COMMENT

Social Media Offences

Genevieve Reed and Thomas White argue that clearer government guidance is needed

Half of the calls made to UK police relate to communications sent *via* social media. Authorities are being inundated with reports from people unsure whether online communication has contravened the law. Despite the rapid technological advancements of recent years, English law remains a relic of a time before the proliferation of social media, relying on provisions formulated when Facebook wasn't even a glimmer in Mark Zuckerberg's eye. To combat social media offences, prosecutors wield a patch-work of legislation conceived before the proliferation of platforms like Facebook, utilizing provisions from the Protection from Harassment Act 1997, and the Communications Act 2003. The legal framework is bolstered by guidelines that were introduced last year. Although a recently published House of Lords Communications Committee report concluded the existing criminal law is "generally appropriate" for the prosecution of social media offences, key elements of the DPP's guidelines are problematic. To provide a greater degree of clarity for prosecuting social media offences, the DPP published further guidance in 2013 setting out four categories of criminal offences. The first three categories direct prosecutors to consider whether the communication constitutes a credible threat, breaches a court order or specifically targets an individual in a manner that constitutes harassment or stalking. There are no particular problems with these categories, which are covered by existing legislation. The rub lies in the fourth and final category, a "sweeping up" provision that provides prosecutors with a fall-back option if they are unable to categorize communications within the scope of the first three categories.

The fourth category criminalizes communications that are grossly offensive, indecent, obscene or false but is deficient in its detail, leaving netizens in a precarious position where they are unable to predict whether comments made *via* social media may expose them to criminal prosecution. Terms such as "grossly offensive" are inherently subjective, meaning there is no clear threshold for the decision to prosecute. The reliance on such terms jars with the principle of legality, which requires laws to be formulated with sufficient precision to allow a citizen to foresee the consequences of a given action. Regrettably, the House of Lords Communications Committee did not support decriminalising "grossly offensive" communications in its recent report, which would alleviate some of the ambiguity that pervades Category 4 of the guidelines. Such uncertainty will stifle the free flow of expression in the digital realm. The 2013 guidelines were introduced following a series of contentious cases in which the right to freedom of expression was undermined.

Most famously, Paul Chambers was arrested and charged under s.172 of the Malicious Communications Act after posting a tweet that Robin Hood airport had "a week and a bit to get your shit together, otherwise I'm blowing the airport sky high!" Chambers was convicted and fined £1,000 before the High Court eventually quashed his conviction because the communication was "clearly not" menacing. Other notable cases involved Liam Stacey, imprisoned for 56 days for tweeting a racially offensive comment, and Azhar Ahmed, who was sentenced to 240 hours of community service for posting a Facebook message that "all soldiers should die and go to hell" following the death of six soldiers in Afghanistan.

It is difficult to see how the 2013 guidelines would have produced a different outcome in any of these cases, especially in light of the recent conviction of Peter Nunn for sending "grossly offensive" messages on Twitter to Walthamstow MP Stella Creasy. As it stands, individual police forces and prosecutors can decide whether an expression warrants prosecution and may request social media platforms remove communication that is distasteful rather than unlawful. There is a caveat in the guidance stating that these types of offences will be subject to a high threshold and that in many cases a prosecution is unlikely to be in the public interest. But this does not provide online expression with the robust protection that is a hallmark of a democratic society. It is not enough for the CPS to say that their prosecutors will not enforce the offences with any great rigour. Although the guidelines advise the CPS to pay particular attention to the right to freedom of expression, this "attention" could vary depending on political and media pressure in lieu of a clear threshold as to when expression is unlawful. It is not suggested that a political prosecution has yet been brought for an offence committed on social media but it is deeply concerning that the CPS has legislation at their disposal that would allow this to happen. CPS guidance ought to provide the public with clarity and enable citizens to regulate their conduct in accordance with the law. However, prosecuting communications that are grossly offensive, indecent, obscene or false threatens the essence of the right to freedom of expression. As Strasbourg has reiterated throughout its body of case law ever since its landmark 1976 *Handyside* judgment, freedom of expression protects not only 'favourable' expression but also that which "shocks, offends or disturbs". This principle must not be obfuscated by changes in the way we communicate. Given that aggrieved individuals can rely on private law to bring actions for defamation, the Government must scrap category four of the DPP guidelines to ensure the right to freedom of expression is not eviscerated in the online realm.

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