Aberystwyth University Student Law and Criminology Journal

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Introductory Note

The Aberystwyth University Student Law and Criminology Journal (AUSLCJ) is proud to present its second edition, showcasing articles written and reviewed primarily by students. Our journal gives students the unique opportunity to participate in academic discourse and to contribute to the knowledge base in both Law and Criminology. The AUSLCJ also aims to promote the use of Welsh language and embed Welsh language into the academic life of the University and beyond.

The Journal is the brainchild of Dr Ola Olusanya, a lecturer at Aberystwyth University, however it is run primarily by students. It is open to all students studying both Law and Criminology, allowing for the sharing of ideas between not only undergraduate and postgraduate students but also the disciplines of both Law and Criminology. This edition includes a wide breadth of subjects, incorporating both long and short essays as well as dissertations and is a clear testament to Aberystwyth University and its students.

In creating this second edition we wanted to ensure that we published the best possible selection of articles in order to meet the standard set by last year's edition. There are various themes explored within this year's journal ranging from the legality of foreign intervention in Syria: 'The legality of the use of force by the US-led coalition against IS in Syria' (written by Sunniva Samdal) to the lack of criminological study in relation to littering despite its negative impact upon the environment: 'Littering the Cinderella of Criminology' by Catrin Stephenson. We hope that you will agree that this year's edition has a little something for everyone depending on their interests.

On behalf of those who worked on the journal, we would like to give thanks to all of the people who contributed their time and effort to ensure that this issue could be published for you to enjoy. We would like to give special thanks to Peter Potts and Helen Sharma for helping publish this edition and Dr Ola Olusanya, for his continued support, encouragement and ideas.

We sincerely hope you enjoy this issue of the Aberystwyth University Student Law and Criminology Journal (AUSLCJ).

Matthew Armytage
Managing editor

Foreword

Few universities afford their students the chance to be involved in the process of publishing academic work while they are still studying. The Aberystwyth University Student Law and Criminology Journal (AUSLCJ) remains one of but a handful of such projects across the country – run by students for the benefit of all the students in the Department of Law and Criminology. Last year saw the publication of the Journal's inaugural volume; yet the true challenge for any journal's long-term survival is to produce a second volume which matches or exceeds the quality of the first. We are confident that this offering has more than met that challenge.

This year saw a record number of high-quality submissions for both law and criminology. It is thus with some regret that, for space reasons, we had to limit what could be included. In making the difficult decisions as to which pieces to feature we have sought to cover as broad a range of topics as possible which will be of interest to the wider Law and Criminology student body – while at the same time reflecting some of the major contemporary issues currently facing the legal and criminological worlds. It would be a disservice to our authors to single out particular works in this Foreword; they have each been chosen on their merits as contributing a new or challenging perspective to the area(s) that they address. We hope that there will be something of interest to everyone in this volume.

As many of you may be aware, our predecessor Ern Nian Yaw tragically lost his life last summer. Ern played an important role in the publication of the inaugural volume of the Aberystwyth University Student Law and Criminology Journal (AUSLCJ). As a lasting tribute we are proud to announce the creation of the *Ern Nian Yaw Award* in his memory – which will be awarded to the authors of the best law and criminology pieces submitted for publication each year. Further details of this year's awards can be found on page 7

Finally, the Editorial Board would like to take this opportunity to express their sincere thanks to all those who gave of their valuable time to submit, edit, or review articles for publication. A lot of unheralded work behind the scenes is required to produce a volume such as this, and it would not have been possible without the contribution of each and every one of them.

It is our hope that you will find it stimulating, interesting, and enjoyable to read; and that you will be inspired to contribute to making the third volume even better.

Edward Ditchfield, Sunniva Samdal, and Karina Djokova

The Editors-in-Chief

The Ern Nian Yaw Award

Our first edition was published last year with the aid of a great many people, far too many to list here. Nonetheless, the efforts expelled by Ern Nian Yaw, one of three editors-in-chief at the time, were exemplary and are worthy of mention. His commitment to the project, his drive to see it completed to a high standard, his staggering work ethic, and his attention to detail, were outstanding and all played an essential part in ensuring the success of our inaugural publication. These qualities were generously paired with a warm, friendly, and endearing personality which infected all those around him. As such it was a pleasure to work with Ern and to follow the example he set.

With great misfortune however Ern never saw the fruition of his contribution to the first edition of the Journal that he helped to launch. In July 2014, shortly before publication, Ern was sadly involved in a traffic accident which claimed his life. His loss was truly tragic and was felt by all involved with the journal and the Aberystwyth University Department of Law and Criminology itself. Writing at the time Professor John Williams, Head of the Department, stated "It is sad beyond what words can express that his life ended so suddenly and at such a young age. His academic successes and the accolades he achieved are testimony to his many achievements during his short life. His death is a great loss. He was a lovely person who will stay in our memories. He was kind and caring. To meet him would brighten up the day. Ern's legacy will inspire future generations of students and staff at Aberystwyth and beyond, and that is an appropriate tribute to such a great person."

In the spirit of Ern's legacy, the first edition was published in his honor. I had the honor of writing Ern's dedication in that edition and although I doubt that my words truly did justice to the sentiment felt by those involved I hope I summed up our wishes by stating "It is our hope that its content can inspire others in the way he has inspired us." In many ways I believe that a great deal of progress towards that goal has been achieved. In the past year I have received a great number of positive comments regarding the Journal. I have seen statistics showing that it is regularly accessed online. The Thomas Parry Library has a hard copy available for students. A further two hard copies were actually (and scandalously) stolen

from within the Department itself. Perhaps most significantly, the number of papers submitted for consideration for the second edition increased by almost fifty percent!

Moving forward however all parties involved in the production of the Journal agreed that we needed to do more to honour Ern's legacy. The first step was to ensure the project did not end in the summer of 2014 and continued to be produced annually. The second was to ensure that Ern himself was remembered and remained part of the Journal itself. With this in mind I am very proud to launch the *Ern Nian Award* which will be bestowed upon the authors of the best law and criminology articles published by the Journal each year. It shall be awarded to authors who have demonstrated the very qualities possessed by Ern: outstanding academic ability, fantastic work ethic, and an eye for detail. To this end the journal would like to congratulate Jack Hickling (The Abandonment of Proportionality: A Critical Analysis of S.43 of the Crime and Courts Act 2013) and Catrin Stephenson (Littering: The Cinderella of Criminology) on the excellent quality of their submissions and for becoming the first recipients of this award.

It is once again our hope that Ern and this award can inspire you as he inspired us.

Andy Hall

Managing Editor

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The Aberystwyth University Student Law and Criminology Journal seeks to enhance the student experience at the Department of Law and Criminology by providing the opportunity for Student Editorial Board members to learn and develop professional skills including copy editing and proofreading. The utmost care has been taken to ensure that all accepted contributions are as error-free as possible. However, it is conceivable that on occasion errors will be missed due to human error.

The concept of justice in the context of decisions about imprisoning women

Violeta Kunovska

The concept of justice is an integral part of political life as it helps measuring the effect of different policies (Walby, 2012).

The purpose of this essay is to look at some theories of justice in terms of sending women to prison. There are three main theories which had the biggest impact on the concept of justice – Rawls, Sen and Nussbaum. Rawls looks at equality between citizens (Bien-Aime, 1990), but when considering imprisonment, treating men and women the same might not mean being equal (Mason & Stubbs, 2010). Sen's theory of justice is based on the notion of capacity and how enabled people are to entitlements (Sen, 2010). However, most women offenders are deprived of entitlements and sentencing women to prison leads to more social problems (Brown et al., 2012). Moreover, Nussbaum lists distinct categories of capabilities, which are goals for achieving full well-being (Walby, 2012) though well-being in prisons is compromised in many cases by mental health problems, self-harm and suicidal attempts (Hutson &Myers, 2012).

One of the most influential theories in modern philosophy is Rawls' 'justice as fairness' (Sen, 2010, p.59). Rawls states that justice should come from the idea of fairness, which calls for unbiased evaluations (Sen, 2010). Rawls' idea is that everyone in a society is equal; equal citizenship (Bien-Aime, 1990). He believes that liberties and opportunities throughout the society should be equal to everyone, the state being responsible for their distribution from one generation to the next, but citizens should be interested in accessing different

opportunities on their own (Hunt, 2013). The rise in the number of women in prison can be contributed to a shift towards treating men and women equally, which resulted in new sentencing patterns, longer prison sentences and changing the nature and seriousness of women's crimes (Gelsthorpe & Morris, 2002). The feminist – inspired approach is that people should be equal, but that does not mean treating men and women the same way (Corcoran, 2010).

This is one of the criticisms of Rawls' idea - he fails to acknowledge the differences between men and women and the specific role women have in the society (Bien-Aime, 1990). The needs of men and women are different and women's needs go beyond material issues of housing, employment and substance abuse; women are primary caregivers, many are victims themselves, addicts or unemployed (Mason and Stubbs, 2010). However, because the female offenders are significantly fewer than male offenders, sentencing laws are focused on male crimes and male characteristics which distance them from the different needs, roles or characteristics of females (Covington & Bloom, 2003).

Mason & Stubbs (2010) state that there is a need for more gender-responsive policies, programs and research. Researchers also make note of the distinction between sex specific characteristics and socially constructed gender roles that women have within society (Covington & Bloom, 2003). Although there is a group of researchers who believe that equality under the law is required in order for women to be treated equally in economic and social realms, there is a mutual agreement that women are being victimised by laws which are there to protect them (Covington & Bloom, 2003). Moreover, the gender-neutral sentencing reforms are being pushed broadly in the USA, but many see the term 'gender-neutral' as utilising the male standard (Covington & Bloom, 2003).

In the UK, the Equality Act 2006 calls for 'gender-specific' services and obliges criminal justice agencies to take the gender differences into account. In order to be objective, criminal justice have to acknowledge the differences and treat men and women differently (Corcoran, 2010). Rawls' work on the concept of justice had a great influence on Sen's idea (Sen, 2010), which has been taken by many and has been recognised as one the most accurate ways to describe justice (Walby, 2012).

Several key points focused by his theory are functioning, achievement or outcome, and capabilities; the capacity to achieve the outcome (Walby, 2012). Sen argues that capabilities are more important than functioning in his approach to justice (Walby, 2012). His capability theory is linked to a number of human needs which helps individuals to flourish (Holmwood, 2013). These needs are universal, inseparable and have to be looked at from multiple dimensions. Sen argues that the recognition and acceptance of the individual flourishing have to be the main question (Holmwood, 2013).

When talking about women in prison, statistics show that the majority of female crimes are ones of the powerless, where women are deficient in capabilities (Brown et al., 2012). Research found that most female offenders experienced a wide range of social problems (Rumgay cited in Gelsthorpe & Morris, 2002). Female prisoners come mostly from ethnic minority backgrounds, with the majority living in poverty. Some might even have a history of discrimination, neglect, abuse, violence or social marginalisation (Brown et al., 2012), out of which the most often stated reasons for offending being financial difficulties and pressure from the responsibilities of caring for a child. Additionally, achieving good outcomes is often obstructed by chronic victimisation since childhood or domestic abuse (Gelsthorpe & Morris, 2002).

Moreover, custodial sentencing of women has a profound impact on family life (Prison Reform Trust, 2011). The primary role often ascribed to Mothers is often one of caregiver, female inmates who would like to maintain contact with their family are often unable to as the number of female prisons is low, so mothers could be sent further away, which may result in them seeing their children rarely (Silvestri, 2012). The consequences on the family life are damaging.

Sentencing women to prison has a great impact on children as well. Many issues have been identified with parental imprisonment such as substance abuse and some mental health issues. Research also shows that maternal incarceration, more specifically, can cause greater disruptions than that of paternal incarceration, leading to greater risk of insecure attachment and psychopathology (Epstein, 2014). There were also different behavioural problems displayed by children whose mothers were imprisoned, such as sleeping and eating disorders, becoming withdrawn and hardships in developing social skills (Caddle and Crisp cited in Silvestri, 2012). Justice can be achieved when there are good social outcomes for each individual or for each group of individuals (Sen, 2010). However, research shows that female imprisonment harms those around them, as well as the women's individual lives. (Silvestri, 2012).

Finally, Sen looks at the idea of well-being (Sen, 2010). The well-being is characterised by freedom of functioning, so that people could find valuable goals to achieve (Drydyk, 2012). It is freedom to achieve something, which shows more a? positive attitude than a freedom from something (Kremakova, 2013). Drydyk (2012) notes that one of the goals in achieving justice would be the increasing of the individual's well-being. Although Sen does not define separate capabilities because he believes this concept should reserve a high level of

abstraction, Nussbaum lists 10 categories of capabilities, many of which include more than one capability (Walby, 2012). It includes life, being able to live to the end of one's life expectancy, body health, emotions, affiliation etc. (Stein, 2009). Nussbaum believes in a justice that is allowing people to fully reach all those capabilities, in order to increase their well-being (Stein, 2009).

However, when talking about justice in the female prison system, research shows that prisons dehumanise and infantilise women through inappropriate treatment, proved to be harmful (Segrave and Carlton, 2011). Carlen (1994) criticises the existing literature for not looking at the notion that prisons inflict 'state-legitimated pain' deliberately (p.136). She believes that the pains are well-known, but they are considered inevitable in order to maintain organisational control. A report from the Prison Reform Trust (2011) states that sentencing women to prison is more traumatic for women and there is a higher incidence of self-harm than for men. For instance, in 2009 43% of all incidents of self-harm in prison are accounted to women, even though they represent only 5% of the whole penal population. Moreover, statistics show that the majority of female inmates suffer from mental health issues and more than a half have personality disorders (Hutson & Myers, 2012).
These problems together with depression, anger at themselves and the wish to die are regularly cited to be reasons why women turn to self-harm and suicidal attempts while in prison (Byrne and Howells, 2002). Self-harm, mental issues, suicides, etc. are disproportionate to Nussbaum's list of capabilities, which are understood to be goals for the concept of justice (Drydyk, 2012).

In conclusion, there are three main theories of justice, juxtaposed to the decision of sending women to prison, considered in this essay. These are Rawls' theory of justice as fairness and Sen's and Nessbaum's theories of capabilities and well-being (Walby, 2012). Women in

prison suffer from a deficiency of capabilities to achieve their role in society (Silvestri, 2012), their well-being is compromised because of the different issues and problems they have (Byrne and Howells, 2002) and there are different points of view whether women should be treated the same way as men, even though it victimises them (Covington & Bloom, 2003).

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The legality of the use of force by the US-led coalition against IS in Syria

Sunniva Samdal

1. Introduction

The Islamic State (IS), also known as the Islamic State of Iraq and Levant (ISIL) and Islamic State of Iraq and Syria (ISIS), is a transnational Sunni Islamist insurgent and terrorist group.[1] Its aim is to establish an Islamic State caliphate ruled by Sharia law. The radical group controls areas in north-western Iraq and north-eastern Syria, including areas adjacent to Syria's borders with Turkey and Iraq.

In the summer of 2014, IS made huge territorial advances into northern Iraqi territory, seizing control of major Iraqi cities and threatening the federal government in Baghdad.[2] The unity of the country being at risk, the Prime Minister Nouri al-Maliki asked the United States for air assistance in quelling the military uprising.[3] The US in turn assembled a coalition of

[1] IS has been designated as a terrorist organization by the United Nations, the European Union, the United States and the United Kingdom amongst others; US Department of State, 'Foreign Terrorist Organisations,' accessed 31/10/14 at http://www.state.gov/j/ct/rls/other/des/123085.htm; Home Office 'Proscribed Terrorist Organisations,' (28/11/14) accessed 06/12/14 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380939/ProscribedOrganisations.pdf; HM Treasury 'Financial sanctions: consolidated list of targets' (19/06/13) accessed 06/12/14 at https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets and http://hmt-sanctions.s3.amazonaws.com/sanctionsconlist.htm.

[2] Abbas, M. 'Maliki asks for US help as ISIS expands in Iraq' (13/06/14) Al-Monitor, accessed 31/10/14 at http://www.al-monitor.com/pulse/tr/security/2014/06/iraq-isis-expansion-mosul-maliki-us-assistance.html#.

[3] Mitchell, A. 'Iraq Asks U.S. to Help Quell Militant Uprising' (12/06/14) NBC News, accessed 31/10/14 at http://www.nbcnews.com/news/world/iraq-asks-u-s-help-quell-militant-uprising-n129091; Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, 22. September 2014, UN Doc. S/2014/691 accessed 07/12/14 at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/691.

partner countries to combat IS and began air strikes against IS targets in Iraq in August 2014.[4]

In September 2014 the military action was extended to Syrian territory in which IS was enjoying a safe haven and secure support platform from which to regroup.[5] The attacks were seen as a necessity in order for the US and its allies to 'degrade and ultimately destroy' the global threat of IS.[6] Hence, starting on the 22nd September 2014, the US, Bahrain, Jordan, Qatar, Saudi Arabia and the United Arab Emirates began air strikes against about 20 IS targets in Syria.[7]

The air strikes in Syria have given rise to a debate as to whether military action against IS in Syria is a legitimate use of force. This article aims to identify possible exceptions to the laws prohibiting the use of force which may be applicable to the air strikes starting on the 22nd September in order to come to assess whether the air strikes are a legitimate use of force under public international law.

The discussion in this article will proceed in three parts. The first part briefly lays out the law governing the use of force, focusing on the United Nations (UN) Charter and customary

[4] However, the action in Iraq will not be discussed as the intervention was done with the consent of the Iraqi government. See: Letter from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, 20 September, UN doc. S/2014/691, accessed 17/12/14 at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf.

[5] BBC, 'Russia Warns US Against Strikes on Islamic State in Syria' (11/09/14), BBC News, accessed 28/10/14 through http://www.bbc.co.uk/news/world-middle-east-29154481.

[6] Sherwood, Harriet, 'Attacking Isis in Iraq and Syria – the Guardian Briefing,' (16/09/14) The Guardian, accessed 28/10/14 at http://www.theguardian.com/world/2014/sep/16/-sp-world-briefing-us-attacking-isis.

[7] Fox News, 'Damascus says Washington gave UN envoy advanced notice before airstrikes' (23/08/14) accessed 28/10/14 at http://www.foxnews.com/world/2014/09/23/damascus-says-washington-gave-un-envoy-advance-notice-before-airstrikes/

international law. The second part examines the exception to the laws of armed intervention in internal conflict. The third and last section investigates whether military intervention in Syria can be justified on the basis of collective self-defence before coming to a conclusion.

2. The Prohibition of the Use of Force

The contemporary prohibition on the use of inter-state force is controlled by both treaty and customary law. The General Treaty for Renunciation of War as an Instrument of National Policy 1928, also known as the Kellog-Briand Pact, was the first attempt to prohibit war completely, and is still in force. Under this treaty war became prohibited, except in self-defence – which emerged as an independent right.[8] Yet since the prohibition applied to war and not use of force, the Pact was flawed: as forcible measures 'short of war' was eliminated from consideration. These shortcomings were redressed in the UN Charter.

One of the Charter's primary purposes is, the 'suppression of acts of aggression or other breaches of the peace.'[9] This statement is given substance in Article 2(4), which provides:

> 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.'

[8] Although the Pact itself made no reference to self-defence, the *travaux préparatoires* indicate that this was because the existence of such an exception was taken for granted; Dixon, M.(2013) Textbook on International Law (7th Ed), Oxford University Press, p. 323.

[9] Art. 1 United Nations Charter.

This general prohibition on inter-State force covers any threat or use of force, avoiding the term 'war', and thus includes forcible measures 'short of war'[10]. The General Assembly Declaration on Friendly Relations between States[11] later settled that the prohibition on the use of force is limited to the use of physical force and aggression. It does not include other types of injurious conduct such as 'economic aggression'.[12]

The prohibition on the use of force embodied in Article 2(4) is also recognised as a rule of customary international law, running parallel to the Charter. It has attained the status of *jus cogens*, becoming a peremptory norm of international law from which no derogation is permitted. [13] Thus all States are prima facie prohibited from the use of force against another State.

The US-led coalition's air strikes in Syria clearly amount to the use of armed force on the territory of another State. However, the operation may be considered a legitimate use of force if it can be justified on the basis of a recognised exception. At present there are three universally recognised exceptions: if authorised by the UN Security Council (SC) pursuant to article 42 of the UN Charter[14]; self-defence; and with the consent of the territorial state

[10] This was the particular problem under the Kellog-Briand Pact where states hid behind claims that their behaviour did not, legally, amount to war; Klabbers, J. (2013) International law, Cambridge University Press, p. 190; Dinstein, Y.(2005) War, Aggression and Self-Defence (4th Ed), Cambridge University Press, p. 85.

[11] 1970, GA Res 2625 (XXV).

[12] United Nations General Assembly Resolution 3314 (XXIX), *Definition of* Aggression, 1974.

[13] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para. 188; Vienna Convention on the Law of Treaties 1969, Article 53.

[14] Article 42 of the United Nations Charter states as follows: 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.' The NATO intervention in Libya in 2011 falls under this category as it was permitted under Security Council Resolution 1973.

where the operations are conducted. As the SC has not authorised military action against IS in Syria this exception does not apply and will be considered no further.

The discussion will now turn to an examination of the two remaining exceptions and their possible applicability to the US-led coalition's air strikes against IS in Syria.

3. Intervention by invitation

Under customary international law the involvement of a third State in the form of armed intervention in the internal conflict of another is lawful if requested by the State's legitimate government. This general rule was recognised in General Assembly Resolution 3314 (xxix),[15] and later in the International Law Commission's Articles on State Responsibility which states:

> 'Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.'[16]

The validity of this has also been confirmed by the International Court of Justice (ICJ) in the cases of *Nicaragua*[17] and *Democratic Republic of the Congo* (DRC).[18] Hence, armed intervention in the internal affairs of a state at the request of the legitimate government is a

[15] General Assembly Resolution on the Definition of Aggression No. 3314 (xxix), Article 3(e) provides that one instance of aggression is 'the use of armed forces which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement.'

[16] 2001, Article 20.

[17] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para. 246.

[18] In *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda* (2005) I.C.J. Rep.168, para. 42-54, the ICJ assumes without any discussion that a government can consent to foreign armed intervention on its territory. It focused rather on whether Congo had consented to the presence of Ugandan troops on its territory and if the consent had later been withdrawn.

clearly established principle of customary law. Relying on an invitation from an illegitimate government however will be contrary to the prohibition on the use of force as it does not have the power to speak for the State and cannot therefore confer any rights on the intervening state.[19] As observed by the ICJ in *Nicaragua*, such intervention would be prohibited as it would bear 'on matters in which each State is permitted by the principle of State sovereignty, to decide freely…'[20]

The air strikes conducted by the US-led coalition against IS in Syria have given rise to questions as to whether it constitutes an illegitimate use of force due to the lack of an invitation to intervene by the Assad government in Syria.[21] However, this issue becomes more complicated in light of recent statements that the Assad regime has lost its legitimacy due to the use of brutal force against the Syrian population;[22] and through state recognition of the Syrian Revolutionary and Opposition Forces, challenging the legitimacy of the Assad regime as Syria's government. Hence, in order to come to a conclusion as to whether the military action in Syria is a prohibited intervention, contrary to the principle of state sovereignty and a breach of the prohibition on the use of force, we must first investigate

[19] Khayre, Ahmed A. M. (2014) Self-defence, intervention by invitation, or proxy war? The legality of the 2006 Ethiopian invasion in Somalia, *African Journal of International and Comparative Law*, 22(2), 208, p. 9; Le Mon, C. 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested', 35 *Journal of International Law and Policy* (2002): 741-93, at 762.

[20] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para. 205.

[21] See for instance Channel 4 News, 'US air strikes in Syria – Q&A,' (23/09/14), accessed 06/01/15 at http://www.channel4.com/news/us-launches-air-strikes-in-syria-q-a; Bellamy, A., 'Legality, Legitimacy, and Humanitarian Intervention Against ISIS in Syria,' (16(19/14) IPI Global Observatory, accessed 06/01/15 at http://theglobalobservatory.org/2014/10/legality-legitimacy-human-protection-international-intervention-isis-syria-r2p/; The Week, 'Islamic State: are the US air strikes in Syria breaking the law?' (24/09/14), accessed 06/01/15 at http://www.theweek.co.uk/world-news/islamic-state/60562/islamic-state-are-us-air-strikes-in-syria-breaking-the-law.

[22] See for instance the UK Government, Foreign & Commonwealth Office, 'Assad inauguration has no legitimacy, says Foreign Secretary,' Press release, accessed 06/01/15 at https://www.gov.uk/government/news/assad-inauguration-has-no-legitimacy-says-foreign-secretary.

whether the Assad regime is truly the legitimate government of Syria, capable of issuing consent. In so doing the test for determining government legitimacy must first be examined.

3.1 The Condition of a Legitimate Government

Under the traditional effective control theory, government legitimacy and capacity for requesting foreign intervention does not depend on the legitimacy of its origin but whether it in fact holds the power and is the master of the nation.[23] There is a presumption under this theory that when a government exercises effective control over the territory and people of the state the government has the exclusive authority to express the will of the state, whether or not it does so with the express or tacit consent of the nation.[24] A government which has seized power by unconstitutional means, such as by the use of force, is a government '*de facto*'. Once such a government loses its control, although it is not actually overthrown, it also loses its capacity to express the will of the State.[25]

State recognition under the effective control theory has been treated as relatively unimportant. This may be seen in the *Cuculla* case of 1868:[26] which concerned a military uprising in Mexico led by Mr Zuloaga, who overtook the capital from which the

[23] It was stated in the *Dreyfus* case of 1901, at p. 188 that: 'According to a principle of international law…today universally admitted, the capacity of a government to represent the State in its international relations does not depend in any degree upon the legitimacy of its origin, so that…the usurper who in fact holds power with the consent express or tacit of the nation acts…validly in the name of the State'; quoted in Doswald-Beck, L. (1986) The Legal Validity of Military Intervention by Invitation of the Government, *British Yearbook of International Law*, p. 192. This approach was reaffirmed in *George W. Hopkins (U.S.A.) v United Mexican States* (1926) Reports of International Arbitral Awards, Vol.IV, para. 12.

[24] Ibid; Wippman, D. (1996) Military Intervention, Regional Organizations, and Host-State Consent, 7 Duke Journal of Comparative & International Law, p. 211-212.

[25] *George W. Hopkins (U.S.A.) v United Mexican States* (1926) Reports of International Arbitral Awards, Vol.IV, para. 12; Doswald-Beck, L. (1986) The Legal Validity of Military Intervention by Invitation of the Government, *British Yearbook of International Law*, p. 192.

