IBIMA Publishing
Journal of Internet Social Networking & Virtual Communities
https://ibimapublishing.com/articles/JISNVC/2023/989773/
Vol. 2023 (2023), Article ID 989773, 7 pages, ISSEN: 2166-0794
DOI: 10.5171/2023.989773

Research Article

The Impact of social media on UK Hate Crime: A Brief Study

Nehaluddin AHMAD[1], Gary LILIENTHAL[2] and Arman bin ASMAD[3]

[1]MA, LL.B., LL.M. (Lucknow University, India), LL.M. (Strathclyde University, UK), LL.D. (Meerut University, India).
Professor of Law, Sultan Sharif Ali Islamic University (UNISSA), Brunei Darussalam

[2]LL. B. (Australia), M. Psychoanalytic Studs., (Deakin University, Australia), Ph.D., (Law)
(Curtin University, Australia).
[2]Professor of Law, and Chairman, Carrington Rand, Yau Ma Tei, Hong Kong, SAR.

[3]Arman bin ASMAD, PhD (Malaysia)
Assistant Rector, Sultan Sharif Ali Islamic University (UNISSA), Brunei Darussalam.

Correspondence should be addressed to: Nehaluddin AHMAD; ahmadnehal@yahoo.com

Received date:2 July 2022; Accepted date:2 August 2023; published date: 27 November 2023

Academic Editor: Sandeep Kumar

Abstract

The study focuses on how the legal system exploited the old discrimination offenses to control contemporary social media. The argument makes the case that hate crimes committed on social media in the United Kingdom are extensions of early twenty-century statute provisions against routinely unlawful discriminatory behavior. It explores the issue of this crime on social media from the perspective of preventing the online transmission of hostility and public insults. Also, it examines the necessary legislative actions to allow law and enforcement agencies to address this issue effectively. In the current approach to cyberspace, social networks are becoming a vehicle for the persistent spreading of hate-based ideologies, and this needs to be prevented. The study's findings will indicate that construct elaboration in DPP v. Collins could define a Facebook writer's culpable state of mind, demonstrating hostility within the meaning of section 28 of the Crime and Disorder Act 1998 (United Kingdom). Therefore, social media hate crime, as committed on Facebook, is nothing more than a publicly offensive sign, and the goal of the law is to stop the spread of hatred online by punishing the motivations behind an individual's words.

Keywords: hate crime, discrimination crime, social media, hostility, reasoning.

Cite this Article as: Nehaluddin AHMAD, Gary LILIENTHAL and Arman bin ASMAD (2023), "The Impact of social media on UK Hate Crime: A Brief Study ", Journal of Internet Social Networking & Virtual Communities, Vol. 2023 (2023), Article ID 989773, DOI: 10.5171/2023.989773

Introduction

This article offers a new kind of contextual analysis of hate crimes on social media in the critical context of judicial construct elaboration, to the elaboration of hate crimes from late-night skinhead attacks to Facebook hostile insults. Its objective is to show how courts have elaborated the construct of hate crime into bias crime, widening its scope, then moving it online to punish non-conformity with prevailing community views.

Construct elaboration, in the law, has a contemporary meaning of the refinement by modification and clarification of one older judicial construction into a slightly different and new advanced version. (Freud, et al., 1953) While many might think this process is new, actually, it is ancient. Thus, the key sophists Hermogenes, Aphthonius, Nicolaus the Sophist, and John of Sardis each discussed methodologies for elaborating the construct elements of a law via the use of commonplace denunciation. (Kennedy, 2003)

Arguably, in a series of construct elaboration cases, the UK and European courts have set up the field for modern-day social media hate crimes. DPP v. Collins confirmed that it is consistent with Article 10 to prosecute a person for using the telecommunications system to leave racist messages. (Director of Public Prosecutions v. Collins, 2006) Pursuant to section 127 of the Communications Act 2003, it was an offense to send a grossly offensive message by a public electronic communications network. In Norwood v. the United Kingdom, a man showed a sign in his shop window, which said: "Islam out of Britain - Protect the British People". Police charged him under section 5 of the United Kingdom's Public Order Act. The ECtHR found no breach of the Article 10 free speech requirements. (Norwood v United Kingdom, 2004)

