Chapter 11

The Need for a Dualist Application of Public and Private Law in Great Britain Following the Use of “Flame Trolling” During the 2011 UK Riots: A Review and Model

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ABSTRACT

Since time immemorial, the legal systems of Great Britain have often been spoken of highly as pinnacles of democracy. However, the split between criminal law and tort law have often caused problems where the police has often focused on the prosecution of people in poverty and where only the wealthy can afford to use the system. This chapter discusses the extent and limitations of existing measures to tackle computer-related crime, particularly with regards to the abusive kind of Internet Trolling, namely “flame trolling.” The chapter recommends further research to establish whether it should be the case that in a society based on dualism that criminal and civil cases should be held at the same time, and that in both instances those being accused of an offence or tort should be allowed to bring a counter-claim. It is discussed that in such a system the cases that would be brought are where there is a clear victim who had no part in the offence against them, such as murder, rape, theft and burglary, which are usually carefully planned and orchestrated acts.

DOI: 10.4018/978-1-4666-8345-7.ch011
INTRODUCTION

It is often said that Great Britain has one of the best legal systems in the world. At present it is made up of three legal jurisdictions, namely the law of England & Wales, Welsh law and Scottish law. Following the 2014 Scottish independence referendum there were calls for a separate jurisdiction of English law as it became clear there would be more powers devolved to Scotland. This might lead to the jurisdiction of England & Wales being broken up, with devolved parliaments in each nation, meaning Acts of the UK Parliament will only be used for issues that affect all nations. All of these existing legal systems have a wide range of similarities, since they are based on a statute and case law model which is a typical feature of common law patronage and therefore sharing the same Supreme Court.

Unfortunately for legislative democracies of this kind, taking account of the role of technology and the effect it has can take a long time. Although it could be argued that existing law is capable of dealing with offences arising out of social media (Bishop, 2010; Bishop, 2013a), the lack of the right for the judiciary to fill the gaps where public law (i.e. statute) does not provide for an act to be an offence causes problems. That is because it takes a long time for the law to update to take account of changes relating to e-democracies. But even the judiciary are not immune to problems, as judges may make decisions in absence of complete information leading to miscarriages of justice. If the courts had the power to fill in the gaps in the law, then there would need to be an easy means for elected politicians to tell these judges what decision they would be expected to make if a law already existed. This would avoid the creation of a democratic deficit where unelected judges, who lack the legitimacy that elected politicians have, could make decisions without being accountable for them.

In many cases legal action is commenced by the authorities for it to then be lost on grounds of technicalities in absence of existing law. An example is issues arising about whether precise set of acts constitutes an ‘offence’ rather than the pivotal argument resolving on whether it was a ‘crime’ from the point of view of both the complainant and the court, regardless of whether a law exists or does not exist. The former is possible under the European Convention of Human Rights, even with the provision of Article 6 giving the right to a fair trial without being charged with a crime that didn’t exist when it was committed. This was vividly exemplified in the case of Pinochet v Bow Street Metropolitan Stipendiary Magistrate and Others (ex parte Pinochet Ugarte) (No. 3) [2000] 1 A.C. 147; [1999] 2 W.L.R. 827; [1999] 2 All E.R. In this case the applicant’s acts were offences in the literal sense but have not been incriminated until the 9 September 1988, when section 134 of the Criminal Justice Act 1988 came into force.

Essentially, an efficient legal system ought to be perceived based on the notion of injury suffered by the complainant as the criterion for a crime to exist (i.e. malum reus), which is called a ‘bleasure’ (Bishop, 2011a; Bishop, 2014a; Bishop, 2014b; Bishop, 2014f). Such an interpretation of the European Convention on Human Rights should only be allowed providing that it does not impinge on the Convention and other rights of the accused and thus cause injury to them through being denied their rights. The dualistic approach in the UK ought to be flexible in allowing merits of monism approach as with private law rather than a strictly dualistic designed interpretation of statutory provisions which largely concentrates on the contextual and literal interpretation of ‘offences’. The proposed approach would be more efficient and would secure greater justice for those who feel trespassed against such as through being harmed by online postings of defamatory statements, acts of assaults and other forms of trespass to person.