[26] *Cuculla v Mexico*, Mexican United States Cl Com (1868); cited in Crawford, J. (2007) The Creation of States in International Law (2nd Ed.), Oxford University Press, p. 23.

constitutional President fled.[27] Major European governments, and arguably the American Representative, recognised the Zuloagan government.[28] However, the constitutional President had not lost control of the rest of the country and later retook the capital. The tribunal found that the Zuloagan regime was not a government under international law, regardless of state recognition, as recognition was based on pre-existing fact but did not create fact.[29]

State recognition and '*de facto*' control was further examined in the *Tinoco Concessions* arbitration of 1923[30]. It was stated in this case that where recognition was based on the alleged government's 'illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight...' and such non-recognition could not outweigh the evidence of a '*de facto*' government's existence.[31] Hence, a government cannot be found to not be the legitimate government of the state on the sole basis that it was not established and maintained in accordance with the Constitution.[32] The question to be asked is whether it exercises control and discharges its functions as a government, respected within its own jurisdiction, without any opposing force assuming to be a government in its place.[33]

However, although State recognition alone cannot negate governmental status, it does provide evidence that the government in question has 'attained the independence and control entitling it by international law to be classed as such'. [34] An important development

[27] Doswald-Beck, L. (1986) The Legal Validity of Military Intervention by Invitation of the Government, *British Yearbook of International Law*, p. 192.
[28] *Ibid*.
[29] Doswald-Beck, L. (1986) The Legal Validity of Military Intervention by Invitation of the Government, *British Yearbook of International Law*, p. 192
[30] *Aguilar-Amory and Royal Bank of Canada claims (Great Britain v Costa Rica)* (*Tinoco Case*)(1923) Reports of International Arbitrary Awards, Vol. I, 369-399.
[31] *Ibid.*, p. 381.
[32] *Ibid*.
[33] *Ibid*, p. 382.
[34] *Ibid*, p. 381.

in relation to state recognition of a government has been the inception of the UN. Almost all universally recognised states are members of the UN,[35] and membership gives legitimacy to the regime that individual state recognition cannot.[36] Further, once a regime is recognised and accepted into the UN, recognition will rarely be withdrawn, even when a government has lost control over a substantial portion of the State; as long as there is no single regime in control to take its place and it is not in imminent danger of collapse.[37] It is also significant if the government controls the State's capital, as in order to have effective control of a State's territory an entity must also possess the machinery of the State, which requires control of the State's capital.[38]

It should also be mentioned here that since the end of the Cold War questions of government recognition have increasingly revolved around democratic criteria and whether it is a freely and fairly elected government.[39] This popular '*sovereign'* approach of democratic legitimacy is still controversial but has, in recent years, validated armed interventions with the consent of a '*de jure*' government in exile that does not exercise effective control over the territory. The most recent example is the appeal to the the Economic Community of West African States (ECOWAS) by Alassane Ouattara, who won the 2010 elections in Côte D'Ivoire, to intervene and remove the usurper Laurent Gbagbo who

[35] The Vatican City is excluded; United Nations Regional Information Centre for Western Europe, 'Being a Member of the World's Biggest Club,' accessed 03/01/15 at http://www.unric.org/en/the-general-assembly/27007-being-a-member-of-the-worlds-biggest-club.

[36] Doswald-Beck, L. (1986) The Legal Validity of Military Intervention by Invitation of the Government, *British Yearbook of International Law*, p. 199.

[37] Wippman, D. (1996) Military Intervention, Regional Organizations, and Host-State Consent, 7 Duke Journal of Comparative & International Law, p. 210; Doswald-Beck, L. (1986) The Legal Validity of Military Intervention by Invitation of the Government, *British Yearbook of International Law*, p. 199.

[38] Talmon, S. (2013) Recognition of Opposition Groups as the Legitimate Representative of a People, *Bonn Research Papers on Public International Law*, No.1/2013, p. 14, accessed 26/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227615;

[39] Fox, G. 'Ukraine Insta-Symposium: Intervention in the Ukraine by Invitation,' (10/03/14) *Opinio Juris*, accessed 01/01/15 at http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-intervention-ukraine-invitation/.

refused to leave office.[40] Taking note of Outtara's request the SC authorised action and a peacekeeping mission to protect civilians.[41] The UN and French forces subsequently attacked Gbagbo's camps and Gbagbo capitulated.[42] However, the popular '*sovereign'* approach has only been applied to cases of military coups where the '*de jure*' government has been unconstitutionally overthrown and the elections were monitored by the UN, not against widespread social protests against the government.[43] Thus, where two opposing forces claim to represent the State and one has the genuine popular approval, the international community and international organisations is likely to prefer the popular sovereign over the one with effective control.[44] Nevertheless, in Syria there is no entity with valid expressed popular approval regarded as the '*de jure*' government. Thus, the test of government legitimacy applicable in this instance is the main criterion of effective control.

[40] Fox, G (2014) Intervention by Invitation, *Wayne State University Law School Legal Studies Research Paper*, No. 2014-04, p. 27, accessed 23/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407539; Gagnon, J. (2013) ECOWAS's Right to Intervene in Côte d'Ivoire to Install Alassane Ouattara as President-Elect, *Notre Dame Journal of International & Comparative Law*, Vol.3(1), Article 3.

[41] UN Security Council Resolution 1962 (20 December 2010); UN Security Council Resolution 1975 (30 March 2011); UN Security Council Resolution 1980 (28 April 2011); United Nations Press Release, 'Deeply Concerned by Humanitarian Situation in Côte d'Ivoire, Secretary-general says 'Civilians are Bearing the Brunt of Violence – the Fighting Must Stop',' 11 April 2011, SG/SM/13503AFR/2160, accessed 03/01/15 at http://www.un.org/press/en/2011/sgsm13503.doc.htm.

[42] Fox, G. 'Ukraine Insta-Symposium: Intervention in the Ukraine by Invitation,' (10/03/14) *Opinio Juris*, accessed 01/01/15 at http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-intervention-ukraine-invitation/. For another example see UN Security Council Resolution 940 (31 July 1994) which authorised military action to reinstate the elected President Jean-Bertrand Aristide after he had requested international action from the international community, having been overthrown by the Haitian military in 1991. Even after having been overthrown he was recognised as the State's legitimate leader; UN General Assembly Resolution on the Situation of Democracy and Human Rights in Haiti, UN Doc. A/RES/46/7, 11 October 1991, accessed 19/12/14 at http://www.un.org/documents/ga/res/46/a46r007.htm.

[43] Vaypan, G. (2014) (Un)Invited Guests: the Validity of Russia's Argument on Intervention by Invitation, *Cambridge Journal of International Comparative Law,* accessed 17/12/14 at http://cjicl.org.uk/2014/03/05/uninvited-guests-validity-russias-argument-intervention-invitation/.

[44] Fox, G (2014) Intervention by Invitation, *Wayne State University Law School Legal Studies Research Paper*, No. 2014-04, p. 27, accessed 23/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407539.

3.2 The Effective Control Test Applied: is the Assad Government the Legitimate Government of Syria?

The Assad regime is not democratically elected and has kept itself in power through the use of military force against its own population.[45] However this is not relevant under the effective control test. What needs to be established is whether the Assad government exercises effective control over the territory and people of the State and performs the state functions. At present, the Syrian territory is divided between the Assad regime, mainly controlling the western and southern parts of Syria; with Kurdish forces, IS and other opposition forces and rebel groups, primarily controlling the northern and eastern parts.[46] However, although the Assad regime has lost control over a significant amount of Syria's territory, it still controls a sufficiently representative part, including the capital Damascus. Additionally, it also exercises the functions of the State such as representing Syria in the UN[47] and organising governmental elections.[48]

Recently the Assad government's legitimacy has been challenged in response to the regime's excessive use of force against its own population to secure its position. The UN Secretary-

[45] For the democratic illegitimacy of the Assad regime see the UK Government Press Release, 'Syria elections only designed to sustain Assad's dictatorship', 21 April 2014, accessed 27/12/14 at https://www.gov.uk/government/news/syria-elections-only-designed-to-sustain-assads-dictatorship; Koush, O. 'Assad won elections but has not legitimacy' (08/06/14), Middle East Monitor, accessed 27/12/14 at https://www.middleeastmonitor.com/articles/middle-east/11961-assad-won-the-election-but-has-no-legitimacy.

[46] See BBC News, 'Syria: Mapping the Conflict,' (11/11/14) accessed 01/01/15 at http://www.bbc.co.uk/news/world-middle-east-22798391.

[47] Member States of the United Nations, accessed 01/01/15 at http://www.un.org/en/members/; Reuters, 'U.S. restricts movements of Syria's U.N. enjoy Ja'afari', (05/03/14) accessed 01/01/15 at http://www.reuters.com/article/2014/03/05/us-syria-crisis-usa-un-idUSBREA2429I20140305; Rosen, A., Walker, H., 'Syria's Ruling Regime Liked Obama's UN Speech – Except for One 'Small Part',' Business Insider, accessed 01/01/15 at http://www.businessinsider.com/syrian-reaction-to-obamas-un-speech-2014-9?IR=T.

[48] See The Telegraph, 'Syria: Bashar al-Assad calls parliamentary election on May 7,' (13/03/12) accessed 02/01/15 at http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9140950/Syria-Bashar-al-Assad-calls-parliamentary-election-on-May-7.html.

General told the UN General Assembly that 'it is evident that President Assad and his Government have lost all legitimacy.'[49] This view was mirrored by the former UN Secretary General, Kofi Annan, who has stated that 'the current (Assad) government has lost all legitimacy.[50] Nevertheless, the fact that a government loses its legitimacy due to the use of force against its own population does not necessarily mean that it also loses its governmental status.[51] The effective control test is the only criterion for governmental status applicable and thus, although the Assad regime has used brutal force against its own population, this does not affect its legitimacy as a government under the effective control test.[52]

Further confusion has arisen due to recent recognition of the Syrian Revolutionary and Opposition Forces (SOC). States such as the UK, France, and Germany have recognised the SOC as 'the sole legitimate representative of the Syrian people,' effectively withdrawing recognition from the Assad government. [53] However, the six members of the Gulf Co-

[49] Secretary-General Ban Ki-moon, 'Secretary-General's remarks to the General Assembly on the Situation in Syria,' United Nations, New York, 7 June 2012, accessed 06/01/15 at http://www.un.org/sg/statements/index.asp?nid=6109.

[50] Kofi Annan, 'My departing advice on how to save Syria', (02/08/12) Financial Times, accessed 06/01/15 at http://www.ft.com/cms/s/2/b00b6ed4-dbc9-11e1-8d78-00144feab49a.html#axzz3O2Y5TemV.

[51] Talmon, S. (2013) Recognition of Opposition Groups as the Legitimate Representative of a People, *Bonn Research Papers on Public International Law*, No.1/2013, p. 20, accessed 26/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227615;

[52] Ibid.

[53] Announcement by the UK Foreign & Commonwealth Office: 'UK, Germany and France call for President Assad to stand down', 18 August 2011, accessed 25/12/14 at https://www.gov.uk/government/news/uk-germany-and-france-call-for-president-assad-to-stand-down; Talmon, S. (2013) Recognition of Opposition Groups as the Legitimate Representative of a People, *Bonn Research Papers on Public International Law*, No.1/2013, p. 3, accessed 26/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227615; BBC News, 'Syria: France Backs Anti-Assad Coalition', (13/11/12), accessed 26/12/14 at http://www.bbc.com/news/world-middle-east-20319787;BBC News, 'Syrian Crisis: Guide to Armed and Political Opposition', (17/10/13), accessed 25/12/14 at http://www.bbc.com/news/world-middle-east-15798218; for the UK Government's stand on UK and Syria see https://www.gov.uk/government/world/syria (accessed 25/12/14); BBC News, 'Syria Conflict: the UK Recognises Opposition, says William Hague,' (20/11/12), accessed 25/12/14 at http://www.bbc.com/news/uk-politics-20406562; Black, I. 'UK: Syrian Opposition 'Sole Legitimate Representative' of the People', (20/11/12) The Guardian, accessed 26/12/14 at http://www.theguardian.com/world/2012/nov/20/uk-syrian-opposition-sole-legitimate-representative-people.

operation Council[54], the US, Turkey, Denmark, Finland, Iceland, Latvia, Lithuania, Norway, Sweden, Estonia, the Netherlands, Belgium and Luxemburg, amongst others, have recognised the SOC as either 'the legitimate representative' or 'legitimate representatives' of the Syrian people.[55] The fact that the National Coalition is recognised as a 'legitimate' or the 'sole legitimate' representative of the Syrian people, rather than the legitimate government of Syria, is significant as this does not replace them as the State's legitimate government.[56] Recognition of the National Coalition is political rather than legal, as made clear by several States issuing the statements.[57] The effect of political recognition is that the recognising State is willing to enter into political or other relations with the group, but it

[54] Membership includes Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

[55] BBC News, 'Syrian Crisis: Guide to Armed and Political Opposition', (17/10/13), accessed 25/12/14 at http://www.bbc.com/news/world-middle-east-15798218; Aljazeera, 'GCC Recognises New Syrian Opposition Bloc', (12/11/12), accessed 26/12/14 at http://www.aljazeera.com/news/middleeast/2012/11/201211121755395345 04.html; Dougherty, J. 'Obama Recognizes Syrian Opposition Coalition,' (12/12/12), CNN, accessed 25/12/14 at http://edition.cnn.com/2012/12/11/world/us-syria-opposition/; Arsu, S.,Arango, T. 'Turks Grant Recognition to Coalition of Syrians', (15/11/12) *The New York Times*, accessed 26/12/14 at http://www.nytimes.com/2012/11/16/world/middleeast/turkey-recognizes-new-syrian-rebel-group-as-legitimate-leader-of-syria.html; Ministry of Foreign Affairs, Iceland, 'Friends of Syria Meeting in Marrakech, 12 December 2012, Nordic-Baltic Intervention', accessed 26/12/14 at http://www.mfa.is/media/mannrettindi/Syrland-yfirlysing-121212.pdf; 'Benelux-messages at group of Friends-meeting Marrakech', December 12th 2012, accessed 26/12/14 at http://www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2012/12/13/benelux-messages-at-group-of-friends-meeting-marrakech-12-december-2012.html; Government of the Netherlands, 'Representative of Syrian Coalition Welcome in Benelux', 13th of December 2012, accessed 26/12/14 at http://www.government.nl/news/2012/12/12/representative-of-syrian-coalition-welcome-in-benelux.html.

[56] Talmon, S. (2011) Recognition of the Libyan Transitional National Council, *Oxford Legal Research Paper*, No.38/2011, p. 3, accessed 25/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868032.

[57] For instance, the head of the National Coalition, Moaz Alkhatib, urged European States to 'grant political recognition to the coalition as the legitimate representative of the Syrian people.' BBC News, 'Syria: France backs anti-Assad Coalition,' (13/12/12), accessed 27/12/14 at http://www.bbc.com/news/world-middle-east-20319787. Similarly, Victoria Nuland, a spokesperson for the US State Department, made the nature of the recognition clear in a Daily Press Briefing: 'This is not a legal step, this is a political step which not only allows us to give the SOC a political lift and to make it clear that they are the primary group that we will be working with, but it also allows us, as I said, to try to better channel the nonlethal assistance that we provide to the political groups that they are working with on the ground in Syria.' US State department, Daily Press Briefing, 12 December 2012, accessed 27/12/14 at http://www.state.gov/r/pa/prs/dpb/2012/12/201930.htm#SYRIA2.

does not create any legal obligations.[58] It merely legitimises the groups struggle against the regime, provides international acceptance, allows the group to speak for the people in international organisations, and usually results in financial aid.[59] Nevertheless, it does not affect the Assad regime's existing legal rights and obligations, as governmental status is based on the pre-existing fact of effective control, not on State recognition.

Based on this discussion the Assad Government is the legitimate '*de facto*' government of Syria, as it has effective control over a sufficiently representative part of the Syrian territory, exercises state functions, and there is no other opposing force assuming to be a government in its place. In particular, the Assad regime's continued presence in the UN provides strong evidence that it is the government of Syria. Indeed, so does Syria joining the UN Chemical Weapons Convention in 2012.[60] Hence, discussion will now turn to whether the government has issued a valid consent to armed intervention.

3.3 The Requirement of Valid Consent

In order for a legitimate invitation to intervene to arise, valid consent must have been expressed. Consent to armed intervention may be expressed or tacit, explicit or implicit, provided that it is clearly established.[61] Before the air strikes on Syrian territory began the

[58] Talmon, S. (2013) Recognition of Opposition Groups as the Legitimate Representative of a People, *Bonn Research Papers on Public International Law*, No.1/2013, p. 12, accessed 26/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2227615.

[59] Talmon, S. (2011) Recognition of the Libyan Transitional National Council, *Oxford Legal Research Paper*, No.38/2011, p. 2, accessed 25/12/14 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1868032.

[60] Channel 4 News, 'US air strikes in Syria – Q&A,' (23/09/14), accessed 06/01/15 at http://www.channel4.com/news/us-launches-air-strikes-in-syria-q-a;The Hindu, 'Syria officially joins UN Chemical Weapons Convention,' (14/10/13) accessed 07/01/15 at http://www.thehindu.com/news/international/world/syria-officially-joins-un-chemical-weapons-convention/article5233423.ece.

[61] Ago, R. (1979) 'Eighth Report on State Responsibility', UN Doc. A/CN.4/318 and Add. 1 to 4, *2 Yearbook of the International Law Commission*, Vol. II(1), para. 69; .

Assad Government did not expressly consent to military action against IS on its territory; nor has any state engaging in the operations offered consent as their legal basis for action.[62] However, before launching air strikes within Syrian territory, the US State Department's Ambassador to the UN, Samantha Power, 'gave her Syrian counterpart an advance indication of likely military attacks against Isis in the country – but strongly denied any military coordination'.[63] By so doing the US effectively declined Syria's offer for cooperation in fighting IS, despite warnings that any action without the government's consent would constitute an attack on Syria.[64] Even so, the Assad Government has as of yet not made any efforts to intervene with the operation.

Arguably, IS being one of the Assad regime's most powerful opponents and the government's failure to object more forcefully to the US action could be interpreted as an implied consent. Similarly, the government has offered formal consent by expressing a will 'to cooperate and co-ordinate' with any side in defeating IS,[65] and is also cooperating with the US-led coalition by standing down its air defences in the relevant areas of operation.[66] However, can this be said to be enough to give rise to a genuine implicit consent?

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[62] In fact, the Unites State Departments spokesman, Jen Psaki, stated: "We warned Syria not to engage US aircraft…We did not request the regime's permission. We did not coordinate our actions with the Syrian government. We did not provide advance notification to the Syrians at a military level, or give any indication of our timing on specific targets."; Arimatsu, L., Schmitt, M. 'The Legal Basis for the War against ISIS Remains Contentious' (06/10/14), The Guardian, accessed 12/11/14 at http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state. The alleged basis for military action will be dealt with in part 4 of this paper.

[63] Chulov, M., Ackerman, S., Lewis, P. 'US Confirms 14 Air Strikes Against ISIS in Syria'(23/09/14), The Guardian, accessed 28/10/14 at http://www.theguardian.com/world/2014/sep/23/us-launches-air-strikes-against-isis-targets-in-syria.

[64] 'Russia Warns US Against Strikes on Islamic State in Syria' (11/09/14), BBC News, accessed 28/10/14 at http://www.bbc.co.uk/news/world-middle-east-29154481.

[65] The Guardian, 'Syria offers to help fight Isis but warns against unilateral air strikes,' (26/08/14) accessed 06/01/15 at http://www.theguardian.com/world/2014/aug/26/syria-offers-to-help-fight-isis-but-warns-against-unilateral-air-strikes.

[66] Bellamy, A., 'Legality, Legitimacy, and Humanitarian Intervention Against ISIS in Syria,' (16(19/14) accessed 06/01/15 at http://theglobalobservatory.org/2014/10/legality-legitimacy-human-protection-international-intervention-isis-syria-r2p/.

Implicit consent is difficult to establish due to its nature. One instance of implicit consent to foreign armed intervention can be found in the Second Congolese Conflict in which Uganda conducted operations in Eastern Congo with the consent of the then president of the DRC, Laurent Kabila, in 1997-98.[67] Both parties acknowledged this consent, which was not initially expressed in written form. However, on 27th April 1998 the two countries concluded a Protocol on Security along the Common Border. This protocol included an agreement to 'co-operate in order to ensure security and peace along the common border.'[68] However, the DRC later contended that these words did not constitute an 'invitation or acceptance by either the contracting parties to send its army into the other's territory' since the Protocol did not expressly refer to such conduct.[69] The ICJ held that the absence of any objection to the presence of Ugandan troops in the DRC, and the subsequent signing of the Protocol, could be 'reasonably understood' as an expression of consent to the continuing presence of Ugandan troops. In any case, the Court held that the legal basis for authorisation was the informal agreements between the parties, predating the Protocol.[70] Thus armed intervention can be based on an implicit expression of consent.[71]

In the Syrian situation there is no evidence of an agreement between the two parties for military intervention. Syria has expressly stated that any intervention must be conducted in liaison with the Syrian government in order to not be considered as aggression.[72] Hence,

[67] *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda* (2005) I.C.J. Rep.168, para. 45.
[68] *Ibid*, para. 46
[69] *Ibid*, Lieblich, E. (2011) Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements, *Boston University International Law Journal,* Vol. 29, 377, p. 358.
[70] *Ibid*.
[71] *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda* (2005) I.C.J. Rep.168, para.47; Lieblich, E. (2011) Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements, *Boston University International Law Journal,* Vol. 29, 377, p. 358.
[72] The Guardian, 'Syria offers to help fight Isis but warns against unilateral air strikes,' (26/08/14) accessed 06/01/15 at http://www.theguardian.com/world/2014/aug/26/syria-offers-to-help-fight-isis-but-warns-against-unilateral-air-strikes.

there is no agreement between the US-led coalition and the Syrian government. Tacitly welcoming the strikes, or a failure to resist more thoroughly, cannot on its own amount to implied legal permission. Hence, the air strikes conducted by the US-led coalition cannot be justified on the basis of an invitation of armed intervention as the legitimate government of Syria has not issued a valid consent. On this basis the air strikes will constitute a violation of the prohibition of the use of force unless it can be justified on the third universally recognised exception of self-defence.

4. Armed Intervention in Syria: A Right of Collective Self-defence against a Non-State Actor?

In a letter to the UN Secretary General, Ban Ki-moon, Samantha Power, the US Ambassador to the United Nations, justified the US-led air strikes against IS in Syria, without seeking the permission of the Syrian government or the UNSC, on the basis of 'the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations.'[73] Thus, the discussion will now turn to examine whether the right of collective self-defence could legitimises the airstrikes against IS. In so doing the exception of self-defence will first be examined in general, before its application to the situation at hand is discussed further.

[73] Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, accessed 29/11/14 at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf; Sengupta, S, Savage, C. 'U.S. Invokes Iraq's Defence in Legal Justification of Syria Strikes' (23/09/14) The New York Times, accessed 29/11/14 at http://www.nytimes.com/2014/09/24/us/politics/us-invokes-defense-of-iraq-in-saying-strikes-on-syria-are-legal.html?_r=0.

4.1 The Exception of Self-defence

Self-defence is a fundamental right under international law and allows each State to resort to force in order to defend itself from an armed attack. This do not mean that the use of force on the territory of another State in self-defence is not a violation of that State's territorial integrity or political independence, but rather that military action in self-defence excuses the violation. The right of self-defence is enshrined in Art.51 of the UN Charter which provides:

> 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council…'

Thus, Art.51 justifies the use of force in self-defence in response to an armed attack; and the right is both individual and collective in nature. However, any exercise of this right must be reported to the SC[74] and will only last 'until the Security Council has taken measures necessary to maintain international peace and security.'

[74] Although there is an obligation to report an exercise of self-defence to the SC it is not clear what the consequences of a failure to report are. In the case of *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda* (2005) I.C.J. Rep.168, there was a failure to report but as the claims of self-defence failed on the facts, there was no further discussion of this issue. Dixon, M.(2013) Textbook on International Law (7th Ed), Oxford University Press, p. 332.

The promulgation of self-defence as an 'inherent' right has been taken to mean that it is a pre-existing right of customary nature, existing independently of the UN Charter.[75] Thus, like the general prohibition on the use of inter-State force, the customary and conventional rights of self-defence run alongside each other, retaining a separate existence, and are applicable to all States.

Self-defence under customary law is taken to have been definitively formulated in the diplomatic correspondence between the US Secretary of State Webster and British officials over the *Caroline* incident of 1837.[76] During this correspondence, Webster indicated that for self-defence to be justified Great Britain had to 'show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[77] Further, Webster specified that the action taken must also involve 'nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.'[78] This statement effectively defines self-defence as lawful under customary law if it is made in response to an immediate and pressing threat which could not be avoided by alternative measures and the force used was proportionate to the danger posed.[79] In other

[75] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) ICJ Rep. 14, para.193-194.

[76] Dixon, M.(2013) Textbook on International Law (7th Ed), Oxford University Press, p.327; Klabbers, J. (2013) International law, Cambridge University Press, p. 193.

[77] The British–American correspondence relating to the *Caroline* incident (Note from Mr Webster to Mr Fox, 24 April 1841) in 29 BFSP 1129, 1138 (1840–41); Dinstein, Y. (2005) War, Aggression and Self-Defence (4th Ed), Cambridge University Press, p. 249.

[78] *Ibid*.

[79] Thus, self-defence will not be justified if the crisis can be avoided through diplomatic means, or if the danger is so remote as to be nothing more than a feeling of suspicion; Dixon, M.(2013) Textbook on International Law (7th Ed), Oxford University Press , p.328. The issue of proportionality was confirmed in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) ICJ Rep. 14 were it was stated at p. 94, para. 176: "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law".

words, any use of force in self-defence must satisfy the three requirements of immediacy, necessity and proportionality.

However, although self-defence under Art.51 and customary law retains a separate existence, the condition of proportionality and necessity applies equally to Art.51.[80]. Additionally, it was held in *Nicaragua* that the exercise of self-defence under customary law is also subject to 'the State having been the victim of an armed attack.' [81] Thus, in order for the right of self-defence under Art.51 or its customary equivalent to arise the conditions of an armed attack, necessity and proportionality must all be satisfied.

4.2 The Applicability of Self-defence against non-State Actors

Whilst Art.2(4) of the UN Charter refers solely to the prohibition on the use of force by one member state against 'any State', Art.51 only mentions a State as the potential target of an armed attack. This is the source of a contentious debate as to whether the right to self-defence under Art.51 only applies to an armed attack by a State, or whether it extends to attacks by non-state actors simply operating from the territory of a foreign state. As the air strikes in Syria are targeting IS, it is necessary to investigate whether the exception of self-defence applies to attacks by non-State actors. If it does not, the air strikes cannot be characterised as action in self-defence.