In Kuhnen v. Germany, the European Commission held that extreme racist speech is outside the protection of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms because of its potential to undermine public order and the rights of the targeted minority. (Kuhnen V. Germany, 1988) In Lehideux and Isorni v. France, the ECtHR confirmed that holocaust denial or revision was outside the protection of Article 10 by Article 17 of the Convention for the Protection of Human Rights and Fundamental Freedoms. (Lehideux and Isorni v France, 1998)

This narrative raises the research question of how the courts used old discrimination crimes to develop regulations of modern significations on social media. We will try to show that the United Kingdom's social media hate crimes are constructed elaborations of early twentieth-century statutory laws against commonplace discriminatory criminal conduct.

The article's methodology is to examine the available multi-jurisdictional evidence of hate and bias crime and then synthesize an outcome in the United Kingdom's law to explain its elaboration into social media hate crime. The next link in the chain of argument is a critical survey of European hate crime laws to draw parallels and differences. To link the prior sections, the argument then provides an explication of motive, purpose, and intention, as relevant to hate crime. The links will be finalized into a final synthesis, within the latter conclusion. Prior to the article's conclusion, the argument sets out an explanation of operative hate crime statutes and the case law in the United Kingdom.

Daily, millions of communications are transmitted through social media. Provisions in the Malicious Communications Act 1988 and the Communications Act 2003 suggest many social media hate crime cases could be prosecuted. Social media platforms include the privately owned and run Facebook, Twitter, LinkedIn, YouTube, WhatsApp, Snapchat, Instagram, and Pinterest. (Crown Prosecution Service, 2016)

These circumstances suggest the possibility of a chilling effect on free speech. Prosecutors are instructed to consider carefully paragraph 4.12(c) of the Code for Crown Prosecutors, (Crown Prosecution Service, 2018) reproduced and considered below in this sub-section, and its question about the circumstances of harm caused to the victim, when the communication targets a particular person. (Crown Prosecution Service, 2016)

The research outcome will indicate that construct elaboration in DPP v. Collins could define a

Facebook writer's culpable state of mind, demonstrating hostility within the meaning of section 28 of the Crime and Disorder Act 1998 (United Kingdom), without the Facebook writer ever knowing personally the criminally affected victim. Thus, a social media hate crime, such as on Facebook, is nothing more than a publicly insulting signification, and the laws' legislative purposes are to prevent the online transmission of hostility and punish a private individual's reasoning underlying his or her rhetoric.

Understanding Hate Crime

Before we consider the question of hate crime, the term "hate" itself is used in a multiplicity of contexts, and as such has no clear lay definition, nor any clear definition in law, psychology, or another academic discipline. Scholars observe that, for the purposes of furthering our understanding of hate crime, the term "hate" is "distinctly unhelpful." (Hall, 2013) Further observe that seeking to define the term hate is like entering a "conceptual swamp" (Berk, Boyd, & Hammer, 1992). For this reason, "hate crime" legislation often uses terms such as "bias", "prejudice" or "hostility" alongside, or sometimes, in place of, the term "hate". Scholars ask to consider a broader understanding of hate, questioning whether hate is *always* a matter of prejudice or bigotry, though this study is not about hate crime in particular but rather hate in its broader and broadest contexts. Indeed, while "hate crime" and "hate studies" remain terms commonly used to describe both the statutory regime regardless of its construction, and the field of research on related scholarship more generally, debate still goes on as to the precise contours of each of these terms. (Brudholm, 2020)

It is commonly accepted amongst scholars that a global definition of hate crime is not available, nor is it perhaps possible, in the historically and culturally given contingent nature of hate crime. (Perry, 2001)It is observed that hate crime means different things to different people. (Chakraborti & Garland, 2012) Some, particularly lay people, will understandably adopt a more literal interpretation in line with the more violent and extreme cases that make the news. Scholars, meanwhile, tend to see hate crimes as a social construct with no straightforward meaning and offer a defining set of characteristics that they regard as central to their commission. Practitioners are likely to pursue a much less complex view that requires few of the machinations evident within academic interpretations.

