

## TAMING THE SOCIAL MEDIA GIANTS – HOW FAR SHOULD THE STATE GO IN REGULATING ONLINE CONTENT?

The advent of social media has irreversibly changed the face of the public sphere, by opening new channels of virtually unrestricted freedom of expression. This did not come without a cost. The Digital, Culture, Media and Sport (DCMS) Committee recently stated that ‘among the countless innocuous postings of celebrations and holiday snaps, some malicious forces use Facebook to threaten and harass others’,<sup>1</sup> and contended that social media companies cannot hide behind the claim of being merely a platform, thus having no responsibility towards the content of their sites.<sup>2</sup>

By not taming the social media giants, those malicious forces can turn into online harassment and unregulated harmful content. Current legislation was drafted with the real world in mind and, as the Law Commission noted, poorly fits the needs of cyberspace.<sup>3</sup> Time is ripe for reform: this is not a case of ‘thus far and no further’, but instead it is a case of updating and adapting the current regulations to the needs of modern society. This essay focuses on what the current regulations are, how they can be improved, and why they should be improved.

Potentially harmful online content is generally prosecuted under the ‘communication offences’ (*i.e.* Section 1 of the Malicious Communications Act 1988 and Section 127 of the Communications Act 2003) and under Sections 2 and 2A of the Protection from Harassment Act 1997. However, these offences all share a very high threshold before facing prosecution,<sup>4</sup> their provisions overlap, and most communications end up falling outside the scope of the Acts. For these reasons, the Law Commission recommended that the communication offences be reviewed in order to make them clear and understandable for both the online users and the law enforcement agencies.<sup>5</sup>

As for harassment, conduct is only punishable when two or more communications are made by the same person.<sup>6</sup> Consequently, people are not protected from the common social media phenomenon of group abuse.<sup>7</sup> In 2013, for example, Caroline Criado-Perez was reported to have received up to 50 abusive Tweets an hour from multiple accounts.<sup>8</sup> These are the exact circumstances for which the current law does not provide.

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<sup>1</sup> House of Commons Digital, Culture, Media and Sport Committee, ‘Disinformation and “fake news”’: Final Report’ (14/02/19), 5.

<sup>2</sup> *Ibid.*, [14].

<sup>3</sup> Law Commission, *Abusive and Offensive Online Communications: A Scoping Report*, Law Com No 381 (Nov 2018), [7.108].

<sup>4</sup> For the communication offences, the content must go ‘beyond the pale of what is tolerable in our society’: *DPP v Collins* [2006] UKHL 40, [2006] 1 W.L.R. 2223, [12] (*per* Lord Bingham).

For harassment, it will be difficult to ‘cross the boundary from the regrettable to the unacceptable’: *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 A.C. 224, [30] (*per* Lord Nicholls).

<sup>5</sup> Law Commission Report (n3), [13.23].

<sup>6</sup> s7(3)(a) PHA 1997.

<sup>7</sup> Law Commission Report (n3), [13.34].

<sup>8</sup> Laura Smith-Spark, ‘Calls for action as female journalists get bomb threats on Twitter’ *CNN* (02/08/13).

Given that offensive content is hardly ever illegal,<sup>9</sup> most potentially harmful content circulates freely on social media. In 2017, the teenager Molly Russell committed suicide, and her father blamed Instagram because of the access she had to harmful content.<sup>10</sup> Instagram has, since then, introduced measures to regulate the content on its platform. In February 2019, Adam Mosseri, Head of Instagram, vowed to remove content encouraging self-harm;<sup>11</sup> four months later, Instagram introduced a tool that automatically detects inappropriate content and asks you 'Are you sure you want to post this?' The aim was to make people rethink posts that seemed similar to the ones that had been reported.<sup>12</sup> This is in line with the DCMS Committee's recommendation that obstacles should be incorporated into social media platforms to give people time to consider what they are writing.<sup>13</sup>

