to lose steam, however, where Eko focuses on aspects of an issue or event that mesh well with his desired framework but ignores the aspects that are most practically important. For example, his analysis of the Mohammed cartoon affair would have been more valuable if he had concentrated on the conflict between the Arab-Islamic communities and the European nations in which they are located, rather than the differences between Denmark and France.

The structure of the book also severely detracts from its effectiveness. As stated above, there is a disconnect between the first five chapters, where Eko describes in broad strokes the theory behind comparative communication law and its general importance in a changing technological landscape, and the case studies. While some case studies, such as the Arab Spring analysis, might, with further explanation, fit somewhat comfortably under this general theme, others, such as the Minitel/Internet case study, seem related only due to the presence of technology. If Eko had provided more explanation, tying each case study back to a cohesive thesis, it is possible he could have crafted a more targeted and meaningful work. However, as assembled in book form, the value of this compilation lies in the strength of its constituent parts, rather than the resulting synergy.