However, the Police Service of Northern Ireland defines a hate incident as: 'Any incident perceived to have been committed against any person or property on the grounds of a particular person's ethnicity, sexual orientation, gender identity, religion, political opinion or disability. (McVeigh, 2017)

Hate crimes are often described as message crimes at the point of perpetration. This serves two purposes: first, the perpetrator sends a message to the victim and his or her community by committing the hate crime; second, the goal of hate crimes is to subjugate the victim's community by inciting hate, fear, and mistrust among them.

Social Media and UK Hate Crime

The hate crime offenses include offenses that may be committed via social media. They include the racially or religiously aggravated offenses, under ss. 28-32 of the Crime and Disorder Act 1998 (CDA), such as aggravated public order offenses and Harassment and Stalking. To prove that the offense is racially or religiously aggravated, the prosecution must prove the "basic" offense followed by racial or religious aggravation, as defined in s28 of the Crime and Disorder Act 1998.

Additional offenses include stirring up racial or religious hatred under Part III of the Public Order Act 1986, specifically the offenses of publishing and/or distributing written material, ss19 and 29C; and distributing / showing / playing a recording of visual images or sounds, ss21 and 29E. Sections 145 and 146 of the Criminal Justice Act 2003 provide for an increased sentence for aggravation related to race, religion, disability, sexual orientation, or transgender identity. The provisions apply to all the offenses of aggravated assaults, criminal damage, public order offenses, harassment, etc., apart from racial and religious crime under ss29-32 of the Crime and Disorder Act 1998, as these offenses carry higher maximum penalties than the basic equivalents.

> To prove that the offense was aggravated and obtain a sentence uplift, it would be necessary to show that either the offender demonstrated hostility to the victim based on the victim's protected characteristic of race, religion, disability, sexual orientation, or transgender identity, or that the offence was motivated by hostility towards persons who had the protected characteristic. In any event, the key to a hate crimes' prosecution for social media actions would be hostility as a vicious error, as already elaborated as being equivalent to hatred.

Hate Crime Offences

According to the United Kingdom Crown Prosecution Service, the high evidence threshold, the public interest and ECHR considerations apply just as much to social media hate crime cases, as in cognate cases. The Code for Crown Prosecutors advises and instructs prosecutors as follows, using the "discrimination" construct elaboration explained as above.

> The circumstances of the victim are highly relevant. The greater the vulnerability of the victim, the more likely it is that a prosecution is required. This includes where a position of trust or authority exists between the suspect and victim. The prosecution is also more likely if the offense has been committed against a victim who was at the time a person serving the public. Prosecutors must also have regard to whether the offence was motivated by any form of discrimination against the victim's ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity; or the suspect demonstrated hostility towards the victim based on any of those characteristics. The presence of any such motivation or hostility will mean that it is more likely that prosecution is required. In deciding whether a prosecution is required in the public interest, prosecutors should take into account the views expressed by the victim about the impact that the offence has had. Inappropriate cases, this may also include the views of the victim's family. Prosecutors also need to consider if a prosecution is likely to have an adverse effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence. If there is evidence that prosecution is likely to have an adverse impact on the victim's health it may make a prosecution less likely, taking into account the victim's views. However, the CPS does not act for victims or their families in the same way as solicitors act for their clients, and prosecutors must form an overall view of the public interest. (Crown Prosecution Service, 2016)

Prosecutors are instructed to be alert to any reference within the communication to a recent tragic event, involving many deaths of persons who share any of the protected characteristics. (Crown Prosecution Service, 2016)

Both United Kingdom and European case law have agitated the matter of the European Convention on Human Rights' Article 10 and racist and/or religious hate crime speech. Four such seminal and relevant cases demonstrate the overall construct elaboration, as follows:

DPP v. Collins confirmed that it is consistent with Article 10 to prosecute a person for using the telecommunications system to leave racist messages. Effect must be given to Article 17 of the European Convention on Human Rights, which prohibits the abuse of any Convention rights, as held in Norwood v. the UK. (Norwood v United Kingdom, 2004)

