

THE JUSTICE PAPERS

The Bar Council

Defending Democracy



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Michael Olatokun
Bingham Centre

In the UK we have a say in how our country is run. We elect Members of Parliament (MP) to create laws and scrutinise government policy. Ministers, usually selected from the party with the largest number of MPs, lead departments, create policy and make decisions. Outside of elections, we have the opportunity to influence decisions by engaging with politicians, holding events, creating petitions and campaigning. If your MP does things that you do not like, you can vote for someone else at the next election. This is representative democracy and it should empower each and every one of us to be part of the public policy conversation.

In this way, we keep our government accountable. And it is certainly important to impose some limits on the exercise of its powers; our government is a mighty force. It commands one of the world's strongest economies, has more nuclear weapons than all but four countries and has a permanent seat on the UN Security Council, from which it shapes international affairs. Our government is in charge of health, education, taxes, crime and the prevention of terrorism. There is a lot at stake and it's important that the system, the representative democratic system, works.

Having a say should not be taken for granted, and the law protects our democracy where it is undermined. Just last year, London's police force banned climate change protests in London.

More alarmingly, 'fake news' is being used to manipulate our thoughts and actions. These issues threaten our ability to critically engage in political debate about how politicians should represent us. The law provides tools to safeguard our representative system – here's how it works.

The ban on climate change protests

Laws at the national and international level protect two important rights: the freedom of assembly and the freedom of expression. The first freedom means that you should be able to join any group that you wish. The second freedom means that you should be able to do and say whatever you wish. These rights are qualified – they can be limited, but only by law and only to the extent necessary in a democratic society. Further, any limitation must be to "achieve a legitimate purpose". It is not hard to imagine limitations that meet these requirements. Most people agree that prohibiting hate speech and prohibiting association with groups set up to harass minority communities is justified. On the other hand, it is also not too hard to imagine that people may disagree on what limitations are necessary in a democratic society and what purposes are "legitimate".

In societies such as ours, there are contested views as to the role of government. As a citizen, you may wish to challenge something the government is doing, and

you might wish to join together with like-minded activists to make your voices heard together. Your campaign may resist the status quo, and your methods might not be considered appropriate by the authorities. This was the challenge faced by the Extinction Rebellion (XR) group last year.

In October 2019, a large number of XR campaigners held protests throughout London. Driven by the scientific consensus that climate change will cause catastrophic damage to the environment within a generation, they marched and occupied areas, aiming to “peacefully shut down all roads into Westminster... and non-violently disrupt the government.”

The response by the authorities was swift. The Metropolitan Police (the Met) banned every climate protest taking place across the whole of the capital, stating that the demonstrations caused “serious public disorder, serious damage to property or serious disruption to the life of the community.” They issued an order, known as ‘a condition’ that “any assembly linked to the XR ‘Autumn Uprising’ must now cease their protests within London by 2100 14th October 2019.” This meant that irrespective of whether someone protested in the centre of London or far, far away on the outskirts, the ban would stop them from marching.

In the XR case the campaigners challenged the Met’s ‘condition’ on the basis that

protests taking place in different parts of the city could not be said to be the same “public assembly” for the purposes of the law. They argued that it was unlawful for the police to create a blanket restriction on all XR protests across the whole of London. They also argued that the Met’s actions undermined the protection given to the right to protest by the law. This was a fundamental clash between competing interests; the right to protest on one hand and the duty of the police forces to maintain order on the other.

In the end, the court decided that the actions of the police force were unlawful. In their decision, the High Court quoted a recent case: “[i]n a free society all must be able to hold and articulate views, especially views with which many disagree. Free speech is a hollow concept if one is only able to express “approved” or majoritarian views. It is the intolerant, the instinctively authoritarian, who shout down or worse suppress views with which they disagree.” This illustrates the importance that our legal system places upon protecting the right to protest and the freedom of expression.

Judges have to make difficult decisions of this nature every day. What do you think about this decision? Was the balance that was struck right?

Digital threats to democracy

We have seen so far that the law empowers us to speak our minds about political issues in-between elections. But what about the elections themselves? In this 'information era', the rise of new technologies used by political advertisers has meant that we are increasingly vulnerable to manipulation. Data Protection laws empower a body called the Information Commissioner's Office (ICO) to punish those that do not respect our information rights, ensuring protection for digital threats to democracy.

'Fake news' or 'disinformation' is false information deliberately spread to influence our behaviour. Disinformation uses advanced forms of technology, such as hyper-targeted advertisements, to influence our thoughts in an acute manner that would not have been possible 50 years ago. Research from the University of Cambridge by Dr David Stilwell suggests that analysis of an individual's social media 'likes' could indicate how they perform on personality tests to a more accurate degree than their family members and work colleagues, leading to the popular saying "Facebook knows you better than your mum."

Political advertising companies Cambridge Analytica and SCL Elections took advantage of the opportunities afforded by hyper-targeted advertising. The firms captured information from countless Facebook profiles and used the Facebook login tool to access the

information of users' 'friends' on the platform. They then used this information to target individual users with political advertising on their social media accounts. The advertising was hyper-targeted and utilised research into emotional and psychological responses to ensure people were deeply influenced by the content they saw, pushing them to vote for particular political parties and issues.

Concerned about the legal, ethical and moral implications of this activity, the ICO launched an investigation. The investigation revealed that the data was processed "in a way that the data subjects were not aware of, for purposes which they would not have expected, without a lawful basis for that processing. Furthermore the processing was incompatible with the purposes for which the data was originally collected."

The ICO issued 11 warning letters to political parties, a six-figure fine to Facebook and enforcement notices to SCL Elections and associated companies. The enforcement notices required the firms to provide social media users whose information they had harvested with information about the data they held and to cease processing the personal data of UK citizens for political campaigning.

The law provides that those who do not comply with enforcement notices will be criminally prosecuted. SCL Elections did not meet the requirements of the notice and were prosecuted in a criminal court

for this failure. The company was fined £15,000 for non-compliance.

The ICO also has direct powers to sanction organisations that do not respect data protection law. The Facebook fine, £500,000, was ordered for failing to protect the privacy of users and for a lack of transparency about how our data could be used. The Data Protection Act 2018 increased the maximum fine the ICO can hand out to the higher of €20,000,000 or 4% of global income in the previous financial year; a real deterrent to companies that seek to use disinformation in the future.

In the era of the all-powerful tech giants, the ability of public servants like the ICO to defend our information rights and successfully hold data misusers to account is inspirational. We should all take this example and appreciate our ability to participate in a representative democracy. We all have a role to play, and the law is as much about empowering us to realise our rights as it is to prevent others from abusing them.