Furthermore, the DCMS Committee recommended that a compulsory Code of Practice be developed by experts and overseen by an independent regulator, which sets down what is and is not acceptable on social media.<sup>14</sup> The regulator would also have the ability to launch legal proceedings against social media companies and administer large fines as penalty for non-compliance with the Code.<sup>15</sup> In Germany, for example, a law was introduced in January 2018<sup>16</sup> that forces tech companies to remove harmful content within 24 hours, or they may be fined up to €50 million.<sup>17</sup> The Committee noticed that one in six Facebook moderators 'works in Germany, which is practical evidence that legislation can work.'<sup>18</sup>

In the Online Harms White Paper, published in April 2019 with the goal of making 'Britain the safest place in the world to be online',<sup>19</sup> the Government endorsed the idea of a compulsory Code of Practice and stated that the development of more effective moderation processes should be included in it.<sup>20</sup>

On the other hand, social media are reluctant to moderate content on their platforms, as the ability to post freely has been treasured since the dawn of the Internet.<sup>21</sup> However, complete freedom of expression may lead to abuse, and social media, by upholding that treasured principle, may fall prey to the malicious forces that publish

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<sup>9</sup> Article 10 extends to communications that 'offend, shock or disturb' in *The Sunday Times v United Kingdom (No. 2)* (1992) 14 E.H.R.R. 229, 241.

See also *Karsten v Wood Green Crown Court* [2014] EWHC 2900 (Admin), [21] (*per Laws LJ*): it 'is not the task of the criminal law to censor offensive utterances'.

<sup>10</sup> Sarah Marsh and Jim Waterson, 'Instagram bans 'graphic' self-harm images after Molly Russell's death' *The Guardian* (07/02/19).

<sup>11</sup> 'Instagram vows to remove all graphic self-harm images from site' *BBC* (07/02/19).

<sup>12</sup> Dave Lee, 'Instagram now asks bullies: "Are you sure?"' *BBC* (08/07/2019).

<sup>13</sup> DCMS Committee Report (n1), [317].

<sup>14</sup> *Ibid.*, [38].

<sup>15</sup> *Ibid.*, [39].

<sup>16</sup> Network Enforcement Act 2017 (Germany).

<sup>17</sup> 'Germany starts enforcing hate speech law' *BBC* (01/01/18).

<sup>18</sup> DCMS Committee (n1), [24].

<sup>19</sup> Online Harms White Paper (April 2019), 4.

<sup>20</sup> *Ibid.*, 70 [7.24].

<sup>21</sup> David A. Wemer, 'Is Regulation of Social Media Companies the Answer to Disinformation?' *Atlantic Council* (08/03/2019).

harmful content. Algorithms alone are not able to stop them: research shows that only a small percentage of the content that is reported and removed from social media was detected by algorithms.<sup>22</sup> Therefore, a hybrid approach to moderation, where human and AI elements work together, will be needed to prevent the spreading of harmful content online.

Compulsory self-regulation and Codes of Practice seem to have been a successful method against disinformation;<sup>23</sup> it may be that the same strategy could be used to regulate online harmful content. By so doing, the content itself would not be made illegal, and its removal would not compel the legal analysis, required when Article 10 is engaged, of whether the restriction is necessary, proportionate and in the public interest.<sup>24</sup>

Times change and the law must change with them. It is now time to review the relevant provisions and enforce self-regulation and content moderation through a compulsory Code of Practice. Also, following the German example, the introduction of a fine for not removing harmful content may boost investments towards more vigorous moderation. Total freedom of expression will be the obvious casualty, but it is necessary to reconsider the appropriate boundaries of such a right in cyberspace. Perhaps it is also time to take a more holistic approach, and one that encompasses, among other things, proper education on the use of social media. At any rate, it seems that there exists a tangible desire to tame the social media giants and adapt the law to the new needs of our society. It can only be hoped that the Law Commission's Consultation Paper next year will be a click in the right direction.

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(994 words)

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<sup>22</sup> Jason Koebler and Joseph Cox, 'The Impossible Job: Inside Facebook's Struggle to Moderate Two Billion People' *VICE* (23/08/18).

<sup>23</sup> See EU Commission (Press Release), 'A Europe that protects: EU reports on progress in fighting disinformation ahead of European Council' (14/06/2019).

<sup>24</sup> CPS, 'CPS Guidelines on prosecuting cases involving communications sent via social media' (Revised: 21/08/18), [30].