Pursuant to the Communications Act 2003, it was an offence to send a grossly offensive message by a public electronic communications network. In DPP v. Collins, the House of Lords considered the meaning and application of the statutory provision. (Director of Public Prosecutions v. Collins, 2006)

The respondent had made telephone calls over a two-year period to the offices of a Member of Parliament, Mr. Taylor. Sometimes he spoke to a staff member and sometimes he left recorded messages. Later, both Mr. Taylor and his staff listened to the recorded messages. In these calls

and recorded messages, the respondent shouted, ranted, and referred to "Wogs", "Pakis", "Black bastards" and "Niggers". Some staff said they were "shocked, alarmed, and depressed" by the respondent's words. (Director of Public Prosecutions v. Collins, 2006)

The Magistrates Court, at first instance, held that the conversations and messages were 'offensive', but were not 'grossly' offensive by the test of a reasonable person. (Director of Public Prosecutions v. Collins, 2006)The prosecutor appealed, saying that the conduct was indeed grossly offensive. In allowing the appeal, the House of Lords elaborated its rhetoric as follows.

The House of Lords held, arguably by construct elaboration, that the object of section 127(1)(a) Communications Act 2003, and its predecessor provisions, was as addressed in section 1 of the Malicious Communications Act 1988. That statute did not require proscribed messages to be sent by post, telephone, or a public electronic communications network. The purpose of the stream of legislation, culminating in section 127(1)(a) Communications Act 2003, was to prohibit using a service, publicly provided and publicly funded to benefit the public, for transmitting communications to contravene society's basic standards. (Director of Public Prosecutions v. Collins, 2006)

In a self-conferral of jurisdiction, the House of Lords observed that the parties agreed that it was for the court to determine, as a fact, whether or not a message was grossly offensive, taking into account the relevant context. For example, speech or language, which otherwise might be insulting, also could be used in a positive or neutral sense. The test must be whether the message would be liable to cause gross offence to "those people to whom it related". (Director of Public Prosecutions v. Collins, 2006)

In contrast with section 127(2)(a) Communications Act 2003 and its predecessor subsections, which required proof of both an unlawful purpose and a certain degree of knowledge, section 127(1)(a) Communications Act 2003 states no guidance on the requisite state of mind to be proved. By analogy to the Public Order Act 1986, the defendant must intend his words to be grossly offensive to "those to whom they relate or be aware that they may be taken to be so". (Director of Public Prosecutions v. Collins, 2006)

Thus, "a culpable state of mind will ordinarily be found where a message is couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognized by the sender". (Director of Public Prosecutions v. Collins, 2006)The message need not actually reach the recipient. All that matters is that reasonable persons in society would find the message grossly offensive. (Director of Public Prosecutions v. Collins, 2006) This represented a move to an objective test, blurring the importance of the defendant's actual intention and state of mind.

The House of Lords held that this conclusion would not be inconsistent with Article 10 of the European Convention, given effect in the United Kingdom by the Human Rights Act 1998. Article 17 of the Convention must also be given effect, per the decision in Norwood v. United Kingdom. (Norwood v United Kingdom, 2004)

In Norwood v. the United Kingdom, (Norwood v United Kingdom, 2004) a man showed a sign in his shop window, which said "Islam out of Britain - Protect the British People". He also displayed the well-known Islamic symbol of a crescent and a star, alongside a public prohibition symbol. Police charged him under the United Kingdom's Public Order Act, which proscribed "any writing, sign, or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm, distress thereby". His High Court appeal was rejected, as the Court held that the subject legislation did not breach the 1998 Human Rights Act, or the European Convention (ECHR) freedom of speech provisions. (Norwood v United Kingdom, 2004) He appealed to the ECtHR, who found no breach of the Article 10 free speech requirements. This now represents the general view of the ECtHR, in respect of hate crimes. (Hare & Weinstein, 2009)

Similarly, **in Kuhnen v. Germany**, (Kuhnen V. Germany, 1988)the European Commission has held, in its major exercise of construct elaboration in the field of hate crime, that extreme racist speech is outside the protection of Article 10, because of its potential to undermine public order and the rights of the targeted minority. The European Commission of Human Rights sitting in private, on 12 May 1988, observed that the applicant was

convicted for originating publications advocating the re-establishment of the NAZI Party in Germany. (Kuhnen V. Germany, 1988) Therefore, there was interference with his right to freedom of expression per Article 10 of the European Convention on Human Rights and Fundamental Freedoms ('the Convention'). The relevant German penal law aimed to protect the basic order of freedom and democracy among people. Therefore, it was legitimate under Article 10 of the Convention as being established "in the interests of national security (and) public safety (and) for the protection of the ... rights of others".