[80] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, paras.176 and 194; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, (1996) I.C.J. Rep.226, para.41.

[81] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para. 195; Tams, C (2009) The Use of Force Against Terrorists, *The European Journal of International Law,* Vol.20, at 369.

In so doing, the position taken by the ICJ will first be examined before turning to look at the impact the attacks on the US in 2001 has had on this area of international law.

In the *Nicaragua* case it was held that a direct attack by a non-State actor could amount to an 'armed attack' against the target State under rules of attribution. The majority view found that the provision of weapons, finance, training facilities and general encouragement to non-State actors using armed force against another State would constitute an unlawful use of force against the victim-State by the supplier-State.[82] The Court looked to the General Assembly's *Definition of Aggression*[83] as assessing the appropriate criterion for the existence of an indirect attack. The Court found that an 'armed attack' included 'not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein"'. [84] Hence, a State will violate the prohibition on the use of force by sending non-State actors to commit armed attacks on the territory of another State or if the state exercised effective control over such military action. As a consequence, there is a right to resort to the use of force in self-defence where the attacks can be attributed to a State. However, the Court did not consider whether the activities of a non-State actor could themselves amount to an armed attack justifying the defendant's response in self-defence.[85]

[82] Blay, S, Piotrowicz, R., Tsamenyi, M. (2005) Public International Law: an Australian Perspective (2nd Ed.), Oxford University Press, p. 232-233; Dixon, M.(2013) Textbook on International Law (7th Ed), Oxford University Press, p. 330.

[83] UNGA Resolution 3314(XXIX), Article 3(g).

[84] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para. 195.

[85] Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 8.

The issue of armed attack by a non-State actor was re-examined in the *Palestinian Wall Advisory Opinion*, in which Israel claimed that the construction of the Barrier was consistent with a right of self-defence against terrorist attacks.[86] However the majority view of the ICJ was that the attacks emanated from the Occupied Palestinian Territory in which Israel exercised control and thus self-defence could not justify the Israeli measures aimed at preventing the attacks.[87] However, Judge Buergenthal did not agree with this conclusion on the basis that Art.51 did not specify that 'its exercise is dependent on the basis of an armed attack by another state,' and that the attack came from across the Green Line[88] and did therefore not emanate from Israel proper.[89] Thus, in his view, the attacks on Israel came from across its border and must 'permit Israel to exercise its right of self-defence against such attacks, provided that the measure it takes is otherwise consistent with the legitimate exercise of that right.'[90] Similar statements were made by Judge Higgins; accepting that action by non-State actors may amount to an armed attack giving rise to a right of self-defence.[91]

Later, in the *DRC* case, the Court held that attacks carried out by rebel groups, launching armed attacks from Ugandan territory into the Congo, were not attributable to the DRC. [92] Consequently, the Ugandan military response to these attacks in the Congolese territory could not be justified under the exception of self-defence.[93] Subsequently the Court concluded that there was 'no need to respond to the

[86] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, [2004] ICJ Rep 131, para. 138.
[87] *Ibid.*, para.139.
[88] The line dividing Israeli territory from the Occupied Palestinian territory; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, [2004] I.C.J Rep 131; Declaration of Judge Buergenthal, para. 6.
[89] *Ibid*.
[90] *Ibid*.
[91] *Ibid*, separate opinion of Judge Higgins, paras. 33-34.
[92] *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda* (2005) I.C.J. Rep.168, para.146.
[93] *Ibid*, para.147.

contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.'[94] However, in their separate opinions, Judges Kooijmans and Simma expressly accepted that self-defence was available against armed attacks by non-State actors 'even if they cannot be attributed to the territorial State', as it would be 'unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require.'[95]

To sum up, the majority of ICJ judgments have held that the right to use force in self-defence against an attack by non-State actors applies where the attack is attributable to the State in whose territory the group is operating. However, the ICJ seems to have failed to take a position as to whether an attack by an independent non-state actor can amount to an armed attack triggering the right of self-defence. In both *Nicaragua* and the *DRC* case the use of force was not exclusively directed at the non-State actors but also against the State from whose territory the rebel forces operated. In the *Nicaragua* case the US claimed to be primarily acting in defence of El Salvador, helping it respond to alleged armed attacks from rebel groups actively supported by Nicaragua, as justification for taking offensive measures against Nicaraguan targets.[96] In the *DRC* case on the other hand, the Court emphasised that Uganda's defensive measures were carried out against the DRC, as Ugandan military action was largely directed against towns and villages far removed from the territory from which the

[94] *Ibid*.

[95] *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda* (2005) I.C.J. Rep.168, separate opinion of Judge Simma, para. 12. Similar statements were made by Judge Koojiman at para.30; Tams, C (2009) The Use of Force Against Terrorists, *The European Journal of International Law,* Vol.20, at 384.

[96] However, the ICJ rejected this claim and found the US to have acted in contravention to the prohibition on the threat or use of force; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, paras. 48, 126-128, 227-228 and 238.

rebel group operated.[97] Hence, as the State was subject to the defensive measures in these two cases, the Court focused on whether the rebel group's attacks could be attributed to the State in order to assess the legitimacy of the military operations, as defensive action must be directed at the perpetrator. [98] Hence, if defensive action is taken against the State in response to armed attacks committed by non-State entities, the attacks must be attributable to the State in order for the attacks to be legitimate. However, as a consequence, the above judgments may be read as not addressing the issue of the use of force in self-defence against non-State actors acting independently from the harbouring State but simply operating from the State's territory. In fact, neither in the *Nicaragua* case, the *Palestinian Wall Advisory Opinion,* nor in the *DRC* case did the ICJ rule out that an attack by private non-State actors could amount to an armed attack triggering the right of self-defence. On this basis, it can be concluded that the ICJ has never provided guidance on the circumstances under which a victim-State is entitled to use force in self-defence against independent non-State actors.

In recent years a more liberal approach to the right of self-defence under Art.51 has been adopted with state practice evidencing a tendency towards recognising the right of self-defence in response to an armed attack carried out by private non-State actors. The leading example of an armed attack by a non-State actor giving rise to the right of self-defence is the attacks against the US on 9/11. The attacks were launched from Afghan territory by the Al-Qaeda terrorist organisation, but they were not controlled by the Taliban-led State. In response, the US took countermeasures in self-defence. The

[97] *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)* (2005) I.C.J. Rep.168, paras. 81-86 and 147; Trapp, K. (2007) Back to Basics: necessity, proportionality and the right of self-defence against non-State actors, *International & Comparative Law Quarterly*, 56(1), p. 143.

[98] Trapp, K. (2007) Back to Basics: necessity, proportionality and the right of self-defence against non-State actors, *International & Comparative Law Quarterly*, 56(1), p. 143.

existence of such a right was recognised by the Security Council, which immediately and unanimously adopted two resolutions in which it recognised the right to self-defence.[99] Hence, if the right to self-defence within Art.51 is activated, the armed attack requirement for the application of Art.51 has been satisfied.[100] Moreover, NATO also regarded it as an armed attack triggering the right of self-defence and invoked Art.5 of the 1949 (Washington) North Atlantic Treaty for the first time.[101] Hence, the legal response by international organisations confirms that the attacks by Al-Qaeda, a non-State actor, qualified as an armed attack.

In the aftermath of the US military operation 'Enduring Freedom' in Afghanistan, several military operations have been launched in response to attacks by non-state actors with no involvement of a state. One of these was the Israeli invasion of Lebanon in 2006, aimed at putting an end to the firing of rockets by Hezbollah. Israel reported the military action to the UNSC as required by Art.51 of the UN Charter and justified it by relying on a right of self-defence.[102] Israel reserved this right on the basis of the 'ineptitude and inaction of the Government of Lebanon' in controlling the insurgent group and the failure to exercise jurisdiction over its own territory for many years.[103] Many States have recognised Israel's right of self-defence in response to the

[99] Security Council Resolution 1368 (2001), (2001-2) RDSC 290, 291 and Security Council Resolution 1373 (2001), (2001-02) RDSC 291, id. Through these resolutions the SC recognised 'the inherent right of individual or collective self-defence in accordance with the Charter', affirming the right of self-defence. Dinstein, Y.(2005) War, Aggression and Self-Defence (4th Ed), Cambridge University Press, p. 207; Klabbers, J. (2013) International Law, Cambridge University Press, p. 200.

[100] It should be noted that the Art.51 right to use force in self-defence 'if an armed attack occurs' has been taken to mean that it is confined to cases in which an actual armed attack has commenced. However, the right to act in self-defence to prevent the threat of an imminent armed attack, referred to as anticipatory self-defence, is widely accepted. Chatham House, 'Principles of International Law on the Use of Force by States in Self-defence,' ILP WP 05/01, October 2005, Principle 1.

[101] Article 5 of the North Atlantic Treaty provides that an armed attack against one or more of the Allies in Europe or North America '*shall be considered an attack on them all*'. (Emphasis added)

[102] Letter from the Permanent Representative of Israel, UN Doc. A/60/937-S/2006/515, accessed 28/11/14 at http://unispal.un.org/UNISPAL.NSF/0/E807FC933A355C94852571AA00517B18.

[103] *Ibid*.

attacks by Hezbollah under the law of self-defence.[104] However, States have also condemned Israel because of the disproportionality between the attacks committed by Hezbollah and Israel's military reaction.[105] This criticism was primarily based on the indiscriminate use of force causing major casualties and suffering amongst the peaceful population, violating international humanitarian law.[106] However, this is a criticism of the excessive way Israel exercised its right of self-defence and thus the Israeli invasion into Lebanon may still be seen as an implicit approval of the right to respond in self-defence to attacks by non-state actors, even if no state is substantially involved in such attacks. [107]

Similarly, in February 2008 Turkey launched a major operation into Iraq in order to stop attacks being carried out on its territory by the Kurdistan Workers' Party (PKK). Turkey did not report its military action to the UNSC but the Turkish prime minister, Recep Erdogan, stated that the operation was justified under the law of self-defence.[108] The Turkish action has been approved by few states.[109] However, even

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[104] This right has been expressly recognised by Argentina, the United Kingdom, Peru, Denmark, Greece, Slovakia and the United States; Security Council's 5489th Meeting, 14th July 2006, UN Doc. S/PV.5489, accessed 02/12/14 at http://unispal.un.org/UNISPAL.NSF/0/1C362A20DB4AF1D4852571AF0060F097; Security Council's 5493rd Meeting, 21 July 2006, UN Doc. S/PV.5493, accessed 02/12/14 at http://unispal.un.org/Unispal.Nsf/e872be638a09135185256ed100546ae4/dc5176e809b7e73d852571f00068cdcb?OpenDocument.

[105] *Ibid*.

[106] *Ibid*.

[107] Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 5.

[108] Croft, A. 'Erdogan hopes "developments" will avert incursion' (22/10/07), Reuters, accessed 28/11/14 at http://www.reuters.com/article/2007/10/22/us-turkey-iraq-erdogan-idUSL2223032720071022; Jones, G. 'Turkey to approve troops to Iraq in defiance of U.S.' (16/10/07) Reuters, accessed 28/11/14 at http://www.reuters.com/article/2007/10/16/us-turkey-iraq-idUSL1354608620071016; Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 3.

[109] The Belgian Foreign Minister noted that the Turkish attacks 'was precisely targeted and aimed only at PKK targets, without harming the population of northern Iraq and local factions' (Questions et réponses écrites, Chambre des représentants de Belgique, 21 February 2008, QRVA 52 010, 1357, accessed 02/12/14 at www.dekamer.be/QRVA/pdf/52/52K0010.pdf). The Dutch Foreign Minister later observed that 'the Turkish actions appear to be restricted to specific actions against PKK

fewer States have condemned the defensive operations, while none was directly concerned with a denial of the right of Turkey to respond in self-defence against the PKK's attacks.[110] Additionally, many States neither condemned nor approved the operation but rather recommended that Turkey resort to proportionate force.[111] Hence, taking into account the international reaction to the operation and the lack of comment, the position of the international community is difficult to ascertain. This becomes especially difficult due to the fact that the matter was never challenged before the Security Council. However, this lack of opposition can be interpreted as tacit consent for Turkey's right to act in self-defence, but that the use of force was unlawful due to the use of disproportionate force.

In light of these two examples following Operation Enduring Freedom it seems that the right of self-defence may have been broadened to cover attacks by private non-State actors. As those actors were independent of their territorial State, the rules of attribution did not apply. Hence, it seems that military force directed at non-State actors within the territory of another State may be legitimate under the exception of

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targets in the border area of northern Iraq' (Verhagen, M. 'Beantwoording vragen van het lid Van Bommel over een Turkse invasia in Noord-Irak' (Ministerial Statement) (3/03/08); Ruys, T. (2008)'Quo Vadit Jus ad Bellum? A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq, *Melbourne Journal of International Law* ,334-365, p. 363; Van Den Herik, L, Schrijver, N. (2013) Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges, Cambridge University Press, p. 369, accessed 02/12/14 at http://books.google.co.uk/books?id=_1JNBAAAQBAJ&pg=PA396&lpg=PA396&dq=Netherlands:+Ministerial+Statement,+3+March+2008+Turkey+Iraq&source=bl&ots=rYq0-CqK25&sig=-PP2fqLqqjU3KoKBFcTo-JlHBYk&hl=no&sa=X&ei=TOp9VN-ZFuOv7AaHnIHIDw&ved=0CCEQ6AEwAA#v=onepage&q=Netherlands%3A%20Ministerial%20Statement%2C%203%20March%202008%20Turkey%20Iraq&f=false.)

[110] Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 6.

[111] See BBC News, 'Turkey Must End Iraq Raid – Bush', (28/02/08) accessed 02/12/14 at http://news.bbc.co.uk/2/hi/europe/7268345.stm; Presidency of the EU, Press Release, 'EU Presidency Statement on the Military Action Undertaken by Turkey in Iraqi Territory', (25/02/08) *Slovenian Presidency of the EU 2008,* accessed 02/12/14 at http://www.eu2008.si/en/News_and_Documents/CFSP_Statements/February/0225MZZturkey.html; Deutche Welle Staff, 'Europe again warns against Turkish intervention in Iraq' (22/10/07) *Deutche Welle* accessed 02/12/14 at http://www.dw.de/europe-again-warns-against-turkish-intervention-in-iraq/a-2834888.

self-defence, as long as force is not directed at the territorial State but the non-State entity only. Additionally, any measures taken against such attacks must be consistent with the exercise of the right of self-defence, namely it must be necessary and the force used must be proportionate.

The argument against the emergence of such a right is that recent state practice does not meet the conditions under which the law of self-defence may evolve. Customary law rules may change through state practice if this practice is general and accepted as law binding upon States.[112] However, for a customary rule to emerge, unanimous state practice is not required.[113] Similarly, conventional law may evolve through interpretation of a treaty based on subsequent state practice in the application of the treaty; and if such state practice is repeated over time and approved by the other parties to it.[114] It is correct that the military operations in Lebanon and Iraq have been condemned by members of the international community. However, as we have seen, this criticism has been based on the operations being disproportionate and thus an illegitimate exercise of military force in self-defence. Thus, recognising a right of self-defence against an attack by non-State actors is more than a one off response to the 9/11 attacks. What is being observed is an emerging tendency towards allowing states to respond in self-defence to armed attacks by non-State actors, even where the acts cannot be attributed to a State. Hence, it seems that a new rule of customary law is evolving in which the use of force against non-State actors justifies the application of the exception of self-defence. However, in order for any such action to be legitimate it

[112] The Statute of the International Court of Justice, Article 38(1); *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para.184-185.

[113] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para.186.

[114] Vienna Convention on the Law of Treaties 1969, Article 30 and Article 31(3); Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 2.

must be recognised as such by the international community, amount to an armed attack within the meaning of Art.51, and satisfy the dual conditions of necessity and proportionality.

Having established that self-defence may justify the use of force against a non-State actor the discussion in this article will now turn to investigate the requirements of armed attack, necessity, and proportionality in light of their application to the US-led air strikes against IS in Syria.

4.3 The Concept of an Armed Attack

In *Nicaragua* the ICJ focused on the 'scale and effects' of an armed attack and a need to distinguish it from a 'mere frontier incident'.[115] The court distinguished between 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.[116] This requirement was expressly affirmed in *Oil Platforms*[117] and makes it clear that not all armed activities can amount to an armed attack sufficient to trigger the right of self-defence.[118] Hence, an isolated minor incident which, due to the manner in which it takes place, cannot be mistaken for a threat to the safety of the State, does not qualify as an armed attack for the purposes of the application of self-defence. [119]

[115] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) ICJ Rep. 14, para 195
[116] *Ibid*, para 191.
[117] *Oil Platforms (Islamic Republic of Iran* v. *United States of America),*(2003) I.C.J Rep. 161

[118] Dixon, M.(2013) Textbook on International Law (7th Ed), Oxford University Press, p. 330.
[119] Zemanek, K. 'Armed Attack' (October 2013) Max Planck Encyclopedia of Public International Law, para. 7, accessed 21/11/14 at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241

The 'scale and effect' requirements seem to imply that an act, or a series of acts, must be of a significant magnitude and intensity, and result in substantial destruction to important elements of the victim-State (meaning its people, economic and security infrastructure), governmental authority, and cause damage or deprive the state of its territory.[120] Hence, it is clear that IS's continuing attacks on Iraqi territory are of a sufficient 'scale and effect' to satisfy the gravity requirement. The group has launched a full-scale invasion into Iraq, taking control of a significant part of its northern territory, towns and cities, and has become a threat to Iraqi citizens.[121] These attacks cannot be mistaken for anything but a use of armed force against the territorial integrity and political independence of Iraq.

However, although a State may have a right to use force in self-defence against a non-State actor, and the attack by the non-State actor qualifies as an armed attack for the purposes of self-defence, this does not necessarily mean that defensive operations on the territory of another State may take place.[122] The scope of a State's right to resort to the use of force in self-defence is limited by the requirements of necessity and proportionality.[123] These will now be looked at separately.

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[120] *Ibid*; Constantinou, A. (2000) The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter, Athénes/Bruxelles, Ant N Sakkoulas, Bruylant, p. 63-64.

[121] *Alaaldin, R., Khan, B. '*Airstrikes on Isis Targets in Syria and Iraq are Legal under International law', (01/10/2014) London School of Economics and Political Science Daily Blog, accessed 21/11/14 at http://blogs.lse.ac.uk/usappblog/2014/10/01/airstrikes-on-isis-targets-in-syria-and-iraq-are-legal-under-international-law/

[122] Arimatsu, L., Schmitt, M. 'The Legal Basis for the War against ISIS Remains Contentious' (06/10/14), The Guardian, accessed 12/11/14 at http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state.

[123] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, paras.176 and 194; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, (1996) I.C.J. Rep.226, para.41; *Oil Platforms (Islamic Republic of Iran* v. *United States of America),*(2003) I.C.J Rep. 161, paras. 51 and 74; *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)* (2005) I.C.J. Rep.168, para.147; the Caroline case of 1837.

4.4 Applying the Condition of Necessity to Armed Attacks by non-State Actors

The necessity requirement means that any action taken in self-defence must be a measure of last resort, 'leaving no choice of means.'[124] In the words of Robert Ago, in his 8th Report to the International Law Commission on State Responsibility:

> *'*(T)he State must not, in the particular circumstances, have had any means of halting, repelling or preventing the attack other than recourse to armed force…had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force. The point is self-evident and is generally recognised.'[125]

Hence, if there are no other practical alternatives to the proposed use of force likely to be effective in ending or averting the attack, the use of force in self-defence will satisfy the necessity requirement.[126] However, all peaceful means must have been exhausted for it to be available.[127]

In order for the necessity requirement to be satisfied in relation to non-State actors operating on the territory of another State there must be some link between the harbouring State and the non-State actor. Recent practice indicates that, where the

[124] The British–American correspondence relating to the *Caroline* incident (Note from Mr Webster to Mr Fox, 24 April 1841) in 29 BFSP 1129, 1138 (1840–41).
[125] Ago, Roberto, Eighth Report on State Responsibility (Addendum), Yearbook of the International Law Commission 1980, Vol. II(1), 60, para 120
[126] Chatham House, 'Principles of International Law on the Use of Force by States in Self-defence,' ILP WP 05/01, October 2005, Principle 3.
[127] *Ibid*.

harbouring State is either unable or unwilling to suppress the activities of the non-State actor on its territory, a right to resort to the use of force in self-defence may arise.[128] For instance, in both the Israeli invasion of Lebanon in 2006 and the Turkish incursion into Iraq in 2008, the States emphasised that the territorial State had failed to abide by its obligation to prevent attacks from being conducted from its territory. These two situations show that defensive force in the territory of a harbouring State against non-State actors is sometimes necessary due to the territorial State's failure to prevent its territory from being used as a base for terrorist operations.[129] The justification for taking action under such circumstances is that the victim-State has little choice. It is faced with the dilemma of either respecting the host State's territorial integrity and sacrificing its own security, or violating that State's territorial integrity in a limited fashion and targeting the defensive operations against the non-State actor only. [130] Hence, provided that the use of force is appropriately targeted, the victim-State may resort to the use of force in self-defence under Art.51. It is the State's acquiescence in or consistent failure to prevent or suppress the activities that satisfies the necessity requirement. However, it flows from this that where a state is actively countering the activities of the non-state actors, doing everything it can to prevent such acts taking place on its territory, a victim-State's use of force against that non-State actor cannot amount to a necessity to use force.[131] This is because measures taken by the harbouring state against the terrorists are an alternative

[128] Tams, C., Devaney, J. (2012) Applying Necessity and Proportionality to Anti-Terrorist Self-Defence, *Israel Law Review*, Vol. 45(1), p. 100.

[129] Trapp, K. (2007) Back to Basics: necessity, proportionality and the right of self-defence against non-State actors, *International & Comparative Law Quarterly*, 56(1), p. 147.

[130] Arimatsu, L., Schmitt, M. 'The Legal Basis for the War against ISIS Remains Contentious' (06/10/14), The Guardian, accessed 12/11/14 at http://www.theguardian.com/commentisfree/2014/oct/06/legal-basis-war-isis-syria-islamic-state.

[131] Trapp, K. (2007) Back to Basics: necessity, proportionality and the right of self-defence against non-State actors, *International & Comparative Law Quarterly*, year? 56(1), p. 147.

option, and a preferable 'choice of means' over foreign armed intervention by the victim-State.[132]

In relation to the air strikes in Syria, the letter from Samantha Power addressed to the UN Secretary-General provided that Iraq had a valid right of self-defence against IS as the insurgent group was attacking Iraq from its safe havens in Syria and 'the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.' [133] It further stated that the Syrian regime had 'shown that it cannot and will not confront these safe havens effectively itself' and thus, due to the Syrian government being unable or unwilling to do so, the US-led coalition 'initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders.'[134]

Assessing the above statements in light of the necessity requirement it seems that anything less than the use of military force would allow IS to expand its territory and commit further attacks and human rights violations. Inaction in Syria during the three-year civil war gave IS freedom to operate and grow in strength, influence and territory. Further, it was from its Syrian bases that the group was able to make their huge territorial advances into Iraqi territory in June 2014, taking control over Iraqi towns and cities. Hence, unless IS's infrastructure in Syria which supports the occupation of Iraqi territory is addressed, it would not be possible for the US-led

[132] Tams, C., Devaney, J. (2012) Applying Necessity and Proportionality to Anti-Terrorist Self-Defence, *Israel Law Review*, Vol. 45(1), p. 98.

[133] Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, accessed 29/11/14 at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf.

[134] *Ibid*.

coalition to defeat IS. [135] The group would merely retreat to its safe havens in Syria in order to regroup, regain its strength, and continue to conduct further attacks into Iraq from Syrian territory. Furthermore, such an allowance would constitute a considerable risk to both the Iraqi State and its civilians.

Additionally, the Syrian government has had two years to dismantle the militant group but has been unable or unwilling to do so, lacking both the capacity and capability. Moreover, the Iraqi government has appealed to the United Nations to recognise the threat to their territorial integrity, asking for support from the international community to defeat IS and protect their territory and citizens.[136] However, as of yet no military action has been authorised. Hence, it seems that all other possibilities have been exhausted and the necessity of military action has been triggered. This justification appears to have gained the support of the UN Secretary General, Ban Ki-Moon, who endorsed the strikes, noting that 'the strikes took place in areas no longer under the effective control of that Government.'[137] Thus, Iraq, and by extension the US-led coalition, can be said to have no choice of other means in order to halt, repel or prevent the armed attacks launched by IS than the recourse to the use of force.

[135] Weller, Mark, 'Islamic State crisis: what force does international law allow? (25/09/14), BBC News, accessed 15/10/14 at http://www.bbc.co.uk/news/world-middle-east-29283286.

[136] Letter from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc. S/2014/440, accessed 30/11/14 at http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/440.

[137] Secretary-General 'Climate Change Summit Not about Talk, but Action, Secretary-General Says at Press Conference, Stressing 'All of Us Can Make a Difference' (23/09/14) United Nations, accessed 07/12/14 at http://www.un.org/press/en/2014/sgsm16186.doc.htm.

4.4 The Condition of Proportionality

In addition to the necessity requirement which concerns the availability of self-defence, the use of force in self-defence must also be proportionate. Under the *Caroline* formula, as mentioned above, the condition of proportionality requires 'nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.' As noted in the Chatham House principles on self-defence, this requires that '(t)he force used, taken as a whole, must not be excessive in relation to the need to avert or bring the attack to an end.' [138] This means that self-defence must be limited to what is necessary to achieve its objective: namely to defend the victim-State and avoid future consequences.[139] Additionally, 'the physical and economic consequences of the force used must not be excessive in relation to the harm expected from the attack.'[140] Hence, unlike necessity, proportionality limits the scope and intensity of the military response used in self-defence.[141]

However, a number of judgments by the ICJ evidence a support for a quantitative conception of proportionality.[142] This conception requires a balance between the damage caused and military means used by the attackers, and the damage caused and

[138] Chatham House, 'Principles of International Law on the Use of Force by States in Self-defence,' ILP WP 05/01, October 2005, Principle 5.

[139] See for instance Tams, C., Devaney, J. (2012) Applying Necessity and Proportionality to Anti-Terrorist Self-Defence, *Israel Law Review*, Vol. 45(1), p.101.

[140] Chatham House, 'Principles of International Law on the Use of Force by States in Self-defence,' ILP WP 05/01, October 2005, Principle 5.

[141] Tams, C., Devaney, J. (2012) Applying Necessity and Proportionality to Anti-Terrorist Self-Defence, *Israel Law Review*, Vol. 45(1), p. 101.

[142] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), (1986) I.C.J Rep. 14, para. 237; *Oil Platforms (Islamic Republic of Iran* v. *United States of America),*(2003) I.C.J Rep. 161, paras. 76-77; *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v Uganda)* (2005) I.C.J. Rep.168, para. 147; Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 11.

the military means used by the victim-State in return. This does not however necessitate that complete symmetry between the scales of attacks is required. A military response will satisfy the quantitative conception of proportionality as long as it is not manifestly out of proportion to the scale of the perpetrators' attacks.[143]

However, rather than dividing these two approaches to the condition of proportionality they should be put together, assessing both the force used to achieve the legitimate end and the intensity of the attack in response to the threat posed.[144] Thus, the use of force must not be manifestly disproportionate to that used by the perpetrator *and* be proportionate to what is necessary to achieve the legitimate objective. However, if the use of force is disproportionate to that used by the perpetrator it may still satisfy the proportionality requirement if it can be shown that it was necessary to reach the legitimate objective of averting or bringing the attack to an end.

The use of force in self-defence against non-State actors, however, seems to also be considered disproportionate where it is either directed at the host state or leads to widespread harm to the civilian population.[145] This was clearly seen in the international response to Israel's invasion of Lebanon, which caused major harm and suffering amongst the civilian population. Similarly, the Israeli action in self-defence caused the destruction of major Lebanese bridges, fuel storage tanks at electrical

[143] *Alaaldin, R., Khan, B. '*Airstrikes on Isis Targets in Syria and Iraq are Legal under International law', (01/10/2014) London School of Economics and Political Science Daily Blog, accessed 21/11/14 at http://blogs.lse.ac.uk/usappblog/2014/10/01/airstrikes-on-isis-targets-in-syria-and-iraq-are-legal-under-international-law/.

[144] *Ibid*; Van Steenberghe, R. (2010) Self-defence in Response to Attacks by Non-State Actors in the light of Recent State Practice: a Step Forward?, *Leiden Journal of International Law*, 183, p. 11.

[145] Tams, C., Devaney, J. (2012) Applying Necessity and Proportionality to Anti-Terrorist Self-Defence, *Israel Law Review*, Vol. 45(1), p. 105.

power plants, civilian installations, and residential buildings.[146] Additionally, an air and sea blockade was imposed against Lebanon, isolating it from its surroundings and cutting off their means of communication with the outside world.[147] It was this indiscriminate use of force that was criticised by the international community for being disproportionate and excessive.

The US-led air strikes in Syria target IS sites and military strongholds only; seeking to end the attacks on Iraq, protect Iraqi citizens, and regain control over Iraq's borders.[148] Military action has not been extended outside of IS occupied territory and has only caused minor civilian casualties. [149] In addition, the air strikes are clearly proportionate to the scale of IS's attacks; who have launched a full military intervention into Iraqi territory. Hence, the air strikes against IS in Syria are not manifestly out of proportion to the scale of IS attacks and are proportionate to achieve the objectives of ending the attacks, protecting Iraqi citizens, and regaining control over Iraq's borders. Thus, at present, the air strikes against IS in Syria satisfy the proportionality requirement.

[146] Security Council's 5489th Meeting, 14th July 2006, UN Doc. S/PV.5489, accessed 02/12/14 at http://unispal.un.org/UNISPAL.NSF/0/1C362A20DB4AF1D4852571AF0060F097.

[147] *Ibid*.

[148] Letter from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, accessed 29/11/14 at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf

[149] Radio Free Europe, 'U.S. Investigating Civilian Casualties in Iraq, Syrian Airstrikes,' (07/01/15) accessed 07/01/15 at http://www.rferl.org/content/iraq-syria-air-strikes-civilian-casualties/26780561.html.

6. Conclusion

The use of military force will only be lawful if it comes under an accepted exception to the prohibition on the use of force. Thus, in this article the focus has been on the only two possible exceptions that may turn the *prima facie* breach of the prohibition of the use of force in Syria into a legitimate armed intervention: namely an invitation to intervene by the legitimate government and collective self-defence.

In the light of the facts and arguments set out above, it is clear that the legitimate government of Syria is still the Assad regime. Even though its legitimacy has recently been challenged, the main criterion is that of effective control, a criterion that the Assad regime satisfies, as it controls a sufficiently representative part of the Syrian territory, including the capital, performs state functions, and there is no other opposing force claiming to be a government in its place. The political recognition of the SOC and illegitimacy claims on the basis of the use of armed force to keep itself in power is not sufficient to deprive the Assad regime of its governmental status. This view is supported by their continued presence in the UN, and by the recent signing of the UN Chemical Weapons Convention. Hence, due to the lack of formal consent by the Assad government, the air strikes against IS on Syrian territory cannot fall underneath this exception.

Turning to the exception of collective self-defence, its application to the situation at hand is unclear due to the uncertainty as to whether Art.51 and its customary equivalent apply against non-State actors. The traditional view favoured by the ICJ has been that of attribution. However, due to the facts in the *Nicaragua* and *DRC* cases, in which force was used not only against non-State actors but also the harbouring State, considerations had to be given to the rules of attribution in order to come to a decision as to the defensive actions'

legality. Similarly, in the *Palestinian Wall Advisory Opinion* the Court found that the attack came from within territory occupied by Israel, and therefore self-defence was not applicable. Hence, a case concerning self-defence against independent non-State actors, operating outside the harbouring State's control, is yet to come before the Court.

There is nothing in the text of Art.51 that limits the use of force in self-defence to armed attacks conducted by another State; and state practice post 9/11 shows an emerging tendency of taking defensive action against non-State actors. The legitimacy of such practice is dependent on the harbouring State being unable or unwilling to exercise control and suppress the non-State actor's activities, giving rise to a necessity for the victim-State to take action in self-defence. This can be seen in both the Israeli and Turkish invasions, condemned for their disproportionate nature only. Hence, it seems that the international community will recognise defensive measures against non-State actors as long as the situation satisfies the conditions of an armed attack, necessity and proportionality, legitimising such action.

The IS invasion into Iraq clearly amounts to a large scale armed attack on Iraq and the Assad regime has shown itself incapable of suppressing IS activities on its territory, giving rise to a necessity for Iraq to take defensive measures in order to end the attacks. It is not possible for Iraq to counter the threat of IS if it is able to regroup and continue launching its attacks from its safe havens in Syria. Not taking action in Syria in order to respect the State's territorial integrity would be taking a great risk as to Iraqi state and citizen security. Hence, military action targeting IS in Syria is necessary. In addition, whilst IS has launched a full scale invasion into Iraqi territory, the air strikes are specifically aimed at IS targets in Syria. Thus, the defensive force used is proportionate to the force used by IS in Iraq. Similarly, the US air strikes in Syria are specifically targeted to the areas controlled by IS and have also caused minor civilian

casualties and are therefore proportionate to the objective of ending the attacks conducted by IS without being directed at the harbouring State or their population. Thus, the air strikes in Syria satisfy the conditions of self-defence.

However, although the situation in Syria satisfies the conditions under which the use of force in self-defence may be exercised, the legality of military action against a non-State actor seems to depend on states recognising it as such. In light of state practice after 9/11 it appears that there is a high possibility that the US-led air strikes against IS will end up being recognised as legal, especially in the light of a lack of criticism against the operation at present. However, as of yet it is not possible to come to a definite conclusion on this point.

A Critical Review of Bereavement Damages in England and Wales

Darcey Hewett

Introduction

1. What are Damages?

In the civil law of torts, when a wrong has occurred the general means by which people seek to rectify that wrong is by claiming money known as damages from the tortfeasor[150]. Damages are to put the claimant back in the position they would have been in, had this wrong not occurred. Damages are not paid to the claimant by way of punishing the wrongdoer; they are purely compensating the claimant for the loss caused by the actions of the defendant. In the words of Chief Justice McLachlin's, as approved in the case of *Fairchild v Glenhaven Funeral Services,*[151] 'tort law is about compensating those who are wrongfully injured… it is about recognising and righting wrongful conduct by one person or a group of persons that harms others'.[152]

Compensatory damages, otherwise known as *restitutio in integrum*[153], have two main aims. The first is to compensate for any pecuniary loss, reimbursing financial loss of earnings. The second is non-pecuniary by definition and compensates for the loss of something non-tangible or easily defined, such as peace of mind, physical comfort and physical amenity.

[150] The person who has committed the tort.

[151] *Fairchild v Glenhaven Funeral Services* [2002] Lloyd's Rep Med 361, para. 11.

[152] McLaughlin J, "Negligence Law - Proving the Connection", in ed Mullany and Linden *Torts Tomorrow, A Tribute to John Fleming* (LBC Information Services, 1998), at 16.

[153] That is, restoration to the whole or uninjured condition.

Non-pecuniary damages are the less calculable of the two and, therefore, the Judicial Studies Board[154] have produced guidelines that set out non-pecuniary damages based on awards given in previous cases. The 1994 Law Commission's Report 'How Much is Enough?'[155] argued that compensation paid for such losses had fallen behind inflation, and that it should be substantially increased,[156] an argument that has endured for some years now. The aim of this paper is to explore the relevance of bereavement damages and will focus on the second non-pecuniary damages.

In tort law to claim for damages for either personal injury or unlawful death an action can be brought about in one of the following ways:

(1) By the injured person, claiming "lost years" as a result of foreshortened life. Such an action is barred by the death of the claimant.

(2) By the estate of the deceased, pursuant to Law Reform (Miscellaneous Provisions) Act 1934.

(3) By a dependent of the deceased or person entitled to a "bereavement award" pursuant to Fatal Accidents Act 1976.[157]

[154] An institution that trains judges.

[155] Law Commission Report, 'Personal Injury Compensation: How Much is Enough?' (1994) Law Com. No 225.

[156] Catherine Elliot and Frances Quinn, *Tort Law*, Ninth Edition, Pearson Education Limited, 2013.

[157] St John's Chambers, 'Claims for Dependency, for the Estate of the Deceased, and for those terminally ill or injured' (2011) http://www.stjohnschambers.co.uk/wp-content/uploads/Fatal-accidents.pdf accessed 11 October 2014.

2. History of Bereavement Damages

The main focus of this research is specifically bereavement damages, covered by Section 1A of the Fatal Accidents Act 1976 that was introduced by the Administration of Justice Act 1982. This section came about after a recommendation proposed by the Law Commission's report 1973 Personal Injury Litigation Assessment of Damages. Bereavement damages are an exception to the traditional way in which damages are awarded as there is an obvious loss of life that has amounted to a claim, therefore no proof of loss needs to be provided.

The bereavement in itself can be sufficient enough proof for the money to be awarded. The damages are set to compensate for the grief and sorrow that follows after losing a spouse or child from the reckless or negligent act of another. It acknowledges that society places a strong emotional attachment to that heartache from losing a loved one caused by the negligent act of someone else. Bereavement damages acknowledge what has happened and tries to recompense somewhat.

Bereavement damages were not readily available to claimants. In fact, before 1982 when they were introduced; there was no statutory sum of money to be awarded whatsoever. The settlement of awards since 1982 has increased somewhat over thirty years. Though the maximum award settlement has increased, it is still debated owing to the widespread disagreement as to whether the current award is inappropriately low.

As seen below, the maximum award for bereavement damages has increased over a period of time.

1982 - £3,500

1991 - £7,500

2002 - £10,000

2008 - £11,800

2013 - £12,980

Currently the settlement is set at £12,980. This still receives criticism from claimant's and lawyers. This issue will be one of the main focal points of this research.

Bereavement Damages in England and Wales

1. Suitable Name

The name of the monetary 'bereavement award' is the source of some debate because it is believed that calling it an award is a misleading term. Claimants should not be awarded for losing a spouse; it is not an award which would be perceived as something positive, by benefiting those who are grieving. Therefore, terms such as 'compensation' or 'damages' are preferred as they do not portray a negative connotation. They are to help compensate for a wrongdoer's action that is irretrievable.

Another issue is that when labelled an award, an action could be seen as a claim for those who are outwardly seeking compensation for mercenary reasons. That is, a claim brought for personal gain or frivolous, also termed 'compensation culture'. This name has been coined by the media and politicians, claiming that people are too quick to sue in an attempt to get some form of damages. Although the compensation culture is seen as a bit of a myth it is worth remembering that it is an incredibly harsh thesis and in reality seems very unlikely in this context.[158] Those claimants who are grieving for a loved one would have many issues

[158] See: Centre for Effective Dispute Resolution, '*Government releases response to Taskforce report, 'Better Routes to Redress' (CEDR*, 23 November 2004) *http://www.cedr.com/news/?item=Government-releases-response-to-Taskforce-report-Better-Routes-to-Redress* accessed 2 November 2014.

on their mind with financial gain most probably being one of the last. It seems outrageous to accuse someone of such mercenary measures at such a time.

2. Who is Eligible to Bring a Claim?

Following the death of someone through a negligent accident, the deceased's estate can claim for the grief felt of losing that family member, although in England and Wales the claim is strictly limited to a specific category of people. Those eligible for bereavement damages are held under S.1(A)(2) of the Fatal Accidents Act 1976 to be a spouse or civil partner of the deceased, a parent of an unmarried minor if he was a legitimate child and, if the minor was illegitimate, the mother of the unmarried minor. These classes are far narrower than those who could claim for damages for loss of financial dependency under the 1976 Act.

There has been an overwhelming amount of criticism for bereavement damages over the years. Many believe that it is unfair to have such a narrow category of people who can claim for bereavement damages. In reality many people who are of a wider relation than that of immediate family members would be upset and saddened, yet cannot claim the damages that are intended to benefit the bereaved. The restriction on compensation for bereavement is a political decision and is difficult to justify on moral or logical grounds.[159] The legislation on bereavement damages is set by the Government, and it links back to the argument that they do not fully comprehend the impact the bereavement awards have on

[159] Kemp and Kemp, *The Quantum of Damages* (Vol. 1, Sweet and Maxwell, 2009), chapter 29.

family members, and how much disagreement there is with the current set maximum as well as the criteria as to whom can apply.

There are many issues surrounding s.1(A)(2) as to who can claim for bereavement damages. The first concerns claims brought by parents for deceased children over the age of eighteen. Is it unreasonable for a parent to claim for a bereavement award, when their child has been negligently killed after they have reached the age of eighteen? The age of the child at the time of death should not matter. The love and admiration parents have for their own child does not change throughout their lifetime. Thus, is it right to say to a parent, who loses a child due to a negligent act at the age of seventeen, that they can successfully claim up to £12,980, but a parent of a child who is negligently killed at the age of eighteen and upwards cannot?

A very good theoretical case example, suggested by Kemp and Kemp, is the 'seventeen-year-old twins, who are injured in a car crash as a result of the negligence of a drunken driver. If one dies on the day before his eighteenth birthday and the other dies on the day after, the parents would recover bereavement damages in respect of the one, but not the other'.[160] When placed in this situation, it is incredibly harsh to tell the parents they can only claim a bereavement award for one of their children, when in fact both were involved in the same negligent accident. Should a few hours out of the range of eligible criteria, not to mention the whole age restriction in itself, matter?

[160] Ibid, chapter 29.

A similar situation occurred in the case of *Doleman v Deakin.*[161] The case concerned an unmarried minor who had been hit by a car driven by an intoxicated driver. The accident put the minor into a coma due to his head injuries and, never having woken up, the minor passed away after his eighteenth birthday. The judge held that 'no cause of action occurred until death, the relevant date was the date of death and not the date of the tortious act'.[162] Stopping bereavement compensation claims for parents of a child over the age of eighteen, especially in those cases where the child has recently turned eighteen, seems an outrageously bold statement to make. It seems to almost suggest that parents suddenly do not love their children as much, or will not grieve as much over a child that is no longer a minor.

Most young adults between eighteen and up to roughly twenty-four years of age are still very much involved and dependent upon their parents. To take that emotional bond between a child and their parent, and then tell that parent that no matter how close they are, or how much they are suffering they cannot under any circumstances claim compensation for bereavement appears highly unjust. In the words of Matthew Stockwell, the president of the Association of Personal Injury Lawyers (APIL),[163] 'it is particularly distressing to me that parents of a child under the age of 18 should be entitled to bereavement damages but once the child is 18, they are not. It is unnatural for a parent to

[161] (1990) Times, 30 January.

[162] Ibid.

[163] A legal association that campaign for improvements of the law in relation to personal injury.

suffer the loss of a child, and that loss is no less if the child happens to be over the age of 18'.[164]

S.1(A)(2)(ii) states that only the mother of an illegitimate child can claim for bereavement damages, not a father. This can be seen as discriminatory and unfair. However, the extent of this argument lies deeper within the very aggravated and contentious argument in family law about fathers' rights over children and their parental responsibility. Currently only mothers have automatic parental responsibility over their natural or adopted child.

Children are prohibited from claiming for any type of bereavement damages. They may only make a claim for loss of support or bring a dependency claim when they lose a parent within the 1976 Act. This raises the question of whether it is justified to not allow a child to pursue a claim for their loss when they will grieve and suffer sorrow just as any parent or spouse would. Conversely, it could be argued that children of a young age will not understand the true implications for pursuing a bereavement award, why they are entitled to compensation, and that it is being given to them from the tortfeasor that has negligently killed their parent(s). Would it be possible to explain to them 'because your mother/father was killed in a fatal accident, you are now entitled to £12,980'? It just does not seem comprehensible for a young child to understand.

On the other side of the coin, it is possible for a person to make a claim on the child's behalf and hold the money on trust for them until they reach an age of which they are able to understand and receive the money. Just because they are young, does not mean they should

[164] *Hartigan, T.* 'Bereavement Damages – A Geographical Injustice?' 26 September 2014, http://www.trethowans.com/site/library/legalnews/bereavement_damages_a_geographical_injustice accessed 11 October 2014.

not be entitled to any compensation. This is another focal point where those eligible to bring a claim, currently are not able to do so. This is an issue undergoing a lot of criticism, and needs to be considered in the next law reform.

As mentioned above, a wife or husband of the deceased may bring a claim for damages for bereavement. It appears highly unfair that a spouse can claim for the grief of a husband or wife, but cannot claim for the loss of their own child if that child is over the age of eighteen. It is even more controversial as in the case of *Martin v Grey*[165] where a wife was successful in claiming bereavement damages for that of the husband, even though a petition for divorce was under way, and a decree nisi[166] had been granted. Bernard Livesey QC stated that 'if a claimant comes within the qualifying terms of the provision an award cannot be denied and if he falls outside those terms an award cannot be made… I presume that Parliament intended that the award should be given in full without judicial enquiry or evaluation into either the genuineness or depth of a claimant's feelings of loss…Thus, in the case of an analogous award under subsection (b) - which applies to cases where the deceased was a minor who was never married - if such a person dies merely one day before his eighteenth birthday, the parents will recover the full award but if he dies the following day, the parents will get nothing'. This highlights that the law has no regard to moral grounds, as parents cannot claim for children over the age of eighteen. However, a spouse can make a claim when they are filing for divorce and a decree nisi has been granted. Despite it not being about whether the partner is still in love and grieving they may very well be. It just seems incredibly unjust to allow such a claim when a parent cannot claim for their own children.

[165] (1998) (13 May 1998, unreported).

[166] A court order granted when the court is satisfied that the petitioner is entitled to a divorce.

3. The Award Settlement

The purpose of an award of bereavement under the Fatal Accidents Act 1976 s.1(A)(1) is to relieve the family member with a compensatory payment in regards to grief and sorrow. In no way is it possible to put a price to match such grief but s. 1(A)(3) still attempts to do so. As previously mentioned, the Administration of Justice Act 1982 updated the section on bereavement damages, from £10,000 to £12,980 in 2013. So as it stands, the current maximum a bereaved family member can gain is set at £12,980.

It is concerning and much debated that the current set maximum of bereavement damages are inappropriately low to be seriously considered and beneficial to those who need it. A family member who seeks bereavement damages is going through a very distressing time and to be told that this grief only amounts to £12,980 seems derisory. Tom Hartigan, Associate in Trethowan's personal injury soliciting team stated:
'I have dealt with many fatal accidents claims…it is extremely difficult to explain to a bereaved husband or wife that they are only entitled to £12,980 for the loss of their spouse'.[167]

In any circumstance it is difficult to put a price on grief but it is a wide spread agreement that the current maximum in England and Wales needs to be increased. It can be argued that it is cheaper to kill someone than it is to permanently injure someone. As it stands paying bereavement damages would cost the tortfeasor £12,980, whereas if the tortfeasor

[167] *Hartigan, T.* 'Bereavement Damages – A Geographical Injustice?' 26 September 2014, http://www.trethowans.com/site/library/legalnews/bereavement_damages_a_geographical_injustice accessed 11 October 2014.

was negligent and the act were to permanently blind someone, he/she would then have to pay around £30,000. In the words of Kemp and Kemp:

'Damages for pain, suffering and loss of amenity for causing serious injury may be as high as £260,000. Damages for pain, suffering and loss of amenity for causing death zero'.[168] Although the damages for death have now increased over the years, having it written in those terms, enlightens the seriousness of how barbaric it is to have such a low maximum payment in England and Wales. The APIL have raised concern about the current settlement being too low. They had managed to fight their way to increase the settlement from £10,000 to £11,800, but they are still urging for a much higher increase.

4. Juries in England and Wales

Trial by jury in civil cases in England and Wales is almost obsolete. The eradication of juries for civil cases was a gradual process and happened over the nineteenth century. Currently, *'less than one per cent of civil cases are tried by jury'.* [169] The small minority of civil law cases that can still have a trial by jury were held under Senior Courts Act 1981. These cases include libel/slander, malicious prosecution, false imprisonment and fraud. Cases outside of the provided remit can have a jury at the discretion of the court. In the case of *Ward v James*[170] the Court of Appeal stated that *'personal injury cases… should be by judge alone unless there were special considerations*'.[171] It was later held that the technical issues of law arising from

[168] Kemp and Kemp, *The Quantum of Damages* (Vol.1, Sweet and Maxwell 2009), chapter 1.

[169] Elliot, C., Quinn, F. *English Legal System* (13th Ed, Pearson Education Ltd, 2012/13), p. 231.

[170] *Ward v. James.* [1962 W. No. 197.] - [1966] 1 Q.B. 273.

[171] Elliot, C., Quinn, F. *English Legal System* (13th Ed, Pearson Education Ltd, 2012/13), p. 231.

personal injury cases were unsuitable for a jury. This concludes that there are no trials by jury in cases of bereavement compensation, and it would almost seem absurd when the maximum award is set to £12,980. Hence, it is left to the discretion of the judge.

Bereavement Damages in Scotland

1. Background of Bereavement Damages

Before any of the debates take place, it is important to understand where the Act originated from. The Damages (Scotland) Act 2011 deals with damages in relation to personal injury and death and any other connected purposes. The 2011 Act sought to implement 'the Scottish Law Commission's Report on Damages for Wrongful Death, which was published on 30 September 2008'.[172] This consultation paper had explored recommendations made by the Scottish Law Commission, 'in reports on psychiatric injury and limitation and prescribed claims'. [173] The section of bereavement damages otherwise known as compensation under Scottish law will be the main focus of comparison and the relevant section is s.14(1) and (2).

In Scotland a compensatory form of damages will be paid out where a negligent act or omission has occurred. However, it is not easy to pinpoint the amount of compensation the grieving family member will be entitled to. This is outlined under s.4(3)(b) of the 2011 Act: Such sum, if any, as the court thinks just by way of compensation for all or any of the following –

[172] Damages (Scotland) Act 2011, 'Explanatory Notes', http://uk.practicallaw.com/uklegislation/asp/2011/7/notes/division/2# accessed 22 October 2014.
[173] The Scottish Government, 'Personal Injury', 2011, http://www.scotland.gov.uk/Topics/Justice/law/damages/damagesetc accessed 18 October 2014.

(i) distress and anxiety endured by the relative in contemplation of the suffering of A and before A's death.

(ii) grief and sorrow of the relative caused by A's death,

(iii) the loss of such non-patrimonial benefit as the relative might have been expected to derive from A's society and guidance if A had not died'.

There is no set maximum award settlement for bereavement in Scotland. The decision is made on a case-by-case basis through either a judge or jury. As stated by APIL President Matthew Stockwell:

'Cases are taken on their merits, damages are generally higher and the law is much more flexible about who can receive them.'[174]

2. Who is Eligible to Bring a Claim?

In Scotland the criteria for those who can claim is held under the Damages (Scotland) Act 2011 Section 14(1) and (2). Those eligible for bereavement damages in Scotland go beyond that of 'immediate family.' However, the 2011 Act has maintained a strict distinction between those of whom fall under the category of 'immediate family' members and those who are 'other relatives'.

The immediate family members are defined under S.4(5)(a) 2011 Act to include all members of family that are defined in S.14(1) ss.(a) to (d). These family members are able to claim for

[174] Hyde, J. 'Personal Injury Lawyers call for £100,000 Bereavement Damages,' the Law Society Gazette, 24 September 2013, http://www.lawgazette.co.uk/practice/pi-lawyers-call-for-100000-bereavement-damages/5037834.article accessed 18 October 2014.

damages under S.4(3)(b) as mentioned above, for non-pecuniary loss and loss of financial support. The 'other relatives' are those who fall under S.14(1)(b)(e)-(h). These relatives will only be eligible to claim for loss of financial support. The main area of focus will be immediate family members, as these will be eligible for compensation in relation to 'bereavement damages'.

The award of compensation can go to a wide variety of family members, to relieve them of some of the misery caused by a negligent act of a tortfeasor. Conversely, can it be said that the current list of eligible claimants' is too wide? Is it fair for brothers, sisters, grandparents and grandchildren to be able to claim bereavement compensation? It cannot be wholly unreasonable to expect that these family members will be grieving just as much as a parent, spouse or child would be for losing a relative. It must be stressed that this is immediate family, indicating the close relations between them and the likely love and admiration they have for each other. This should justify them having an bereavement award available to them. It is also important to remember that the deceased family member did not die of natural causes; they have had their life taken away from them at any given age in an unexpected and negligent accident. The family members of a close relation should be able to claim from the tortfeasor for their loss.

3. Juries in Scotland

The civil law cases held in the Court of Session[175] in Scotland and are tried by either judge or jury. Juries tend to have a lot of the personal injury cases, perhaps because the claimants opt

[175] The Scottish equivalent to the High Court.

to have trial by jury on the chance of having a higher bereavement compensation payment. As mentioned previously, the cases in relation to personal injury and bereavement damages are decided on a case-by-case basis. S. 5 of the Jury Trials (Scotland) Act 1815 provides: '(F)or reparation by pecuniary damages, the jury, if they shall find a verdict for the pursuer, shall also assess the damages'.