The Commission referred to Article 17 of the Convention, which stated as follows:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The Commission had found previously that the freedom of expression set out in Article 10 of the Convention might not be invoked contrary to Article 17. Thus, the applicant's proposals were counter to one basic value underlying the Convention, that the fundamental freedoms of the Convention "are best maintained ... by an effective political democracy".

The applicant's policy contained racial and religious discrimination, and, therefore, the Commission found that the applicant was trying to use the freedom of information enshrined in Article 10 of the Convention to contribute to destroying the rights and freedoms within the Convention. Under these circumstances, the Commission concluded that the interference in the applicant's rights was "necessary in a democratic society" within the meaning of Article 10 of the Convention. (Kuhnen V. Germany, 1988) Similarly, in Lehideux and Isorni v. France, the ECtHR confirmed that holocaust denial or revision was outside the protection of Article 10 by Article 17. (Lehideux and Isorni v France, 1998)

The Prospects for International Prosecution

Genocide cases and crimes against humanity could be the next limit of social media jurisprudence, drawing on precedents set in Nuremberg and Rwanda. The Nuremberg trials in post-Nazi Germany convicted the publisher of the newspaper *Der Sturmer*; the 1948 Genocide Convention subsequently included "Direct and public incitement to commit genocide" as a crime. That is forbidden by the Genocide Convention (1948), Article 3(c). If genocide were to be committed, then incitement could also be prosecuted as complicity in genocide, prohibited in Article 3(e), without the incitement necessarily being direct or public. During the UN International Criminal Tribunal for Rwanda, two media executives were convicted on those grounds. As prosecutors look ahead to potential genocide and war crimes' tribunals for cases such as Myanmar, social media users with mass followings could be found similarly criminally liable. (Laub, 2019)

Conclusion

The prosecution may need to identify the precise moment when the motive first emerged to demonstrate that racism was the driving force behind the criminal conduct. This would be almost impossible, especially on a social media platform, suggesting a need for further elaboration on judicial constructs. Thus, in response, courts have only admitted evidence of the defendant's racism when it involved statements made at the time of the criminal activity, using the *res gestae* theory already encoded by the French and English laws. Provisions in the United Kingdom's Malicious Communications Act 1988 and Communications Act 2003 suggested many social media hate crime cases could be prosecuted.

It brought into play the ambiguous relationship between motive and intention. As discussed above, intent was the purpose of using a specific means for bringing about some certain result. In this way, intention to insult meant the reason why a particular means was used for a planned outcome. By contrast, motive was the impelling power, which triggered the action required to achieve the specific result. According to DPP v. Collins, only the reasoning of the accused for using his or her method for the planned criminal outcome would indicate a culpable state of mind, where a message was in terms showing an intention to insult. The

message need not actually reach the intended recipient. All that matters is that reasonable persons in society would find the message grossly offensive. This objective test admits the inaccessibility of the mind of the accused.

A Facebook member wanted to make a reasoned political point, and thereby insulted another user of Facebook, who suffered some kind of consequent somatic personal injury as a result of his mental disposition and his relationship to Facebook activity. According to DPP v. Collins, this might indicate the Facebook writer's culpable state of mind, also demonstrating the required hostility within the meaning of section 28 of the Crime and Disorder Act 1998 (United Kingdom), without the accused ever knowing personally the criminally affected victim. Also, insult by Facebook would virtually eliminate the *res gestae* component suggested by the French Code and English statute, because there would be no way to know the tight sequence of events of a lone person using Facebook. Hate crime, then, might well be nothing more than an insulting sign, and the legislative purpose is to prevent symbolic hostility by the mass taking down of signs.

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