Thus, it is a jury's role to agree on an amount of damages to be awarded to the claimant. An issue with this is that juries may either over or under-compensate as they are allowed to decide on any set amount of bereavement damages to be awarded, unlike the set maximum given to claimants in England and Wales.

Over-compensation by jurors is a very contentious argument among academics and legal professionals. It was pointed out in a number of different cases that, where juries made the calculation of awards, there was an 'underlying disparity between the levels of damages a judge and a jury will award to relatives in fatal claims'.[176] It is seen to be that judges award damages for bereavement around the £30,000 region, whereas juries can award three times that number, sometimes reaching a staggering £100,000.

Where there is a trial by jury, one of the important factors to remember is that unlike a judge, who would know or can search previous case law decisions, juries are not told or made aware of the payments given to claimants in previous cases. They have little guidance, merely being given a piece of paper known as the 'Proposed Issue' that informs them of a maximum award that they cannot exceed.

There is quite a difference between the amounts of damages awarded to those in fatal claims under s.14 of the 2011 Act. Judges often will not exceed £50,000. In fact, the highest

[176] Lothian, A. 'Fatal Claims in Scotland, Putting a value on death,' 6 July 2011, http://www.andersonstrathern.co.uk/legal-updates/fatal-claims-in-scotland-putting-a-value-on-death/#.VE-yQvmsWSp accessed 6 October 2014.

amount awarded in the past 10 years was £41,000, granted to a spouse who had lost her 34 year old husband. There seems to be a particular routine with the amount awarded by judges. This would in effect create a clear and precise precedent to follow for future reference, avoiding confusion and bitterness between societies with extremely different awards for the same situation. Bereavement compensation awarded by juries however, the opposite. In the past 10 years, compensation awards have been increasing rapidly and significantly. The highest award, being £120,000, was granted to a child who lost their mother at the age of 50 and was later appealed. Hence, juries are clearly much more willing to award damages, and at a much higher rate than those given by judges.

The extent of the argument for the disparity of the bereavement damages awarded by a jury can be seen in the joint case of *Hamilton v Ferguson* and *Thomson v Dennis*[177] whereby both cases were appealed on the basis of the excessive amount of bereavement damages awarded. There was a five judge bench addressing the issue of this case, which sought to provide a solution to the difference in bereavement damages being awarded by the judge and the jury. It required a judge to give guidance to a jury about the amount that should be awarded, as well as expecting judges to increase their awards. For a case to come to this point demonstrates that there is a widespread concern about the increasing bereavement awards from juries in Scotland.

Another case where excessive damages have been awarded by a jury is that of *Catherin Foley v RJK*.[178] In this case the husband had died after falling down the stairs in the middle of the night as the hand rail that was fitted by the defendants had completely come away from

[177] *Hamilton v Ferguson Transport (Spean Bridge) Ltd; Thomson v Dennis Thomson Builders Ltd,* 2012 Scot (D) 10/6.

[178] *Catherine Foley McGee and Ors v RJK Building Services Limited,* 2013 CSOH 10.

the wall. The widow was awarded £80,000, the daughters aged 44 and 57 both got £35,000, the son aged 43 was awarded £27,500, and even the grandchildren and godchildren received some compensatory money. These awards were significantly higher than those awarded by judges.

Previously, a widow could expect no more than £50,000 and adult children no more than £18,000 from a judge.[179] It is no wonder that the system within Scotland is criticised due to this clear disparity between the awards from judges and juries which are in some cases considerably alarming.

In the case of *Young v Advocate General for Scotland*[180] a family member brought a claim for bereavement damages of a serviceman after he had died when a Nimrod aircraft caught fire, exploded and crashed over Afghanistan. The jury awarded the mother of her serviceman son £90,000 by way of bereavement award.[181] In this case the jury gave the claimant three times the amount of what a judge would be likely to give, highlighting the disparity of awards yet again.

This case had also sought damages for 'the first reported bereavement award made to a sibling - the deceased's sister was awarded £60,000 by the jury'.[182] The dispute over the sibling being allowed to claim will be discussed below but for the time being it needs to be noted that yet again there are extremely high awards granted from a jury. Family members

[179]Digby Brown Solicitors, 'Legal Commentary: Increased judicial awards in fatal accident cases,' 21 January 2013, http://www.digbybrown.co.uk/site/news_main/legal_commentary_judical_awards_fatal_cases accessed 23 October 2014.
[180] *Young v Advocate General for Scotland* 2009 Scot (D) 5/8.

[181] Brodies Solicitors, 'Record bereavement award made by Scottish Jury in third Nimrod crash case,' 1 January 2011, http://www.brodies.com/node/1570 accessed 3 December 2014.
[182] Ibid.

achieving such high levels of damages through a trial by jury are only going to encourage further claims being pursued down the jury route in the future. This reinforces the argument of 'compensation culture' and that the contemporary society is one of a compensation seeking culture. People will opt for a trial by jury in Scotland on the off chance of being awarded a more substantial amount of money for the grief and sorrow felt for losing a loved one. If they were not seeking more money, surely trial by judge would be sufficient? Although it would be unkind to attack a claimant with this allegation when they are already going through a heartbreakingly hard time, it appears that this debate will continue for the foreseeable future as there is no true way of proving that people are in fact acting on selfish grounds or not.

Critical Comparison between the Two Jurisdictions

1. Should Bereavement Damages Exist?

The harsh reality is that no matter how much money is awarded to the claimant they will never be fully compensated for their loss or satisfied with the award. The award cannot fully help the situation or bring their loved one back. It could be argued that paying a claimant for the loss of their spouse on the grounds of bereavement is profiting from loss and that it has had no actual beneficial impact on the claimant's life. It is incredibly harsh to expect a bereaved claimant not to gain any form of compensation for bereavement from the tortfeasor whose negligence in some way caused the death of the family member.

It is important to remember that the purpose of this award is not to punish the wrongdoer, but to compensate for the loss. Lord Hailsham stated when the bereavement damages were introduced that 'they can only ever be a token payment as it is clearly impossible to quantify

or provide adequate financial compensation'.[183] Albeit a token payment of acknowledgment of the sorrow caused, is it not somewhat better to have something rather than nothing? It allows the bereaved to feel that some form of justice has been granted for the unexpected, sometimes unexplained negligent act that caused the death of another. It would be socially and morally unacceptable for bereavement damages not to exist, even if the nature of the award is sometimes misconstrued.

The 2007 Ministry of Justice's consultation paper 'the Law on Damages' had an overwhelming response from lawyers in regards to retaining bereavement damages. Those that are against abolishing bereavement damages far outweigh those who are in favour. Some of the reasons as to why there was such an overwhelming agreement as to why the bereavement award should be retained include reasons such as that it reflects the wishes of society, showing that the justice system is listening to people and taking note, and understanding that such an awful occurrence deserves some acknowledgment. Many noted that the law was in fact flawed but nonetheless entrenched in English and Welsh law. However even though flawed, the awards give an 'important contribution towards the estate of the person killed'.[184] No law can come into force that affects everyone and not being subject to criticism, and this is true of bereavement damages.

Those against the abolition have a stronger argument. There are critics who are in favour of abolishing Section 1(A). Those in favour argue that 'the award should be replaced with an apology'.[185] In many respects, those who feel they have been wronged, especially in relation

[183] Draft Civil Law Reform Bill, 'Pre-Legislative Scrutiny Justice Committee Contents,' 31 March 2010, http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/300/30005.htm accessed 7 October 2014.
[184] Ibid.

[185] Ibid.

to medical negligence would prefer an explanation from their doctor and an apology, so it would make sense to have an apology for negligence in respect to personal injury and loss of a loved one. Conversely, the claimants would be grieving and be extremely angry and hurt. Would an apology be enough to rectify the situation? Then again, neither can £12,980. It is a very quarrelsome argument, and no true explanation or meaning would come of it. Everyone handles situations differently and it is not fair, just or reasonable to have one rule that applies to all when everyone is so diverse. However, one cannot have a different approach for each and every person as that would lead to public outcry and inconsistencies.

2. The Claimants

Those who are eligible to claim for bereavement damages in Scotland are a lot broader and there is a more considered approach unlike that of England and Wales. Under both jurisdictions a spouse or civil partner is eligible to claim but Scotland also allows a cohabitee to do so. In England and Wales on the other hand '*a* cohabitee is excluded from the definition, despite the fact that a cohabitee can pursue a dependency claim'.[186]
In England and Wales, a parent could only claim for the loss of their child who is under the age of eighteen, and the child cannot claim for the loss of either parent. This is extremely narrow in comparison to Scotland, as under the Scottish jurisdiction a parent can claim for the bereavement of their child, no matter the age. It also allows both parents to claim for an illegitimate child, whereas under English and Welsh law only a mother can make a claim for bereavement compensation for the loss of an illegitimate child. One of the most outstanding comparisons that need to be made is in fact that children can claim for the loss of a parent

[186] Mardell, J., Serfozo, K. Personal Injury and Clinical Negligence Litigation, College of Law Publishing, 2014), p. 287.

under the Scottish statutory law. This has caused great debate amongst those who are affected directly from such a claim and legal professionals. It is no wonder that there is a persistent urge to update the law in England and Wales to be similar to that of Scotland.

Under S.14 Damages (Scotland) Act 2011 brothers, sisters, grandparents and also grandchildren are eligible to claim for bereavement damages. It has been previously discussed whether this is worthwhile and justifiable, however, should England and Wales adopt the same approach? Should a claim for further relatives under English and Welsh law be permissible? This has been the centre of the arguments for quite some time. APIL have urged to widen the eligibility to allow children to claim for their parents, illegitimate fathers to be allowed to claim and also cohabitees. As can be seen those eligible to claim is a lot broader for patrimonial and non-patrimonial losses. In contrast with England and Wales, not only is the pool of relatives a lot wider, but the approach is also much different.

3. Should the Award Be Increased in England and Wales?

The Fatal Accidents Act 1976 S.1A(3) has defined within the statute how much a bereaved claimant can claim. The section provides that a claim of £10,000can be made. This provision was updated in 2013, allowing a claimant to be able to receive up to £12,980. In regards to the Scottish Justice System, there is no maximum settlement as to what a claimant can be awarded. The damages are decided on a case-by-case basis by either a judge or jury, as previously discussed. The Ambassador of APIL Matthew Stockwell said that ‘damages in

Scotland are generally higher, and the law is much more flexible'.[187] When awarding damages to the bereaved parties, the amount of compensation is determined by the judge or by a jury if the defendant has chosen a trial by jury. This can be anything from £30,000 up to £120,000 in some cases involving juries. There is no set minimum or maximum as to how much a party can receive. There is a great difference in bereavement award maximum settlements between the two legal justice systems. It is therefore no surprise that many feel that the current award for England and Wales needs to undergo serious consideration for a reform in the law.

The question is therefore whether bereavement damages within England and Wales should be increased. In 2007 researchers at the University of Warwick undertook a study on bereavement damages within England and Wales. Their research suggested that the current maximum award is unequivocally insufficient, and does not come close to compensating claimants for their loss suffered and their unhappiness.

The public surveys APIL had undertaken came to the resounding result that the bereavement damages were based on economic value of the loss of a loved one and they proposed a new approach of examining 'the effect on mental well-being of particular life events, including bereavement'.[188] It would be problematic to measure the mental well-being of a person who is grieving and use that as a guide as to how much in bereavement awards they are entitled to. It is practically impossible to decide what may be sufficient for

[187] Hyde, J. 'Personal Injury Lawyers call for £100,000 Bereavement Damages,' the Law Society Gazette, 24 September 2013, http://www.lawgazette.co.uk/practice/pi-lawyers-call-for-100000-bereavement-damages/5037834.article accessed 18 October 2014.

[188] Elliot, C., Quinn, F. *Tort Law (*9th Ed., Pearson Education Ltd, 2013), p. 408.

one person, and whether that is adequate for another. Each and every individual deals with grief in their own way, and some people may be more seriously affected than others.

It is hard to justify bereavement damages as a whole, and as to how much (if at all) the current maximum should be increased. It is still a matter of debate amongst those who are, or have been affected and legal professionals, that the current settlement in England and Wales should be increased to match that of Scotland. A survey by APIL shows that '80% of those surveyed perceived the Scottish system for bereavement damages as being fairer, prompting calls for the law in the rest of the UK to be reviewed; 57% felt a figure of more than £100,000 would be appropriate'.[189] There is a large amount of criticism and urgency for a reform in the law, and having many suggestions from public surveys instigated by APIL shows how out of touch the justice system is with the feelings of those who are affected. It seems highly unfair to have such a low amount for someone to claim as a bereavement award when, in cases of personal injury, claimants would have received a much higher award. The bereavement damages in England and Wales having once been at a zero balance before 1982 later becoming £3,500 that is only a fraction of the current settlement. It is still argued to be too low.

There is also great aggravation towards the fact that when a couple have lost their child, the bereavement damages that both the mother and father would be entitled too actually only get one proportion of the damages (the set £12,980) split between them in the one household. The same applies to parents who are not actually living together but have lost a child. This surely cannot be fair. Both the mother and father will be seriously distressed and grieving in their own way, but can only claim for bereavement damages to be shared

[189] Hartigan, T. 'Bereavement Damages – A Geographical Injustice?' 26 September 2014, http://www.trethowans.com/site/library/legalnews/bereavement_damages_a_geographical_injustice accessed 11 October 2014.

between them. This is especially harsh when the parents are no longer together but lose a child due to a fatal accident.

There is grave concern over the parent who is the tortfeasor being allowed to claim or stopping the other parent from claiming their half of the bereavement damages. This was the situation in the case of *Navaei v Navaei.*[190] The case involved a car accident by which the mother's negligent driving caused the death of the daughter. The father tried claiming for himself and demanded that he should receive the whole statutory sum and that the mother should not be awarded as it would be contrary to public policy. The father was claiming bereavement damages on his own behalf for his own benefit and self-gratification. The court held that 'in bringing a claim under the 1976 Act, a claimant is under a duty to bring act on behalf of all dependents and the father was allowed only half the damages'.[191] Can this really be seen as fair? The mother would not be in a position for claiming bereavement damages as she is the tortfeasor, however, the father that is now grieving because of the negligent acts of the mother can only claim for his half of the damages? It seems incredibly unreasonable for such a ruling to stand.

4. Use of a Jury

The use of juries between the two jurisdictions for awarding bereavement damages is very different, as has been discussed. The question is whether a jury should have statutory allowance to dictate how much a claimant can receive in bereavement awards in England

[190] *Navaei v Navaei* (1995) (6 January 1995, unreported).

[191] Mardell, J., Serfozo, K. *Personal Injury and Clinical Negligence Litigation* (College of Law Publishing, 2014), p. 287.

and Wales on a case-by-case basis as in Scotland. Knowing the extent of what the juries are willing to award, and knowing that it is not without its critics, would it be wise to introduce a jury? Is it not fair to have a set maximum award for a judge to allow rather than a jury? Juries in Scotland have been known for over-compensating and being overly generous. If this were to happen in England and Wales, it could lead to even more problems and it could encourage even more claimants to seek an action against the tortfeasor in hope of receiving monetary compensation. It is a very open ended argument and many people will disagree. However, as can be seen from previous case law, having a jury to decide the amount to be compensated to the claimant is the wrong way forward.

Having so many arguments surrounding this area of the law reflects what society and legal professionals' think of the situation and will continue to encourage an update in the English and Welsh law. The awards in Scotland are a lot higher than that of England and Wales, and there is therefore no wonder there are so many complaints about the set maximum for bereavement damages.

An increase in the set maximum is needed, but to have a jury who are only given an amount as to which they are not to exceed so they can award what they feel is right seems to be leading to very eccentric outcomes causing problems as the awards are so far and beyond what is given by a jury to that of a judge. In Scotland, it has led to most claimants asking to have a trial by jury in hope of obtaining more money. If this were to happen in England and Wales, the suggested law reforms for bereavement damages would surely continue to arise, only this time with the view that juries are in fact overcompensating.

It could be suggested that juries are given a maximum award settlement as to what they can award, but cannot exceed. For instance, a £50,000 maximum, this would allow a jury to have

discretion on what is a suitable award for the claimant. It is quite clear the current award settlement of £12,980 needs to be increased but to what extent is yet to be agreed upon in a future law reform. It is clear however that having a maximum amount would allow a jury to appropriately compensate a claimant without overcompensating and causing outrage amongst legal professionals.

Reforming the law

1. England and Wales

There have been a few attempts at reforming the law in England and Wales and most, if not all the time, a comparison has been drawn between the jurisdictions in England, Wales and Scotland. One of the first major law reports to recommend a change was the Law Commission's Claims for Wrongful Death Report in 1999. The aim of this report was to recommend an update in the legislation for Government and Parliament to consider enacting. The report focuses on bringing the area of the law more in line with modern day society and to make the law fairer.

The report recommended extending the eligibility criteria as to who can claim to include 'the deceased's children, siblings and long term partners' and also proposed 'the quantum of the award should be uplifted to £10,000, with an overall maximum award for any one death of £30,000…subsequently be adjusted to keep pace with changing economic conditions'.[192] Nonetheless, too this day, 15 years later, the suggested extension of claimants from the report has not been implemented. The law not having been changed in any way, not even

[192] The Law Commission, Claims for Wrongful Death: Item 1 of the Seventh Programme of Law Reform, Damages (1999) Law COM No.263.

partly, led to more questions and arguments in future reports. However, the extension of the award settlement was implemented- increasing it to £10,000 in 2002, but the maximum of £30,000 was not enforced. This report has suggested that the award is to subsequently increase to keep up with changing economic conditions in England and Wales. Since this report, the set maximum has increased on a further two occasions. Albeit a small difference in some ways has been made, the report has not gone to waste. The arguments proposed in the report were greatly supported by all consultants who worked on the report and the arguments have carried through to further reform recommendations.

Another law reform report came in 2009 was scrutinised by the House of Commons. The report suggested extending the list of those eligible to make a claim. However, this report suggested abolishing the list and replacing it with a general category. The House of Commons rejected this idea on the basis that 'the claimant [would have] to prove his or her bereavement in court which is likely to be a distressing and potentially protracted proceeding at a difficult time'.[193] This was later retracted and the Law Commission suggested an extension on the current list of those allowed to claim, to include cohabitees, long term partners who plan to marry and for children under and over the age of eighteen to claim for the loss of their parents. The children extension for under the age of eighteen was rejected but the extension for cohabitees of more than two years was proposed. In fact the House of Commons had stated 'this is a long overdue reform…while any qualifying period is necessarily arbitrary, we believe the two year period, which is common in statute, is the

[193] House of Commons Justice Committee, Draft Civil Law Reform Bill: pre-legislative scrutiny (6th Report of Session 2009-10), http://www.publications.parliament.uk/pa/cm200910/cmselect/cmjust/300/300i.pdf accessed 9 December 2014.

most appropriate solution'.[194] Yet, there is still no statutory allowance for a cohabitee of two years or more to claim bereavement damages today.

It was noted by the House of Commons in relation to children that 'close ties of love and affection do not cease or weaken when a child reaches 18…we therefore recommend that Parliament should recognise the on-going importance of that relationship by extending eligibility for bereavement damages to all children who lose a parent'.[195] This argument has been proposed many times and the House of Commons have in fact acknowledged the importance of this. Yet, there is still no statutory legislation to allow children to pursue a claim. This should and most certainly will, go towards any future arguments for bereavement damages, and maybe then Parliament will realise how strongly society feel towards this and endorse it in a future law reform.

In relation to the award settlement, the 2009 report suggested having a 'ceiling' approach, whereby there is a set maximum of three times the current settlement that is outlined in the Fatal Accidents Act 1976, to be divided equally between the three parties rather than having one portion of bereavement damages split between the three claimants. It was suggested that a set maximum of three would be appropriate as it seems that three is the typical extension of family members who would be looking to claim. However, it has been noted that any more than three claimants would lead to discrepancies. The House of Commons agreed that a cap on the bereavement award was needed, for it to be shared equally between the claimants.

[194] Ibid.

[195] Ibid.

The two reports have both suggested a reform of the Fatal Accident Act 1976. S.1A over the same issues, the expansion of those who can claim for an award and an increase of the amount a claimant can receive. Yet, the law has still not updated the law in respect of who can claim for bereavement damages. There have been many arguments and proposals and the House of Commons have even agreed, but still nothing. The award settlement has increased since, from £11,800 in 2008 to £12,980 in 2013. This has increased and arguably, keeping up to the social economic standard. Although, an urge for an increase to three times the amount similar to that of Scotland's has been continuously pointed out and debated.

2. Scotland

The Damages (Scotland) Act 2011 in relation to bereavement damages has not gone without its critics and suggested law reforms, although far less frequent than that of England and Wales.

The most recent major law reform proposals came about in 2008 in the Scottish Law Commissions report 'Damages for Wrongful Death'. It is interesting to note that this report did not say much about the current award settlements being given by a judge or jury. Rather, the main focus of the law reform was based around the list of claimants eligible to claim and the intention behind the award. Concerns about the definition and intentions of such awards were raised, having said 'the awards are problematic in that they are an attempt to provide compensation for something that cannot be quantified'.[196]

[196] Scottish Law Commission, Promoting Law Reform: Report on Damages for Wrongful Death (2008) Scot Law COM No.213, http://www.scotlawcom.gov.uk/publications/reports/2000-2009.accessed 23 October 2014.

However, there was an overwhelming majority of respondents from the consultation that had said the claims for non-patrimonial loss should continue to compensate for the loss of a loved one from a negligent accident. It was held that 'in general the current system worked well'.[197] This report had only raised minor concerns, and even so they were later dismissed. It is clear from this report that many people are generally very happy with the current legal system and how it works in regards to bereavement awards. Nonetheless, two years later the very same concerns were raised.

The Scottish Government released a consultation paper in 2010.[198] The main aim for this consultation was suggesting a reform of the 2011 Act in order to modernise and simplify the law, seeking views on how the Government plan to approach the provisions proposed. Similarly to the 2008 report, the main suggestion for reform was related to those eligible to claim a bereavement award. The Scottish Law Commission had commented saying 'the current list of relatives entitled to sue…is too wide and anachronistic and that there was no compelling reason for allowing such a comparatively wide range of relatives'.[199] They had suggested that anyone who was to apply for bereavement damages through S.14 ss.(e) to (h) of the Damages (Scotland) Act 2011 were to be disregarded, as the criteria was too wide and becoming too complicated. The Scottish Law Commission proposed that the right to sue for patrimonial and non-patrimonial loss should be restricted to those who are categorised as 'immediate family' members. In later discussions from the Scottish Government it was held that this recommendation had very little support due to the complex family structures.

[197] Ibid.

[198] The Scottish Government, Civil Law of Damages: Damages for Wrongful Death: A Consultation Paper, (2010) http://www.scotland.gov.uk/Publications/2010/07/06142911/0 accessed 23 October 2014.
[199] Ibid.

It would be unfair to reject a family member that may very well qualify for patrimonial and non-patrimonial loss.

Overall, there have been very minor changes to the current Scottish legal system in regards to bereavement damages. There seems to be widespread agreement and satisfaction with the current statute law in relation to who can claim and as to how much should be awarded by the discretion of a judge or jury. The only criticism that seems to arise repeatedly is that of the immediate family members, and other family members. Often it has been noted in previous law reform reports that the current law is complicated and unclear. Perhaps this is because they have both categories of those of who can claim in the same section of the statute, but overall there seems to be no major concerns.

3. The Association of Personal Injury Lawyers *(*APIL)

Should the English and Welsh statute law extend the list of relatives that can claim for bereavement damages, similar to that of Scotland? The amount of contentious arguments surrounding the 1976 Act has not gone unnoticed. There has been great urgency and many reports suggesting ways the Government should implement changes to the current statute law, not just on the extension as to who can claim but also the maximum award that can be received.

One of the leading commentators and the force behind the increase of the bereavement award in 2008 was APIL. The association was formed by personal injury lawyers who share a view of representing the interests of victims who have suffered personal injuries. APIL are 'dedicated to campaigning for improvements in the law to enable injured people to gain full

access to justice'.[200] The association has greatly influenced Parliament and the Government as to the increase of the award thus far, and continue to produce surveys and reports for a further change in the law. APIL regularly undertakes surveys for research among the general public and stakeholders to complete authoritative research reports to represent the needs of personal injury claimants, to influence internal and external sectors towards a change in the law. In 2013 APIL had undertaken a survey of personal injury claimants in relation to bereavement damages. The response was overwhelming, and it is clear just how much people wish for the current legal system to be reformed. Some of the survey results were as follows '57% of people think the level should be over £100,000…37% of people feel a parent should receive bereavement damages for the loss of a child regardless of the child's age…a third agreed that a child regardless of age, should receive bereavement damages for a parent'[201] and finally 'nearly 74% of people thought bereavement damages should be awarded on a case by case basis'.[202]

Whether a reform of s.1.A of the Fatal Accidents Act 1976 will be enacted, extending the list of eligible claimants remains to be seen. It is quite clear that the arguments and urge for a reform of the law will not be going away until action has been taken. It is particularly clear from the surveys that many people agree that an update of the law is needed, which is very much similar to the jurisdiction in Scotland. However, whether judging bereavement claims on a case-by-case basis is wise remains unknown until at least trialled, even though, in light of the outcomes of cases arising in Scotland showing a disparity of awards given, it would

[200] Association of Personal Injury Lawyers, Bereavement Damages: A research project (2013), http://www.apil.org.uk/files/campaigns/bereavement-damages-research-report-2013.pdf accessed 12 October 2014.
[201] Ibid.

[202] Ibid.

seem unwise. The disparity of awards from judges and juries seems to be causing even more problems.

Concluding Thoughts

Having researched extensively into this area, and analysed all the pros and cons of increasing the bereavement damages award and redefining the family members that are able to claim, I have concluded that the law should be reformed and the following views are my own.

1. Value of the Damages Award

I am in agreement with many others, that the current award needs to be increased. I am unsure of what the actual increase should be (and neither experienced enough or qualified to define it). However, I do believe that £12,980 is far too low, but feel that £100,000 is also excessively high, not needed and may encourage the compensation culture. It must be remembered that claimants will most likely seek compensation in other areas of the law as well in relation to a negligent accident. Bereavement awards are purely compensating for the grief and sorrow felt. No award can fully compensate for the loss felt but it needs to be realistic.

2. Splitting of the Damages Award

I also propose that when bereavement damages are to be awarded to a family, the set amount is not to be split between the claimants. For instance, if a mother and father both

claim for the loss of their child, they should both in turn receive the full statutory amount. Everyone has their own way of grieving and have been affected in different ways. It would be unfair and unkind to acknowledge this as a joint grievance.

3. Scope of Claimants

I propose the extension on the family members that should be allowed to claim is as follows.

- Fathers of an illegitimate child should have just as much right as the mother to claim for damages, if they are actively taking a role in that child's life. To be denied this I think is incredibly unjust.
- Parents should be able to claim for the loss of their child, no matter their age. The love and admiration for their own children will not disappear as soon as they hit the age of eighteen.
- Cohabitants should be able to claim for their cohabiting partner if they have been living together for two years or more. There does not need to be any sign of future marriage, just an active relationship (will need to have been consummated). Nowadays many couples are choosing not to marry and are deciding to become cohabiting couples for long term purposes instead of marriage. Thus, it would be unfair to treat them any differently to a married couple.
- Children over the age of eighteen should be able to claim for the loss of either parent. They will also be suffering and grieving for their loss, it appears unfair to deny them of this claim. Children under the age of eighteen however are a little more difficult. I would like to have the option open for them to pursue a claim for bereavement damages; although I do believe that it should only be allowed to a child who can reasonably understand the nature of what has happened and as to

why they are allowed a bereavement award. I can appreciate this is a very tricky area to try and regulate as it seems difficult to prove that the young child fully understands. If not, I would also propose that the child be allowed to claim for bereavement damages in general, no matter their age.

- Brothers, sisters and grandparents should also be able to claim. As in Scotland they should come under the category of 'immediate family' members, and would suffer with a level of sorrow that cannot be ignored. I would propose in relation to these family members, that the award settlement they receive is not as high as any immediate family members above would have been awarded. This would be left to the discretion of the judge on a case-by-case basis.

4. Judge or Jury

The amount of damages that can be claimed should be left to the discretion of the judge, not a jury. This would prevent serious discrepancies and over-compensating like that of juries in Scotland which can in turn fuel the compensation culture of modern times.

Britain's case for federation. The contemporary debate on devolution and modern challenges to the doctrine of parliamentary sovereignty in the light of Dicey's views on Irish Home Rule.

Kacper Zajac

Introduction

1.1 Aim of the paper

The aim of this article is to present a legal case for the federalisation of the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom")[203] under a written constitution which would restrict the powers of Parliament in accordance with the Lockean concept of limited government. It will be proven, with reference to the relevant historical context, that such a constitutional change is the most appropriate response to the challenges that the Constitution of the United Kingdom faces today.

AV Dicey is the highest authority on the constitutional law of the United Kingdom, therefore any discussion surrounding this subject cannot be conducted without touching upon his work. His interpretation of the doctrine of parliamentary sovereignty remains the underlying principle of the British Constitution. This article is not interested in challenging this principle on the basis of political practice but rather to show Dicey's reasoning as outdated or

[203] Interpretation Act 1978, schedule 1

otherwise unsuitable for the 21st century. Consequently, by refuting Dicey, one removes the main obstacle that stands in the way of major constitutional reform. The reform that would clarify grey areas of contemporary British constitutional law: such as the position of the law of the European Union, the effectiveness of the Human Rights Act 1998, and the question of progressing devolution. In the face of those developments it is necessary to reconsider the validity of the doctrine of the sovereignty of Parliament. In order to do so, one must reconsider the conclusions and assumptions that led to the establishment of the doctrine in the first place.

1.2 Schedule

Firstly, this article will examine the historical context starting with the concept of the separation of powers itself. In order to understand the nature of the British Parliament its history will be presented in the context of the ideological conflict between John Locke and Thomas Hobbes on the scope of powers that a government should enjoy. Subsequently, this article will thoroughly examine Dicey's understanding of the doctrine of parliamentary sovereignty, as well as his approach to the concept of legal autonomy in reference to Irish Home Rule. At this point, this article will aim to refute Dicey's arguments against any measure that would impose limits upon the powers of the United Kingdom Parliament. Only then will the contemporary issues of European Union law, Human Rights, and devolution be introduced to the debate. The final chapter will sum up the previously presented arguments and conclude the discussion.

1.3 Terminology

Firstly, it should be clarified what is meant by "*Parliament*". The Parliament of the United Kingdom is a legislative body that consists of the House of Commons, House of Lords and the Crown, acting together as the "*Queen in Parliament*".[204] An Act of Parliament is a product of three readings in each House, though the requirement of assent from the House of Lords can be bypassed after one year has passed since the introduction of the Bill.[205] Similarly, the role of the Queen is purely symbolic, as it is a constitutional convention that the Monarch gives their Assent.[206]

The literature cited in this article remains inconsistent in terms of the terminology, especially in relation to the names of Parliament at different time periods. It should be noted that this article relies on the reprints of the final versions of original works. However, in order to avoid confusion, it will adopt a simplified model of terminology: "*English Parliament*" refers to the historical Parliament of England (which at the time included also Wales)[207] before the Union with Scotland in 1707,[208] "*British Parliament*" refers to the Parliament of Great Britain (England, Scotland and Wales) whereas "*the United Kingdom Parliament*" refers to the Parliament of both the United Kingdom of Great Britain and Ireland (1801-1922) and the contemporary Parliament of the United Kingdom of Great Britain and Northern Ireland. "*The Parliament of Ireland*" refers to the proposed Parliament of Ireland under the Home Rule

[204] Dicey A.V., "*Introduction to the Study of the Law of the Constitution*" (The Macmillan Press Ltd, London 1959) at p39

[205] Parliament Act 1911, s2 as amended by Parliament Act 1949, s1

[206] Jennings I., "*The law and the Constitution*" (University of London Press, London 1959) at p143

[207] Laws in Wales Act 1542

[208] Union with Scotland Act 1706

Bills whereas "*The Northern Ireland Assembly*" is the contemporary legislature of Northern Ireland under devolution.[209] Similarly, "*the Parliament of Scotland*" refers to the Parliament of Scotland before its Union with England in 1707 and it should not to be confused with "*the Scottish Parliament*", that is the legislature of Scotland under devolution.[210] Consequently, "*the National Assembly for Wales*" is the devolutionary legislature of contemporary Wales.[211]

In relation to the Constitution, this article will adopt the general terms "*the British Constitution*" and "*the Constitution of the United Kingdom*" which will be used interchangeably regardless of the historical period.

Finally, it should be clarified that the use of the term "*government*" in this article refers to "the system by which a state or community is governed";[212] as opposed to "*the executive*" which only refers to the executive branch of government under the doctrine of the separation of powers.

1. Historical Context

This section deals with the historical context of the sovereignty of the United Kingdom Parliament. Firstly, it will describe the difference in approach to the social contract theory between Thomas Hobbes and John Locke, with the emphasis on the doctrine of the

[209] Northern Ireland Act 1998

[210] Scotland Act 1998

[211] Government of Wales Act 1998

[212] Oxford Dictionaries; http://www.oxforddictionaries.com/definition/english/government retrieved 28/11/14

separation of powers. Last but not least, it will present a short history of the United Kingdom Parliament in the light of such intellectual struggle.

2.1 Social Contract Theory

The Social Contract is "an implicit agreement among the members of a society to cooperate for social benefits, for example by sacrificing some individual freedom for state protection..."[213] The concept was initiated by theorists such as Thomas Hobbes and John Locke and subsequently developed by Jean-Jacques Rousseau[214] to explain the source of the legitimacy of a government.

2.1.1 Hobbes: *Bellum omnium contra omnes*

In his book "*Leviathan*",[215] Thomas Hobbes, put forward the concept of the omnipotent sovereign as a response to a bleak vision of man's nature. Hobbes believes that an individual is driven by "a perpetuall and restlesse desire of Power..."[216] which leads to a permanent state of war.[217] Consequently, people seek help in the society as the only way to secure their life and liberty.[218]

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[213] Oxford Dictionaries; http://www.oxforddictionaries.com/definition/english/social-contract retrieved 28/11/14

[214] "*Of The Social Contract, Or Principles of Political Right*" (1762)

[215] Originally printed in 1651

[216] Hobbes T., "Leviathan" (W. W. Norton & Company Inc. New York 1997) at p55

[217] *Ibid.*, at p56

[218] *Ibid.*, at p57

Peace can last only where "*a common Power*" exists to enforce contracts.[219] People might give up their right to governance by transferring it to another person by word and/or actions.[220] However, then, such a move is irreversible and further exercise of the right by a transferee should not be hindered.[221] "For a man that hath passed away his Right to one man to day, hath it not to passe to morrow to another".[222] Hence, all men have "to conferre all their power and strength upon one Man, or upon one Assembly of men ... and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgement ... it is a reall Unitie of them all, in one and the same Person..."[223]

Such a doctrine of unity has very profound consequences. Accordingly, the Sovereign "cannot Forfeit: He cannot be Accused by any of his Subjects, of Injury: He cannot be Punished by them. He is Sole Legislator: and Supreme Judge of Controversies..."[224] Consequently, Hobbes refuses to accept any separation of powers. In fact, the author claims that an attempt to divide the Sovereign power leads to mutual destruction.[225]

Finally, the Sovereign cannot be found in breach of the social contract because "the Soveraigne maketh no Covenant with his Subject before-hand..."[226] What is more, there

[219] Hobbes (n 14) at p76

[220] *Ibid.*, at p73

[221] *Ibid.*

[222] *Ibid.*, at p77

[223] *Ibid.*, at p95

[224] *Ibid.*, at p110

[225] *Ibid*., at p165

[226] *Ibid*., at p97

would be no judge to adjudicate on the dispute.[227] Consequently, subjects of the Sovereign cannot challenge the authority once established.[228]

2.1.2 Locke and Federalist Papers

The concept of a Sovereign with unlimited powers was opposed by John Locke. In his *magnum opus,* "*Two Treatises of Government*",[229] Locke sets out his idea of a social contract written in the light of the Glorious Revolution.[230]

Although Locke distinguishes between a State of Nature and a State of War[231] he agrees with Hobbes that "*a common Superior*" is necessary because humans, as partial creatures, should never be judges in their own cases when a dispute arises.[232] Consequently, Civil Government must be established so that the violence is restrained.[233]

It is the extent of powers (that the sovereign should enjoy) that Hobbes and Locke disagree about. Accordingly, "the liberty of Man, in Society, is to be under no other Legislative Power, but that established, by consent, in the Common-wealth, nor under the Dominion of any Will, or Restraint of any Law, but what the Legislative shall enact, according to the Trust put

[227] *Ibid*.

[228] *Ibid*., at p98

[229] Originally printed in 1689

[230] 1688

[231] Locke J., "*Two Treatises of Government*" (A Mentor Book, New York 1965) at p321

[232] *Ibid*., at p316

[233] *Ibid*.

in it".[234] The law making power must be vested exclusively in the legislature appointed by the public[235] or otherwise the legislation passed would lack legitimacy.[236] The Members of society confer upon the legislature only such powers as they themselves used to enjoy in the State of Nature.[237] Hence, the legislature enjoys only powers related to the protection of life and property.[238]

Consequently, and unlike Hobbes, Locke believes that such a body "can never have a right to destroy, enslave, or designedly to impoverish the Subjects".[239] Neither can it deprive citizens of their property without their consent.[240] Locke argues that although the legislature is the supreme authority of the land[241] it nevertheless must act within the scope of powers conferred upon it by the citizens who can "*remove or alter* the Legislative, when they find the Legislative act contrary to the trust reposed in them".[242]

Unlike Hobbes, Locke also believes that everyone must be subject to the law.[243] As a result, the executive power must be distinguished from the legislative in order to avoid a situation

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[234] *Ibid*., at p324

[235] *Ibid*., at p401

[236] *Ibid*.

[237] *Ibid*., at p402

[238] *Ibid*., at p403

[239] *Ibid*.

[240] *Ibid*., at p406

[241] Locke (n 29) at p412

[242] *Ibid*., at p413 (emphasis added)

[243] *Ibid*., at p373

where the law-making body exempts itself from the laws it has made.[244] As such the executive must be accountable to the legislature.[245] This is because once the Sovereign is in possession of "both legislative and Executive Power in himself alone, there is no Judge to be found, no Appeal lies open..."[246] Consequently, Locke recognises the separation of powers only between the executive and legislature. He does not suggest that legislation should be subject to judicial review, even though he believes it must not contravene natural law.[247]

The Lockean idea of the separation of powers was further developed by Montesquieu in "*The Spirit of the Laws*".[248] However, unlike Locke, Montesquieu argued for the separation of powers between the executive, the legislature and the judiciary. What is more, Montesquieu contributed to the system of checks and balances "by placing powers of control over the other branches in the hands of each of them."[249] The creators of the United States, the Founding Fathers, expressly accepted that "the accumulation of all powers, legislative, executive and, judiciary. In the same hands ... may justly be pronounced the very definition of tyranny".[250]

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[244] *Ibid*., at p410

[245] *Ibid*., at p414

[246] *Ibid*., at p370

[247] Waldron J., "*The Dignity of Legislation*" (Cambridge University Press, Cambridge 1999) at pp63-4

[248] Originally published in 1748

[249] Vile M.J.C., "*Constitutionalism and the Separation of Powers*" (Oxford University Press, Oxford 1967) at p93

[250] Hamilton A., Jay J., Madison J., "*The Federalist: or, The new Constitution*" (J. M. Dent and Sons Limited, London 1937) at p245

The Founding Fathers accepted also Hobbes's idea of the state of nature as permanently engrossed in war; however they rejected his concept of the omnipotent sovereign.[251] "For them, the American experience can be viewed only as a Lockean solution to a Hobbesian problem."[252] Hence, Madison explained that "the interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devise should be necessary to control abuses of government".[253]

2.2 History of the United Kingdom Parliament

Unlike the American Congress, the Parliament of the United Kingdom is a result of centuries of gradual evolution. Inevitably, its nature is different. The political history of pre-union England is a history of struggle between Kings and Parliaments.[254] This struggle ended with the unquestionable victory of the legislature. However, it seems that Parliament did not merely limit the powers of the Crown but has claimed them for itself.

Following the Magna Carta,[255] the King was obliged to consult the Barons before any direct taxation burdens could be levied.[256] However, since the Statute of Proclamations 1539, until

[251] Mace G., "*Locke, Hobbes, and the Federalist Papers*" (Southern Illinois University Press, Carbondale 1979) at p10

[252] *Ibid*.

[253] Hamilton, Jay, Madison (n 48) at p264

[254] Butt R., "*The Power of Parliament*" (Constable, London 1967) at p34

[255] Magna Carta 1215, article 14

[256] Butt (n 52) at p33

it was struck down by the court,[257] the Crown had a practice of ruling by decrees.[258] Even after that, the Monarch was still in a position to refuse the assent or suspend the operation of an Act which would infringe upon his or her prerogatives.[259] The parliamentary authority in the early 17th century continued to be weak. The judiciary still maintained that common law controlled legislation passed by Parliament[260] and might even treat an Act of Parliament as void if it contravened the Scripture[261] or natural law[262] in general.[263]

In 1628 Parliament forced Charles I to assent to the Petition of Right[264] which, *inter alia*, "asked for a settlement of Parliament's complaints against the King's non-parliamentary taxation and imprisonments without trial".[265] This, however, did not resolve the conflict between Parliament and the King which subsequently led to the outbreak of the Civil War[266]

[257] *Case of Proclamations* (1611)

[258] Barnett H,, "*Constitutional & Administrative Law*" (Routledge, Abingdon 2011) at p110

[259] *Ibid*.

[260] *Dr Bonham's Case* (1610) 8 Co Rep 114a at 118a

[261] *R v Love* (1653) 5 State Tr 825 at 828

[262] *Day v Savadge* (1614) Hob 85; 80 ER 235 at 237

[263] Loveland I. "*Constitutional Law, Administrative Law and Human Rights; A critical Introduction*" (Oxford University Press, Oxford 2009) at p23

[264] Petition of Right 1628

[265] "Charles I and the Petition of Right" http://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/overview/petition-of-right/ retrieved 26/11/2014

[266] 1642–1651

and a temporary abolition of the monarchy altogether. The short period of the Republic[267] ended with the restoration of the Stuart dynasty to the throne by the Long Parliament.[268]

Not until the Glorious Revolution of 1688 did Parliament establish its superior position.[269] The Bill of Rights passed in 1689 substantially limited the powers of the Crown. It forbade the Monarch from keeping a standing army in time of peace,[270] reaffirmed the authority of Parliament in relation to all taxation burdens,[271] prevented the Monarch from suspending the laws passed by the legislature[272] and others.[273] The principles laid down in the Bill of Rights were to enjoy a superior status in relation to the powers retained by the Crown.[274] Consequently, from that point any case law setting limits upon the validity of parliamentary legislation was to be disregarded.[275]

It is safe to say that early medieval Kings ruled in accordance with the Hobbes's idea of an omnipotent sovereign across the whole of Europe. The process of taking over the competences of the British Monarchs by Parliament, although initiated by the latter, was sanctioned by a series of judicial decisions. However it was possible only after Parliament passed the Act of Settlement 1700: imposing further limitations upon the competences of

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[267] 1649-1660

[268] Butt (n 52) at p49

[269] Barnett (n 56) at p115

[270] Bill of Rights 1689, article 6

[271] *Ibid*., article 4

[272] *Ibid*., article 1

[273] Maer L., Gay O., "*The Bill of Rights 1689*" (House of Commons Library 2009) http://www.parliament.uk/briefing-papers/SN00293/bill-of-rights-1689 retrieved 26/11/2014

[274] Loveland (n 61) at p28

[275] *Ibid*.

the Crown by securing judicial independence. Accordingly, in 1701 Holt CJ suggested that "an Act of Parliament can do no wrong, though it might do several things that look pretty odd".[276] This principle was confirmed by Blackstone in 1765 in his "*Commentaries*".[277] However, apart from ambiguous suggestions in the *Thornby*[278] and *Greate Charte Parish*[279] cases, at that time there was still little judicial authority to support this claim.[280]

In 1832[281] the whole electoral system of England and Wales was reformed. "The Reform Act of 1832 gave the House of Commons greater influence over the formation and the political complexion of governments..."[282] From that point the composition of the House was independent from the Crown's patronage.[283] It seems that the Great Reform improved the legitimacy of Parliament as a whole. Consequently, the judiciary expressly obliged itself to follow the intention of the legislature. In 1842 Lord Campbell[284] declared that the validity of any Act appearing at the Parliamentary Roll cannot be challenged in a court of law.[285] This approach was confirmed in 1871[286] and remains the official line today.[287] It is probably this

[276] *City of London v Wood* (1701) 12 Mod Rep 669 at 687 cited in Loveland (n 61) at p31

[277] Loveland (n 61) at p31

[278] *Thornby d Duchess of Hamilton v Fleetwood* (1712) 10 Mod 114

[279] *Greate Charte Parish and Kennington Parish* (1742) 2 Stra 1173

[280] Loveland (n 61) at p31

[281] Representation of the People Act 1832

[282] Butt (n 52) at p61

[283] *Ibid*.

[284] *Dalkeith Rly Co v Wauchope* (1842) 8 Cl & Fin 710, 8 ER 279, HL

[285] Loveland (n 61) at p32

[286] *Lee v Bude and Torrington Junction Rly Co* (1871) LR 6 CP 576

[287] Loveland (n 61) at p32

process that Lord Steyn had in mind when he said that the supremacy of the United Kingdom Parliament had had its origin in the common law.[288]

Nevertheless, "we might ... wonder if the sovereignty of Parliament, a constitutional device created to safeguard the nation and its empire against the tyranny of its King, had succeeding merely in transferring tyrannical authority into different hands?"[289]

It is apparent that the sovereignty of the United Kingdom Parliament has its roots in Hobbes's concept of unity between "*a common Power*" and citizens. It can be illustrated by the fact that an Act of Parliament cannot be challenged in a court of law – as Hobbes puts it, "he cannot be Accused by any of his Subjects..."[290] What is more, as Hobbes prescribes, the rights of men "depend on the Silence of the Law".[291] Although the transition of the competences from the Crown to Parliament was seemingly in accordance with the Lockean idea of an appointed sovereign, the scope of the transferred powers is plainly contrary to the vision of Locke. It could be concluded that, unlike following the American Revolution, the omnipotence of the British Crown was transferred to Parliament rather than to "*people*".[292] As a result, the legal position of an individual in relation to a government remains the same.

It has been suggested that the transition of powers from the Crown has not stopped at Parliament. Although in theory it is the legislature that exercises the unlimited power over the United Kingdom, political practice determines that "the executive dominates

[288] *Jackson v Attorney General* [2005] UKHL 56, *per* Lord Steyn at [102]

[289] Loveland (n 61) at p29

[290] Hobbes (n 14) at p110

[291] *Ibid*. at p130

[292] Loveland (n 61) at p28

Parliaments, so that parliamentary sovereignty often seems to amount to a form of elective executive dictatorship".[293] The phenomenon was first formulated by Walter Bagehot in "*The English Constitution*".[294] Bagehot argues that "the efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers".[295] The Cabinet is "a committee of the legislative body selected to be the executive body", it is the link connecting the two branches of government.[296]

Traditionally it was the Monarch that was in position to choose the ministers; however this is one of the powers claimed by Parliament now.[297] Nevertheless, the Cabinet enjoys a range of powerful competences, such as advising the Monarch on the dissolution of Parliament, therefore, it could be claimed that the Constitution of the United Kingdom involves a fusion of the legislative and executive rather than absorption of one by the other.[298] Bagehot believes that fusion has the benefit of flexibility and ensures the smooth cooperation between the legislative and executive.[299]

It could be claimed that the fusion of powers described by Bagehot expressly contradicts the principle of checks and balances. In fact he agrees with Dicey and insists that a strict separation of powers hinders functioning of both the legislature and executive.[300] According

[293] Waldron, "*The Dignity of Legislation*" (n 45) at p4

[294] Originally printed in 1867

[295] Bagehot W., "*The English Constitution*" (Sussex Academic Press, Brighton 1997) at p8

[296] *Ibid*.

[297] *Ibid*.

[298] Bagehot W., "*The English Constitution*" (Sussex Academic Press, Brighton 1997) at p10

[299] *Ibid*., at p18

[300] *Ibid*., at p15

to Bagehot, "the excellence of the British Constitution is that it has achieved this unity; that in it the sovereign power is single, possible, and good".[301] On the other hand, the system of checks and balances was devised for a reason. The reason being that power concentrated in the hand of one branch, not limited by the Constitution, must inevitably result in abuse.

Dicey's Worldview

This section examines Dicey's understanding of the sovereignty of Parliament. Firstly, it will deal with the nature of the British Constitution. Next, it will explain the doctrine of parliamentary sovereignty in contrast to legislatures limited by written constitutions. Finally, this section will examine Dicey's approach towards potential restrictions upon the powers of the United Kingdom Parliament in the light of the author's criticism of Irish Home Rule.

3.1 Introduction

The first issue that must be considered is the doubt surrounding the British Constitution itself. The fact that it remains unwritten has led some into questioning its very existence.[302] However the Constitution of the United Kingdom, as with any other constitution, consists of "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state".[303] In that sense, according to Dicey, the British Constitution consists of two sets of rules – strict "*laws*" and unwritten conventions.[304] Its uniqueness, however, is to

[301] *Ibid*., at p125

[302] De Tocqueville cited in Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p22

[303] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p23

[304] *Ibid*.

be found in its form: namely, the rules of constitutional value are not written in a single document and cannot always be clearly distinguished from other laws.[305] British "laws therefore are called constitutional, because they refer to subject supposed to affect the fundamental institutions of the state, and not because they are legally more sacred or difficult to change than other laws".[306]

Such features of the British Constitution have led Dicey to distinguish between sovereign and non-sovereign legislative bodies.[307] Accordingly, a sovereign legislative body, such as the Parliament of the United Kingdom, can alter constitutional rules with an ordinary majority of the Houses rather than by using a special procedure.[308] What is more, legislation passed by such a body is not subject to judicial review on the grounds of its constitutionality.[309]

3.2 The Sovereignty of Parliament

In order to establish what a sovereign legislative body entails one must refer to Dicey's *magnum opus* "*Introduction to the Study of the Law of the Constitution*".[310]

In simple terms, the doctrine means that Parliament is a body which, to use Dicey's own words, has "*the right to make or unmake any law whatever*" that would be enforced by the

[305] *Ibid*., at p89

[306] *Ibid*., at p127

[307] *Ibid*., at p87

[308] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p89

[309] *Ibid*., at p92

[310] Final version printed in 1908

courts.[311] Consequently, a feature of "*supremacy*" is attached to Parliament so that "there is no person or body of persons who can, under [the British] constitution, make rules which override or derogate from an Act of Parliament..."[312] The omnipotence of the United Kingdom legislature is illustrated by a common proverb that "Parliament can do everything but make a woman a man and a man a woman".[313]

Furthermore, Parliament is a sole legislator for the land and no other body can claim such power unless it is derived from an Act of Parliament.[314] Hence, Parliament is not bound by international law unless expressly consented.[315] This is illustrated by the fact that although it is the executive that concludes international treaties, they do not form part of the law of the United Kingdom until incorporated by an Act of Parliament.[316]

Finally, the last element of the doctrine of parliamentary sovereignty is the principle of implied repeal. That is, the existing Parliament cannot bind any subsequent Parliaments.[317] Where a subsequent Act of Parliament is inconsistent with legislation that is already in force, such an Act must automatically prevail.[318] Hence, although some Acts use expressions such

[311] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p40 (emphasis added)

[312] *Ibid*.

[313] Jean-Louis de Lolme *inter alia* cited in Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p43

[314] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p52

[315] *Ibid*. at p62

[316] Loveland (n 61) at p34

[317] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p64

[318] *Ellen Street Estates Ltd. V Minister of Health* [1934] I KB 590 cited in Jennings (n 4) at p162

as "*forever*",[319] it does not preclude Parliament from altering or repealing such Acts altogether.[320]

On the other hand, it should be noted that the unlimited power of Parliament is a purely legal doctrine and even Dicey himself admits that it should not be confused with either day-to-day political power to make any law it wishes[321] or sovereignty as expression of the will of electors.[322] Nevertheless, Dicey's interpretation of the doctrine is heavily criticised by Sir Ivor Jennings who claims that "if sovereignty is supreme power, Parliament is no sovereign".[323] He implies that courts have never attempted to curtail the powers of Parliament because Parliament has never taken extreme measures.[324] This approach seems to have been confirmed by the Appellate Committee of the House of Lords in *Jackson's* case: where it was stated *obiter* that although the supremacy of Parliament was "*the general principle*" of the British Constitution it was not "unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism".[325]

[319] Eg Union with Ireland Act 1800

[320] Jennings (n 4) at p168

[321] Dicey "*Introduction to the Study of the Law of the Constitution*" (n 2) at p71

[322] *Ibid*., at p73

[323] Jennings (n 4) at p148

[324] *Ibid*., at p160

[325] *Jackson* (n 86), per Lord Steyn at [102]

3.3 Criticism of Legislative Limits

The following paragraphs deal with Dicey's criticism of the general concept of legislative limits as expressed in his major work "*Introduction to the Law of the Constitution*".

First of all, Dicey is in favour of flexible constitutions with no clear distinction between ordinary and fundamental laws. He argues that, by an attempt to secure some fundamental rules, rigid constitutions prevent natural developments which might trigger revolutions.[326] Although this argument finds confirmation in history, especially the French history of the 18th and 19th centuries, flexible constitutions carry their own risks. If no demanding procedure is required to alter some fundamental laws, there is no effective safeguard for civil liberties, which makes revolution equally possible. It appears that the balance should be struck so the constitution is rigid enough to secure rights for citizens but flexible enough to allow changes when necessary.

Secondly, for Dicey, any legislature which must follow a special procedure in order to amend constitutional law is a non-sovereign law-making body.[327] The author reasons that as long as legislation is subject to potential invalidation on the grounds of unconstitutionality, a legislature that produces it is merely a subordinate law-making body, not a sovereign one. Moreover, Dicey draws a strong parallel between municipal bodies possessing a limited law-making power, such as School Boards, and national Parliaments, such as the Parliament of

[326] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p129

[327] *Ibid*., at p92

France.[328] Even though he himself admits the absurdity of the comparison, he nevertheless maintains that the American Congress could be compared to an English Railway company.[329]

It could be said that Dicey's conclusion is premature. He argues that if measures passed by the Parliament of France and a School Board can both be invalidated as contravening a higher form of law both bodies must be subordinate. At no point does the author attempt to reconcile this position with the fact that the Parliament of France and the American Congress can still change the Constitution – they are merely obliged to abide by a special procedure. On the other hand, a School Board would never be able to alter a legislative act that governs it, regardless of the procedure used.

Considering Dicey's approach to the idea of a limited government, it seems natural that he would oppose the idea of federalism. Dicey believes it could come into existence only when certain preconditions are fulfilled and even then it is inferior to a unitary form of government. Accordingly, there must be "*a body of countries*" which used to be the subject of a common sovereign, share locality and history and therefore are capable of bearing the "*impress of common nationality*".[330] Furthermore, inhabitants of such countries "*must desire union and must not desire unity*"[331] as well as feel a strong allegiance to their own government.[332] According to Dicey, federation is designed to reconcile national unity with rights of local states.[333] In order to do so, powers are divided between the central and local

[328] *Ibid*., at p93

[329] *Ibid*., at p150

[330] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p140

[331] *Ibid*.,

[332] *Ibid*., at p142

[333] *Ibid*., at p143

governments so that only matters of common interest fall within the scope of powers of the federal government.[334] This distribution of powers must be safeguarded by a constitution which is written,[335] rigid[336] and alterable only in accordance with a special procedure.[337] Consequently, any law contravening the supreme law of the land would be invalidated by the Supreme Court whose position is vital for upholding the Constitution.[338]

Such legalism, according to Dicey, would lead to the predominance of the judiciary and would make the judges "the masters of the constitution".[339] This, however, seems to be an unfortunate exaggeration. If properly designed, a constitution based on the separation of powers devised by Locke and Montesquieu prevents any branch of government from gaining a supreme position within the government. Accordingly, judges are still liable to impeachment for misconduct or, in the United States, Congress can increase the number of judges sitting in the Supreme Court so the opposition is outvoted.[340] a move which was attempted during the Roosevelt administration of the 1930s.[341]

[334] *Ibid*.,

[335] *Ibid*., at p146

[336] *Ibid*.,

[337] *Ibid*., at p147

[338] *Ibid*., at p158

[339] *Ibid*., at p175

[340] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at 175, footnote

[341] Clark T.S., "*The Limits of Judicial Independence*" P.L. 2012, Apr, 374-377 at 375

Finally, federalism limits the powers of a government in accordance with the classic system of checks and balances so all three branches stand at the same level.[342] Dicey believed that the separation of powers along with the distribution of powers between the federal and local governments led to "*a weak government*".[343] In his view, federalism leads to the dilution of powers which, in confrontation with a centralised state, would put federation in a disadvantageous position.[344] He claims that the welfare of the United States flows not from federalism but in spite of it, and this is only because the United States does not have any powerful neighbours and also does not need foreign policy.[345] Undeniably, such a claim is no longer valid. Since the end of the World War II the United States has been conducting a very active foreign policy and at no point was it hindered by the federal nature of the United States government.[346]

3.4 Criticism of Irish Home Rule

Dicey seems to believe that the sovereignty of Parliament is the source of British welfare; therefore it is not a surprise that he opposed Irish Home Rule. Accordingly, throughout the three books he wrote on Irish Home Rule the author makes several important arguments opposing legal autonomy within the British Constitution as well as any potential federalisation of the United Kingdom. The following paragraphs will explain the nature of Irish Home Rule itself, and then critically examine Dicey's approach to the question of a

[342] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p156

[343] *Ibid*., at p171

[344] *Ibid*., at p172

[345] *Ibid*.

[346] It appears that similar conclusions could be inferred from the international position of the Russian Federation.

special legal autonomy; while the final paragraphs will focus on the author's attitude towards the potential federalisation of the United Kingdom. Such a critical examination of Dicey's ideas will take into account the social, political and legal changes that have taken place since the end of the 19th century.[347]

3.4.1 Structure and History of Irish Home Rule

Irish Home Rule was designed to create an autonomous Irish legislature which would resemble the colonial manner of self-governance. It was introduced to the political debate as a response to the problems that Great Britain experienced in governing Ireland. Accordingly, Irish Home Rule, by creating an autonomous legislature, was to be the final settlement of the Irish question that would relieve the United Kingdom Parliament from the burden of Irish affairs but at the same time maintain its supremacy.[348]

There were three Home Rule Bills which Dicey was concerned about. All of them bear similar features. Therefore, regarding the aim of this article, there is no need to go into great details of the proposed Bills. Consequently, the following paragraph will explain the subtle differences between the relevant pieces of legislation, but the subsequent chapters will not distinguish between the different variations of Home Rule. Similarly, some arrangements,

[347] The criticism of Dicey's arguments against the Irish Home Rule should be constructed as directed at Dicey's position on the concept of autonomy and federation in general. At no point does the author of this paper claim that so called Home Rule was an appropriate tool to govern Ireland at the time.

[348] Dicey A.V., "*A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912*" (Forgotten Books, London 2012) at p34-5

such as administrating financial and religious regulations, which are immaterial for the purpose of the presented arguments, will not be discussed.

The First Irish Home Rule Bill[349] was defeated in the House of Commons in 1886.[350] Dicey argued against that Bill in "*England's Case against Home Rule*".[351] Had it been passed, the Bill would have established the Irish legislative body[352] which in practice would have elected the executive chaired by the Lord-Lieutenant as a representative of the Crown.[353] The Irish Parliament, as Dicey calls it, would have been allowed to legislate on any subject not expressly forbidden by the Act[354] – examples of such exclusions being the succession of the Crown,[355] declaring war,[356] regulating the military,[357] conducting a foreign policy.[358] Accordingly, an Act of the Irish Parliament would have been subject to the veto of the Lord-Lieutenant[359] and constitutional scrutiny by the Judicial Committee of the Privy Council.[360] Under the Bill, in return for an autonomous legislature, Ireland would have given-up its

[349] Government of Ireland Bill 1886

[350] Hadfield B., "*The Belfast Agreement, sovereignty and the state of the union*" P.L. 1998, Win, 599-616 at 602

[351] Originally Published in 1886

[352] Government of Ireland Bill 1886, clause 1

[353] Dicey A.V., "*England's Case Against Home Rule*" (The Richmond Publishing Co. Ltd. Richmond 1973) at p228

[354] Government of Ireland Bill 1886, clause 2

[355] *Ibid*., clause 3(1)

[356] *Ibid*., clause 3(2)

[357] Government of Ireland Bill 1886, clause 3(3)

[358] *Ibid*., clause 3(4)

[359] *Ibid*., clause 7

[360] *Ibid*., clause 25

representation in the United Kingdom Parliament.[361] However, had it come into force, the Act would have been alterable only by the Parliament of the United Kingdom ("*the Imperial Parliament*") with the Irish representatives reflecting the previous composition.[362]

The Second and Third Irish Home Rule Bills were designed not to strip the United Kingdom Parliament of the Irish representation.[363] However the Irish members of the Imperial Parliament would have not been allowed to vote on matters confined exclusively to Great Britain.[364] The Bills were argued against in "*A Leap in the Dark or our New Constitution*"[365] and "*A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912*"[366] respectively. The Third Irish Home Rule Bill was passed into law as the Government of Ireland Act 1914; however, it was suspended due
to the Great War.[367]

Dicey claimed that although in theory Home Rule sustained the sovereignty of the United Kingdom Parliament, in practical terms it would have rendered it purely symbolic in relation to Ireland.[368] The author points out that a distinction must be made between Great Britain's reality where Parliament legislates on a daily basis and the colonial practice whereby it is

[361] Dicey, "*England's Case Against Home Rule*" (n 151) at p231-2

[362] Government of Ireland Bill 1886, clause 39

[363] Government of Ireland Bill 1893, clause 9

[364] *Ibid*., clause 9(3)

[365] Originally Published in 1893

[366] Originally Published in 1913

[367] Hadfield (n 148) at 602

[368] Dicey, "*A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912*" (n 146) at p35

only occasionally that Parliament exercises its legislative power,[369] although in theory reserving the right to do.[370] Accordingly, although Parliament would have been able to repeal laws passed by the Irish legislature, Dicey argued that Irish Home Rule in practice would mean no more than the power to amend the Act under which it operates.[371] As a result, Parliament would no longer govern Ireland the way it governed Great Britain.[372]

For Dicey, regardless of its form, Home Rule for Ireland was a flawed device based on a faulty assumption that all regions should be governed by similar local bodies because it works in one of them.[373] Dicey maintained that introduction of legal autonomy would not solve the problem of Irish hostility towards the United Kingdom government because it would have only granted Ireland partial independence.[374] Accordingly, Dicey admits that by virtue of being a nation, Irish people have the right to full independence rather than to demand a deep constitutional reform of the Constitution of the United Kingdom as a whole.[375] On the other hand, according to Dicey, granting Ireland full independence would also have had serious consequences for Great Britain, such as the loss of available

[369] *Ibid*., at p37

[370] Subsequently embodied in the Statute of Westminster 1931

[371] Dicey A.V., "*A Leap in the Dark or our New Constitution*" (Forgotten Books, London 2012) at p25

[372] Dicey "A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912" (n 146) at p36-7

[373] *Ibid*., at p28

[374] Dicey, "*England's Case Against Home Rule*" (n 151) at p98

[375] *Ibid*., at p70

resources,[376] impediments to trade, necessity of conscription and the burden of additional taxation.[377]

3.4.3 Federalisation of the United Kingdom

As previously explained, Dicey rejected the idea of the special legal autonomy as well as of an independent Ireland. He suggested that the other outcome Home Rule could lead to was the quasi-federalisation of the United Kingdom.[378] Nevertheless, Dicey opposed reshaping the United Kingdom into a federation even though he admitted that monarchies could also form federations.[379] He acknowledged that federations have some advantages, such as impartiality of the central government so that no region feels inferior to another.[380] Similarly, Dicey admitted that the US Constitution was right in prohibiting Congress from passing any *ex post facto* laws,[381] as well as any legislation[382] that would set aside contracts.[383] Nevertheless, Dicey remained very sceptical to the idea of federalisation of the United Kingdom. He believed that a federal form of government is unsuitable for the United Kingdom.

[376] *Ibid*., at pp145-6

[377] *Ibid*., at pp147-8

[378] Dicey, "*A Leap in the Dark or our New Constitution*" (n 169) at p14

[379] Dicey, "*England's Case Against Home Rule*" (n 151 at p163

[380] *Ibid*., at p270

[381] US Constitution, Article 1, Section 9

[382] US Constitution, Article 1, Section 10

[383] Dicey, "*A Leap in the Dark or our New Constitution*" (n 169) at p89

First of all, Dicey claims that the United Kingdom consists neither of different states nor nations but is unitary.[384] He refers to the point made in "*Introduction to the Law of Constitution*" that federation requires "*a body of countries*" bearing "*an impress of common nationality*". [385] His claim in relation to the United Kingdom appears not to have been true then, and is even less true now. Throughout his book Dicey admitted that the Irish were a separate nation.[386] Undeniably, so are the Scottish[387] and Welsh.[388] The modern United Kingdom is "a multinational state, holding together people belonging to a number of different nations".[389] Furthermore, adopting Dicey's own requirement of inhabitants who "must desire union and must not desire unity",[390] it could be argued that such circumstances might have existed at the time of the creation of the Unions with Scotland and Ireland. Dicey himself noted in "*Thoughts on the Union between England and Scotland*"[391] that, before the Union took the form of a unitary state, the Scots argued for federation.[392] Nevertheless, irrespective of the circumstances of the past, it seems that such a condition exists now. It

[384] Dicey, "*England's Case Against Home Rule*" (n 151) at p53

[385] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p140

[386] E.g. Dicey, "*England's Case Against Home Rule*" (n 151) at p142

[387] E.g. Tony Blair in "*Scotland's Parliament*" Cm. 3658 (1997) cited in Brazier R., "*Constitutional Reform; Reshaping the British Political System*" (Oxford University Press, Oxford 2008) at p109

[388] E.g. Welsh Labour Manifesto 2010 at p23 http://www.politicsresources.net/area/uk/ge10/man/parties/waleslabmanifesto.pdf retrieved 04/12/2014

[389] Bogdanor V., "*The New British Constitution*" (Hart Publishing, Oxford and Portland, Oregon 2009) at p89

[390] Dicey, "*Introduction to the Study of the Law of the Constitution*" (n 2) at p140

[391] Originally printed in 1920

[392] Gray J.M., "*Memoirs of the Life of sir John Clerk of Penicuik*" (University Press, Edinburgh 1892) at p60 cited in Dicey A.V., Rait R.S., "*Thoughts on the Union between England and Scotland*" (MacMillan and Co. Ltd., London 1920) at p209

can be illustrated by progressing devolution on the one hand, and the unsuccessful Scottish referendum for independence on the other – union, not unity.

Secondly, Dicey argues that federalism could be justified only as a transitional period adopted by two independent states on a route to a complete unity, but not as a step backwards.[393] However he does not submit any arguments in support of this claim. It is solely his subjective opinion and there is no logical argument why it could not be the ultimate form of statehood. He claims there is a tendency in favour of great unitary states. It must be admitted that the 19th century did in fact witness small states uniting into big entities such as the German Empire or the Kingdom of Italy. However, it could be argued that the nature of international relations has shifted from force-based interaction to political and economic cooperation, such as within the European Union. Consequently, there is no need for big states with even bigger armies.

Similarly, there is no longer a need for Parliament to enjoy unlimited power for the purpose of defence.[394] Insofar as such a legislature is useful in times of war, it is highly undesirable in times of peace. As mentioned before, an unrestricted Parliament can disregard civil liberties. On the other hand, even Dicey admits that a legislature under a federal constitution must observe a Bill of Rights.[395] Therefore, regarding the nature of contemporary international relations, it seems that the need for civil liberties outweighs the need for extensive powers in the name of national defence.

[393] Dicey, "England's Case Against Home Rule" (n 151) at p66;

[394] *Ibid*., at p169

[395] *Ibid*., at p167

Thirdly, Dicey claims that a local government of Ireland (as opposed to a federal government) under a federal constitution could obstruct the implementation of foreign policy or even secretly favour enemy states at the expanse of the federal government.[396] However there is no historical data that would support such a claim. Similarly, contrary to what Dicey argues,[397] there is no evidence that a federal constitution leads to a contest between local and central governments. Such interaction will ultimately depend on the attitude of citizens and the manner in which the Constitution has been written.

What is more, Dicey insists that the British Constitution lacks the spirit of federalism.[398] According to the author, the Parliament of the United Kingdom is composed of equal members who in principle do not represent their communities but rather the nation as whole.[399] Dicey's argument is supposed to be illustrated by the fact that there are no regional parties such as a Scottish Party.[400] Plainly, this is no longer the case.[401]

Dicey makes a point that the nature of the problem with Ireland is very peculiar due to its historical background; therefore it might be resolved only by a specifically tailored measure.[402] In his view, federalism would apply the same solution to different problems presented by different constituent parts of the United Kingdom.[403] On the other hand, the

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[396] *Ibid*., at p177

[397] Dicey, "*A Leap in the Dark or our New Constitution*" (n 169) at p19

[398] *Ibid*., at p7

[399] *Ibid*.

[400] *Ibid*.

[401] The Scottish National Party, Plaid Cymru, Sinn Féin

[402] Dicey, "*A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912*" (n 146) at p22

[403] *Ibid*., at p23

demands for autonomy currently flowing from Scotland, Wales and Northern Ireland are all based on similar reasoning. Any differences peculiar to the region could be dealt with by the local governments created under the federal constitution. Dicey argues that introducing federation would raise problems related to the relationship between Great Britain and its colonies such as India.[404] Obviously, such concerns are no longer valid.

Another major concern for Dicey is the role of the judiciary under a federal constitution. He believes that the existence of a written constitution requires a constant need for judicial interpretation as to the constitutionality of Acts of Parliament.[405] However at the same time he argues that since the judges err, it should not be up to them to decide on constitutional matters.[406] For Dicey, there is one more problem with the judicial power to invalidate Acts of Parliament. He claims that federal courts lack the ability to enforce their judgements.[407] Hence, judgements invalidating legislation would be left unenforced, especially regarding the fact that citizens of the United Kingdom lack the spirit of legalism.[408] After all, it is easier to recognise the authority of Parliament rather than of the Supreme Court.[409]

Doubts of similar nature are raised by Jeremy Waldron. He claims that since Hobbes rejected the idea of separation of powers altogether, and Locke recognised only separation between the executive and legislature, both thinkers believed that it was the legislature's role to

[404] *Ibid*., at p24

[405] Dicey, "*England's Case Against Home Rule*" (n 151) at p185

[406] Dicey, "*England's Case Against Home Rule*" (n 151) at p186

[407] *Ibid*., at p258

[408] Dicey, "*A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912*" (n 146) at p18

[409] Dicey, "*England's Case Against Home Rule*" (n 151) at p188

adjudicate disputes under the social contract theory.[410] The law-making body is to be "*the Supreme Power*" therefore any other body with the power to overrule a piece of legislation naturally would have to be regarded as a higher power.[411] Ideally, the legislature has also the advantage of being composed of elected representatives as opposed to the unelected members of the judiciary.[412]

Waldron believes that legislation is a tribute to achievements citizens accomplish through cooperation.[413] Consequently, he argues that legislation derives its authority from the decision-making process based on deliberation, disagreements and the right of all citizens to participate in the debate which ultimately results in reaching a majority decision.[414] Waldron opposes the judicial review process on the grounds that all areas of law, including fundamental rights, should be subject to a democratic debate.[415] He argues that in the course of such debate, an agreement might be collectively arrived at that a particular right is to be sacrificed for certain legislative objectives.[416] Hence, to subsequently authorise judges to strike down such legislation is to allow the minority's view to prevail after the actual debate has been concluded.[417] Finally, Waldron agrees with Dicey that although the democratic process is likely to result in mistakes, a judicial scrutiny is not immune to that risk

[410] Waldron, "*The Dignity of Legislation*" (n 45) at p86

[411] *Ibid*.

[412] *Ibid*., at p87

[413] *Ibid*., at p156

[414] Goldsworthy J., "*Legislation, Interpretation, and Judicial Review Review*" 51 U. Toronto L.J. (2001) at p75

[415] *Ibid*., at p78

[416] Goldsworthy "*Legislation, Interpretation, and Judicial Review Review*" (n 212) at p78

[417] *Ibid*.

either,[418] and that the constitutional arrangements do not guarantee compliance if not supported by the public spirit.[419] He also joins Dicey's earlier argument over the crucial role of the judiciary.[420]

Undeniably, all men err. However, both Dicey and Waldron overlook the fact that the majoritarian decision-making process, as prescribed by Waldron, seems to work in small communities where all voices can be heard. In the course of such debates it is, in fact, possible to consider and subsequently reject some fundamental rights for legislative purposes. Naturally, on a national level, such discussions can take place only in Parliament which, as an elected body, seemingly fulfils the role envisaged by Waldron. However the fusion of powers and the position of the Cabinet within the British Constitution, as described by Bagehot, create a situation whereby the executive dictates the agenda to the legislature. Considering the party discipline enforced by the Whips, it would be naïve to believe that the Members of Parliament are actually able to represent their constituents and not act in the interest of their own parties. Consequently, it appears that although the judiciary is the non-elected branch of government, it has the advantage of being apolitical and impartial legal experts immune to any external influence. Therefore it could be said that it would be wiser to render constitutional safeguards dependent upon the judiciary rather than count on the changeable wisdom of a politicised Parliament.

In terms of the unbearable burden on the courts, it seems that the judicial review of primary legislation is not as notorious as Dicey and Waldron insist. Accordingly, between the creation

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[418] Waldron, "*The Dignity of Legislation*" (n 45) at pp84-5

[419] *Ibid*.

[420] Waldron J., "*A Right-Based Critique of Constitutional Rights*" 13 Oxford J. Legal Stud. 18 (1993) at p20

of the US Constitution and the outbreak of the Civil War, the Supreme Court of the United States invalidated only two Acts of Congress – one in 1803[421] and the other in 1857,[422] thereby unleashing the Civil War.[423] Finally, when an Act is in fact struck down, the decision will most likely be respected as there is no historical evidence to the contrary. What is more, it could be argued that Dicey overlooks the fact that it is not the force that secures compliance – it is the social contract. Interestingly, in the Irish context, Dicey admits that "you cannot vote men into content, you cannot coerce them into satisfaction".[424] According to the social contract theory, a judgment of a court is enforceable because there is an understanding amongst citizens which stipulates that it is socially useful to recognise the authority of the court.

Finally, Dicey argues that a federal relationship between England and Ireland would trigger demand from other parts of the Union for similar forms of autonomy.[425] Although such demands might not have existed at the time of writing, they do exist now. Unrest in Northern Ireland in the 90s, the recent referendum on the independence in Scotland, and further powers for the National Assembly in Wales under the Government of Wales Act 2006, all prove that there is a pressing need for local autonomy.

[421] *Marbury v Madison*, 5 U.S. 137 (1803)

[422] *Dred Scott v Sandford*, 60 U.S. 393 (1857)

[423] Bogdanor (187) at p83

[424] Dicey, "*A Leap in the Dark or our New Constitution*" (n 169) at p119

[425] Dicey, "*England's Case Against Home Rule*" (n 151) at p189

Contemporary Debate

This section deals with the contemporary challenges to the British Constitution. First of all, at the international level, the supremacy of European Union law directly contravenes the supremacy of the United Kingdom Parliament. Secondly, at the individual level, the Human Rights Act 1998 does not guarantee fundamental freedoms in the face of the will of Parliament. Finally, at the national level, there is a deep need for wider devolutionary powers for the local legislatures.

4.1 European Union

The legal system of the United Kingdom is of dualist nature. Accordingly, for ordinary international law to be enforceable before a British court it must be implemented by Parliament in the form of an Act.[426] In that respect, the law of the European Union is undeniably a unique invention. As established in the famous case of *Van Gend en Loos*,[427] under the doctrine of direct effect European Union law "is capable of conferring rights on individuals which national courts are obliged to uphold".[428]

However, it is not the doctrine of direct effect that causes friction within the British Constitution. The problem arises where an Act of Parliament collides with legislation of the European Union. The European Communities Act 1972[429] attempted to accommodate such

[426] Loveland (n 61) at p34

[427] *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62

[428] Giddings P., Drewry G., "*Britain in the European Union; Law, Policy and Parliament*" (Palgrave MacMillan, Houndmills 2004) at p37

[429] European Communities Act 1972, s2(4)

inconsistency by directing a court to construe national legislation so as to give effect to the obligations flowing from membership.[430] The courts[431] have been willing to apply such an interpretation even contrary to the *prima facie* literal meaning of a statute;[432] however the Act was silent on the supremacy of Community law (as it then was) over national legislation. Such a doctrine derives from the jurisprudence of the European Court of Justice. Following the case of *Costa v ENEL*,[433] it is recognised that European Union law must take precedence over conflicting provisions of national legislation. Those obligations were upheld by the Appellate Committee of the House of Lords in the famous case of *Factortame*.[434] It was stated that Parliament had accepted the supremacy of European Union law by virtue of the European Communities Act 1972.[435] Hence, "for the first time since 1688 a court suspended the operation of an Act of Parliament".[436]

It seems that the construction of the European Communities Act 1972 as a measure through which the supremacy of European Union law is acknowledged remains inconsistent with the traditional doctrine of implied repeal. To regard the European Communities Act 1972 as a justification for invalidation of a later Act of Parliament, is to regard the former as immune to implied repeal. This new position has been explained in the case of *Thoburn v Sunderland*

[430] Giddings, Drewry (n 226) at p51

[431] E.g. *Pickstone v Freemans plc* [1989] AC 66

[432] Giddings, Drewry (n 226) at p51

[433] *Flaminio Costa v ENEL* [1964] ECR 585 (6/64)

[434] *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1992] 1 AC 603

[435] *Ibid*., at 658

[436] E Wick, "*The Evolution of a Constitution: Eight Key Moments in British Constitutional History"* (Oxford, Hart, 2006) 156 cited in Bogdanor (n 187) at 29

City Council.[437] According to Lord Justice Laws, "*ordinary statutes may be impliedly repealed. Constitutional statutes may not*".[438] The European Communities Act 1972, inevitably an Act of constitutional value,[439] is therefore immune to the doctrine of implied repeal. This, however, only created more confusion.

Consequently, it might be the case that, as long as the European Communities Act remains in force, no Act of Parliament (other than by expressly repealing the Act itself) would be able to take precedence over legislation of the European Union.[440] On the other hand, it has been suggested that where an Act of Parliament expressly repudiates the law of the European Union a court will follow domestic legislation.[441]

The sovereignty of the United Kingdom Parliament, although limited in practice, is to be found in the power to amend or in fact repeal altogether the European Communities Act 1972. Nevertheless, it can be argued that by creating an exception to the doctrine of implied repeal, parliamentary sovereignty as a whole has been altered.[442] At least as long as the European Communities Act 1972 remains in force. Evidently, the full impact of the obligation flowing from membership of the European Union on the constitutional arrangements of the United Kingdom remains unclear.

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[437] *Thoburn v Sunderland City Council* [2003] QB 151

[438] *Ibid*., at para 63 (emphasis added)

[439] *Ibid*., at para 62

[440] Jowell J., Oliver D., "*The Changing Constitution*" (Oxford University Press, Oxford 2011) at p118

[441] *Per* Lord Denning in *Macarthys v Wendy Smith* [1979] 3 All ER 325 at 329 cited in Giddings, Drewry (n 226) at p55

[442] Jowell, Oliver (n 238) at p119

Interestingly, in terms of the philosophical background, Hobbes argues that "the Legislator in all Common-wealths, is only the Soveraign..."[443] Furthermore, "... nor is it possible for any person to be bound to himself; because he that can bind, can release..."[444] Hence, it could be claimed that the position of the law of the European Union affects the validity of the claim that the United Kingdom Parliament is a true sovereign as regarded by Hobbes.

4.2 Human Rights

It has been suggested that one of the main purposes of any constitution is to secure the basic rights of the individual.[445] The traditional approach to fundamental freedoms under the British Constitution is based on the concept of negative liberty: that is, freedom to do anything that has not been explicitly forbidden by Parliament.[446] The absence of special constitutional safeguards in combination with the unlimited power of Parliament results in a situation whereby, in Dicey's own words, "Parliament could, and would were the necessity acknowledged by the country, within twenty-four hours suspend the Habeas Corpus Act".[447] Hence, it is apparent that citizens of the United Kingdom are not protected by any effective Bill of Rights. This position has not been changed by the introduction of the Human Rights Act 1998.[448]

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[443] Hobbes (n 14) at p133

[444] *Ibid*.

[445] Bogdanor (n 187) at p54

[446] Jowell, Oliver (n 238) at p71

[447] Dicey, "*A Fool's Paradise; Being a Constitutionalist's criticism on the Home Rule Bill of 1912*" (n 146) at p96

[448] As mentioned before, under the dualist legal system of the United Kingdom international law requires an Act of Parliament in order to be enforceable by a national court of law. Therefore, the ratification of the European Convention of Human Rights in 1951 did not enable the citizens of the

The Human Rights Act 1998 attempts to implement the European Convention on Human Rights[449] into the legal system of the United Kingdom in such manner as to both give effect to the international obligations and preserve the sovereignty of Parliament.[450] First of all, the Act imposes an obligation on all "public authorities" not to "to act in a way which is incompatible with a Convention right".[451] However, at the same time it expressly excludes from this obligation "*either House of Parliament*".[452] Secondly, the Act requires a responsible minister to issue a statement of compatibility in relation to the Bill being introduced to the House.[453] Thirdly, the court is directed to construe legislation so as to give effect to the Convention rights,[454] and in deciding so to take into account the jurisprudence of the European Court of Human Rights.[455] Where such interpretation is impossible, the court has discretion to issue a declaration of incompatibility.[456] Nevertheless, the declaration is not able to invalidate an Act of Parliament.[457]

This position remains in compatibility with Hobbes's view on the subject. Accordingly, "*the Soveraign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civill*

United Kingdom to bring claims under the Convention. From 1965 to 2000 British citizens could rely on the European Convention on Human Rights against the state only before the European Court of Human Rights. The Human Rights Act 1998 allowed individuals under the jurisdiction of the United Kingdom to rely on the Convention before British courts.

[449] Human Rights Act 1998, s1

[450] Bogdanor (n 187) at p59

[451] Human Rights Act 1998, s6(1)

[452] *Ibid*., s6(3)

[453] *Ibid*., s19

[454] *Ibid*., s3

[455] *Ibid*., s2

[456] *Ibid*., s4(2)

[457] *Ibid*., s4(6)

Lawes..."[458] because an attempt to subject the Sovereign to laws tends to weaken the state.[459] It appears that Parliament has intentionally decided to cling to Hobbes's idea of unlimited power at the expense of guaranteeing fundamental freedoms.

Nonetheless, following the case of *Thoburn v Sunderland City Council,*[460] as a piece of legislation of constitutional value,[461] Human Rights Act cannot be impliedly repealed. Consequently, the Act constitutes another "*exception*" further undermining the sovereignty of Parliament as understood by Dicey.

It appears that the only effect of the declaration of incompatibility is to bring the matter to the attention of the executive[462] so that the responsible minister is in a position to remedy the legislation in question "by order".[463] Nevertheless, the executive can purposely derogate from the Convention and refuse to amend the relevant piece of legislation.[464] What is more, the Human Rights Act intentionally fails to empower a court to provide a remedy for a breach of the convention rights as prescribed in Article 13 of the Convention.[465] One might wonder what the purpose of the Act is if it does nothing but provide the court with the power to point out that an Act is incompatible with Human Rights. It has been suggested that the practice of the executive to amend legislation contravening the Convention rights

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[458] Hobbes (n 14) at p133

[459] *Ibid*. at p164

[460] *Thoburn* (n 235)

[461] *Ibid*. at para 62

[462] Jowell, Oliver (n 238) at p86

[463] Human Rights Act 1998, s10

[464] Brazier R., "*Constitutional Reform; Reshaping the British Political System*" (Oxford University Press, Oxford 2008) at p129

[465] Bogdanor (n 187) at p60

might at some point in the future be considered a constitutional convention.[466] However it could be argued that a non-legal rule is not an adequate safeguard for something as fundamental as Human Rights. This typically neoliberal point of view is represented recently by authors such as Ronald Dworkin,[467] but at the same time continuously opposed by Jeremy Waldron.[468] Nevertheless, it could be claimed that by introducing the Human Rights Act 1998 the Labour Government consciously refused to accept the arguments put forward by Waldron as to the merits of a negative approach to liberty. It is now a question of rendering the Bill fully enforceable.

Since the enactment of the Human Rights Act 1998 there have been calls from the Conservatives[469] to replace the Act with a British Bill of Rights.[470] However it is impossible to enact a fully effective Bill of Rights and to preserve the sovereignty of Parliament at the same time. It has been suggested that, with the traditional approach to the sovereignty of Parliament, it might be only political reality or a gentleman's agreement that prevents Parliament from repealing a Bill of Rights.[471] As a potential solution Lord Scarman argued[472] that an Act of Parliament could be passed restoring the House of Lords' veto power in

[466] *Ibid*. at p61

[467] See Dworkin R., "*A Bill of Rights for Britain*" (Chatto & Windus, London 1990)

[468] Waldron, "*A Right-Based Critique of Constitutional Rights*" (n 218)

[469] Conservatives Manifesto 2010, pp88 and 84

[470] Jowell, Oliver (n 238) at p98

[471] Brazier (n 262) at pp130-1

[472] "*Bill of Rights and Law Reform*" in R. Holme and M. Elliott (eds.), 1688-1988: "*Time for a New Constitution*" (London: Macmillan, 1988), 109-10

relation to Bills dealing with fundamental rights.[473] Such a solution makes it more difficult to alter those Acts; however it does not guarantee their inviolability.

It has been argued that for a Bill of Rights to be effective it must have a superior status in relation to other pieces of legislation and be amendable only by a special majority of Parliament.[474] The unlimited sovereignty of Parliament results in the equally unlimited power of the executive upon which there are no constitutional checks.[475] This is the effect of the Cabinet government described by Bagehot. It appears that the effective judicial protection of fundamental freedoms is the only course of action that protects an individual from abuses "in the name of majority, or simply through carelessness or thoughtless".[476] To leave the question of Human Rights entirely to Parliament is to disregard the system of checks and balances. It has been suggested that since the judiciary is already empowered to disapply legislation passed contrary to European Union law, there is no reason why a court should not be provided with such power in relation to Human Rights.[477] The doctrine of the sovereignty of Parliament is already undermined in any event.[478]

[473] Brazier (n 262) at p132

[474] Barnett A., Ellis C., Hirst P., "*Debating Constitution; New Perspectives on Constitutional Reform*" (Polity Press, Cambridge 1993) at p45

[475] Bogdanor (n 187) at p15

[476] Barnett, Ellis, Hirst (n 272) at p40

[477] Bogdanor (n 187) at p80

[478] *Ibid*.

4.3 Devolution

It could be argued that devolution, although not in principle, "imposes a severe limitation upon the sovereignty of Parliament".[479] Accordingly, the United Kingdom Parliament does not govern Scotland, Northern Ireland and Wales in the same way that it governs England, where its sovereignty "still corresponds to a real power to make laws affecting every aspect of England's domestic affairs".[480]

Devolution is a means of delegation of powers from a central Parliament to the local legislatures.[481] This is as opposed to federalism which is based on the division of competences between the central and local legislatures. However it has been suggested that in practice the Parliament of the United Kingdom does no more than merely supervise devolved legislatures.[482] Consequently, "devolution may prove in practice to be closer to federalism than might at first sight appear".[483] In fact the whole concept of devolution is plain evidence of a struggle between regional-national ambitions and the traditional approach to the British Constitution. This struggle will become even more apparent now, after Scotland has decided to maintain the Union amid promises of wider competences for the Scottish Parliament.[484]

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[479] *Ibid*., at p112

[480] Bogdanor (n 187) at 113

[481] Jowell, Oliver (n 238) at p213

[482] Bogdanor (n 187) at 113

[483] *Ibid*.

[484] E.g. "*Better together - a new hope for a federal Europe*" , EUobserver, October 8, 2014

The Scottish Parliament operates under the Scotland Act 1998. It is allowed to legislate on any matter unless it is reserved exclusively to the Parliament of the United Kingdom[485] Moreover, such legislation cannot be incompatible with the law of the European Union or the European Convention on Human Rights.[486] The Scotland Act 1998 expressly preserves the power of the United Kingdom Parliament to legislate on matters falling under the competencies of the Scottish legislature.[487] However it is a constitutional convention that the United Kingdom Parliament will not legislate for Scotland without the consent of the Scottish Parliament.[488] The Sewel Convention was a response to the concerns over the clash of powers between the United Kingdom and Scottish Parliaments. "A convention is a non-legal rule which supplements legal rules, imposing non-legal rather than legal obligations."[489] Hence, it seems that the Sewel Convention is in no way a sufficient guarantor for something as fundamental as the autonomy of the local legislature. It has been claimed that in the absence of federal arrangements the Convention is based on nothing more than goodwill.[490]

The Northern Ireland Assembly is a result of the Good Friday Agreement[491] and operates under the Northern Ireland Act 1998.[492] The scope of its powers resembles the position of the Scottish Parliament. However, "an Act of the Assembly may modify any provision made

[485] Scotland Act 1998, s29(2)(b)

[486] *Ibid*., s29(2)(d)

[487] *Ibid*., s28(7)

[488] Bowers P., "*The Sewel Convention*" (House of Common Library, 2005) SN/PC/2084 http://www.parliament.uk/site-information/glossary/sewel-convention/ retrieved 28/11/14

[489] Bogdanor (n 187) at p16

[490] Burrows N., "*Devolution*" (Sweet & Maxwell, London 2000) at p62

[491] Belfast Agreement 1998, strand 1

[492] Cm. 3883 (April 1998) cited in Jowell, Oliver (n 238) at p230

by or under an Act of Parliament in so far as it is part of the law of Northern Ireland."[493] On the other hand, the National Assembly for Wales operates under the Government of Wales Acts of 1998 and 2006. It has been argued that the Assembly was never intended to be as autonomous as the legislatures of Scotland and Northern Ireland.[494] Accordingly, only after the 2011 referendum[495] has the National Assembly been allowed to legislate in the form of Acts which are pieces of primary legislation.[496] Nevertheless, unlike the other devolutionary bodies, the Welsh Assembly is able to legislate only on the specific "*matters*"[497] listed in the Act.[498]

Any Act of any devolved body is subject to judicial scrutiny on the grounds of its *constitutionality*".[499] Accordingly, legislation passed outside the scope of powers conferred by the relevant devolution Act will be invalidated by a court as *ultra vires*. Likewise, in relation to European Union law and Human Rights, the effect of the case of *Thoburn v Sunderland City Council*[500] is that the Acts establishing devolved legislatures cannot be impliedly repealed.[501]

[493] Northern Ireland Act 1998, s5(6)

[494] Brazier (n 262) at p113

[495] Government of Wales Act 2006, s103

[496] *Ibid*., s107(1)

[497] *Ibid*., s93(3)

[498] *Ibid*., Schedule 5

[499] Bogdanor (n 187) at p115

[500] *Thoburn* (n 235) at para 69

[501] Jane Munro J., "*Thoughts on the "Sewel Convention*"" S.L.T. 2003, 23, 194-196

Devolution could be regarded as a sign that "the legal absolutism of British parliamentary sovereignty is not as settled throughout the United Kingdom as it was once taken to be".[502] However, despite devolutionary arrangements the United Kingdom remains a unitary state.[503] It was the Parliament of the United Kingdom that established the legislatures and it can deprive them of their powers by virtue of an ordinary Act.[504] Moreover, the scope of the power conferred cannot be extended by the legislatures themselves.[505] It seems that on the one hand, in legal theory, devolution has managed to preserve parliamentary sovereignty; however, on the other hand, in practice, devolution has undermined the principle of "*a sole Legislator*" as insisted on by Hobbes.

Epilogue

The United Kingdom is somehow unique in respect of the lack of a written and codified constitution. It has been argued that it is because a written constitution usually marks a fresh start in a state's history, whilst the United Kingdom did not have such ground-breaking moments.[506] Nevertheless, at this moment in history a new constitution is highly desirable. The Labour Government has initiated the reform by, *inter alia,* the already mentioned devolution and Human Rights Act, as well as by other innovations such as the introduction of the directly elected Assembly and Mayer of London,[507] reform of the House of Lords,[508]

[502] Brazier (n 262) at p111

[503] *Ibid*., at p110

[504] *Ibid*.

[505] *Ibid*., at p113

[506] Bogdanor (n 187) at p11

[507] Greater London Authority Act 1999

[508] The House of Lords Act 1999

rights of access to information,[509] reform of the Appellate Committee of the House of Lords,[510] and the independence of the Bank of England.[511]

In any event, AV Dicey remains widely regarded as the highest authority on the British Constitution. Therefore, this article has dealt with his *rationale* for the sovereignty of Parliament. In the light of the uncertainties surrounding the European Communities Act 1972, Human Rights Act 1998 and devolution, it appears that the new constitution ought to discard parliamentary sovereignty as a leading principle. It could be argued that it is impossible to reconcile the Hobbesian approach to the omnipotent Legislator with the British society of the 21st century. Instead, the New Constitution would comply with the Lockean idea of a limited government expressed through the separation of powers along with the check-and-balance system.

Consequently, a fully enforceable Bill of Rights should be introduced. The judiciary would be empowered to disapply any legislation that contravenes fundamental freedoms. Whether the Bill was to be based on the European Convention on Human Rights or contain typically British rights remains outside the scope of this article.[512] Next, the authority of European Union law must be clarified. As long as the United Kingdom is a member of the Union, the impact of the European legislation should be transparent. Finally, devolution would be transformed into a full scale federation with local legislatures operating independently from

[509] The Freedom of Information Act 2000

[510] The Constitutional Reform Act 2005

[511] Bogdanor (n 187) at pp4-5

[512] For discussion see Joint Committee on Human Rights Report "*A Bill of Rights for the UK?*" HL165, HC 150, 2007-8

the central Parliament. Accordingly, an English Parliament ought to be established so that there is no effect of non-English votes on English matters.[513]

[513] Hadfield B., "*Devolution, Westminster and the English Question*" P.L. 2005, Sum, 286-305 at 288

Y Gwasanaeth Iechyd Gwladol a'r Her o Ddarparu Gofal Iechyd ar Gyfer Poblogaeth Oedrannus

Elinor Laidlaw

Ymddengys fel petai chwyldro demograffig ar droed ar draws Ewrop a ledled y byd. Amcangyfrifir gan y WHO[514] bod y nifer o bobl 60 mlwydd oed a throsodd yn tyfu ar raddfa gyflymach nag unrhyw grŵp oedran arall.[515] Cynyddodd y nifer o bobl dros 65 mlwydd oed yng Nghymru a Lloegr o 8.3 miliwn i 9.2 miliwn (un ymhob chwe pherson)[516] dros y pum mlynedd diwethaf. Yn yr un cyfnod, dywedodd Age UK bod y nifer o bobl sy'n derbyn rhyw fath o ofal cymdeithasol wedi gostwng o 1.2 miliwn i 890,000.[517]

Wrth i'r unfed ganrif ar hugain fynd yn ei blaen ac wrth i ddatblygiadau mewn gwybodaeth feddygol ddod yn fwy cyffredin, nid yw goroesi i henaint sylweddol yn anarferol bellach. Gan ystyried y treulir tua thraean o oes person mewn cyfnod o "ymddeoliad," telir sylw cynyddol i ansawdd bywyd unigolion yn ystod y cyfnod hwn.[518] Mae poblogaeth sy'n heneiddio'n cael ei gydnabod fel mater byd-eang o bwys cynyddol, yn enwedig o ran goblygiadau ar ofal iechyd.[519]

[514] World Health Organisation.

[515] Giordano, S. 'Respect for Equality and the Treatment of the Elderly: Declarations of Human Rights and Age-Based Rationing', [2005] 14(1) Camb Q Healthc Ethics 83, 83.

[516] Cyfrifiad 2011.

[517] The Telegraph, 'Million More Elderly Outside Care System than Before Financial Crash', the Telegraph, 5 Tachwedd 2014.

[518] Henwood, M. 'No Sense of Urgency: Age Discrimination in Health Care', [1991] 2 Crit Public Health 4, 5.

[519] Lloyd-Sherlock, P. 'Population Ageing in Developed and Developing Regions: Implications for Health Policy', [2000] 51(6) Soc Sci Med 887, 888.

Gellid dadlau bod y gwasanaeth gofal iechyd a gynigir i'r henoed ym Mhrydain heddiw yn cael ei ddogni. Diffinnir dogni gofal iechyd fel methiant i gynnig gofal, neu atal gofal y byddai cleifion yn elwa ohono.[520] Bydd yr erthygl hon yn ystyried sut mae polisïau ac amcanion adrannau o'r llywodraeth yn delio gyda'r her o ddarparu gofal iechyd i boblogaeth sy'n heneiddio.

Yr egwyddor sylfaenol y seilir y GIG[521] arni yw y dylai mynediad i ofal meddygol cynhwysfawr, safonol fod ar gael i bob dinesydd ar sail angen meddygol, heb rwystrau ariannol.[522] Yn ogystal, datgenir yng Nghanllawiau'r Cyngor Meddygol Cyffredinol: '(A) patient's lifestyle, culture … race, gender, sexuality, age, or social status, [should not] prejudice treatments provided/arranged'.[523] Atgyfnertha hyn amcanion Y Ddeddf Cydraddoldeb[524] o safbwynt gofal iechyd, gan ei fod yn annog y GIG i weithio tuag at ddileu gwahaniaethu a lleihau anghydraddoldebau o fewn gofal iechyd.

Wrth astudio'r sefyllfa yng Nghymru a Lloegr, ymddengys fod nifer fawr o strategaethau a pholisïau ar waith sy'n ceisio mynd i'r afael â'r broblem o ddarparu gofal iechyd i boblogaeth oedrannus gynyddol. Dywed Deddf Comisiynydd Pobl Hŷn (Cymru)[525] bod cymdeithas sy'n heneiddio yn golygu bod angen ymgymryd â newidiadau hollol newydd oherwydd bod mwy o bobl yn byw yn hirach, gyda iechyd gwell a safon byw mwy llewyrchus. Crëwyd swydd

[520] Maynard, A. 'Rationing Health Care: an Exploration', [1999] 49(1-2) Health Policy 5, 9.

[521] Gwasanaeth Iechyd Gwladol.

[522] Weale, A. 'Rationing Health Care: A Logical Solution to an Inconsistent Triad', [1998] 316 BMJ, 410.

[523] Harper, S. *Ageing Societies*, Hodder Arnold, [2000] 253.

[524] 2010.

[525] 2006.

Comisiynydd Pobl Hŷn Cymru gan y ddeddf er mwyn llywio a rheoli effaith y newidiadau demograffig.[526]

Gan ganolbwyntio ar Gymru, gwelir mai un o'r prif strategaethau sy'n bodoli i fynd i'r afael â darparu gofal iechyd ar gyfer yr henoed yw'r Strategaeth ar gyfer Pobl Hŷn yng Nghymru 2013-2023. Prif bwrpas y strategaeth yw delio gyda'r rhwystrau a wynebir gan bobl hŷn yng Nghymru heddiw, a sicrhau bod bywyd llesol o fewn cyrraedd pawb.
Amlinella'r adroddiad yr heriau sy'n wynebu'r GIG a'r camau gweithredu angenrheidiol i sicrhau y gall berfformio i'r safon uchaf. Derbynnir bod yna newid demograffig ar droed, wrth i'r boblogaeth hŷn gynyddu, ac mae'n ceisio mynd i'r afael â'r anghydraddoldebau iechyd i'r henoed.[527]

Polisi arall sy'n ceisio delio gyda'r broblem o ddarparu gofal iechyd i'r henoed yw'r Fframwaith Gwasanaeth Cenedlaethol ar gyfer Pobl Hŷn yng Nghymru. Gosodir safonau cenedlaethol a gynlluniwyd i sicrhau y gall pobl wrth heneiddio, fwynhau iechyd da ac annibyniaeth am gyhyd â phosib, trwy sicrhau eu bod yn derbyn triniaeth a chymorth meddygol di-dor, safonol pan fo angen.[528] Yn yr un modd, anela'r Fframwaith Gwasanaeth

[526] Llywodraeth Cymru, (Adroddiad n.d.) http://wales.gov.uk/topics/olderpeople/commissioner/commissionerforop/?lang=cy mynediad 5 Tachwedd 2014.

[527] Llywodraeth Cymru, 'The Strategy for Older People in Wales 2013-2023', (Strategaeth 2013) http://gov.wales/docs/dhss/publications/130521olderpeoplestrategyen.pdf mynediad 19 Tachwedd 2014.

[528] Llywodraeth Cynulliad Cymru, 'NHS for Older People' (Adroddiad 2006) http://www.wales.nhs.uk/sites3/home.cfm?orgid=439 mynediad 19 Tachwedd 2014.

Cenedlaethol yn Lloegr at sicrhau gwasanaethau gofal cymdeithasol teg, safonol, sy'n integredig ar gyfer pobl hŷn.[529]

Nid oes amheuaeth bod Cymru a Lloegr yn dyheu am ddarparu gofal iechyd safonol ar gyfer eu dinasyddion hŷn. Mae iaith yr amryw o wahanol bolisïau a strategaethau swyddogol yn arddangos hyn yn glir.[530] Er hyn, mewn gwirionedd, er gwaethaf holl gynlluniau a strategaethau llywodraeth Cymru a Lloegr ar gyfer darparu gofal meddygol cynhwysfawr i'r henoed, gwelir yr hen idiom 'diwedd y gân yw'r geiniog', yn rheoli gwariant cyllid iechyd. Bellach caiff mynediad i driniaeth ei bennu gan ffactorau tu hwnt i angen meddygol,[531] ac oherwydd hyn ymddengys yn aml na dderbynia'r henoed, mewn gwirionedd, yr un safon o ofal iechyd â phawb arall. Dywed yr Athro David Oliver[532] bod y GIG yn methu gwasanaethu'r boblogaeth hŷn ar lefel sylfaenol iawn, a bod 'evidence of discriminatory attitudes from [NHS] staff … which is leading to older people systematically getting a worse deal in hospitals across England and Wales than younger patients'.[533]

Datgela ffigurau a gasglwyd gan Age UK, bod y gyfran o'r boblogaeth sydd wedi ymddeol yng Nghymru a Lloegr ac yn derbyn gofal iechyd, wedi gostwng o draean yn y pum mlynedd diwethaf. Er gwaethaf ymdrechion gan gynghorau i osgoi toriadau ariannol i'r gwasanaethau

[529] Department of Health, 'National Service Framework for Older People', (Fframwaith 2001) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198033/National_Service_Framework_for_Older_People.pdf mynediad 21 Tachwedd 2014.

[530] European Hospital and Healthcare Federation, 'Hospital and Health Care Rationing', [2000] European Hospital and Healthcare Federation Sub-committee on Economics and Planning 4, 4.

[531] Lenaghan, J. 'Rationing and Rights in Health Care', [1996] BMJ 3, 3.

[532] Cynghorydd allweddol ar ran yr henoed ar gyfer Adran Iechyd y Llywodraeth.

[533] The Telegraph, 'Nursing Home Health Care 'Worse than in Jail'' the Telegraph, 25 Tachwedd 2012.

gofal iechyd i'r henoed, dengys hyn yn glir bod gwasanaethau sydd eisoes yn bodoli, yn cael eu dogni i bawb heblaw'r rhai sydd â'r anghenion mwyaf difrifol.[534]

Mae llawer o'r ddadl ynglŷn â dogni gofal iechyd i'r henoed wedi'i hysgogi gan y ffaith bod y Byrddau Iechyd Lleol yn gorfod gweithredu gyda chyllidebau cyfyngedig i ddarparu gwasanaethau iechyd i'r boblogaeth leol. Prif ganlyniad hyn yw bod rhaid gosod blaenoriaethau ar driniaethau er mwyn aros o fewn eu cyllideb,[535] gan nad yw hi'n bosib diwallu holl anghenion gofal iechyd.[536] Datgenir mewn adroddiad gan y Nuffield Trust[537] bod pedair blynedd o doriadau i gyllid y GIG eisoes wedi gorfodi'r byrddau iechyd lleol i ddogni gwasanaethau iechyd yn dynn,[538] gyda rhai ardaloedd yn gostwng eu gwariant hyd at 23% yn y blynyddoedd diwethaf. Rhybuddiodd yr adroddiad y byddai hyn yn gadael cannoedd o filoedd o'r henoed heb gefnogaeth yr awdurdod lleol.[539]

Mae cynghorau lleol wedi gweld toriadau o bron i 30% i'w cyllidebau cyffredinol ers 2010[540] mewn ymdrech i leihau'r diffyg cenedlaethol. Ymatebasant drwy leihau gwariant ar

[534] Age UK, 'Agenda for Later Life 2014: Public Policy for Later Life', 2014.

[535] Mullen, P. 'Is it Necessary to Ration Health Care?', [1998] 18(1) Public Money and Management 52, 52.

[536] Hunter, D. 'Desperately Seeking Solutions: Rationing Health Care', [1999] BMJ 318, 318.

[537] Nuffield Trust and Health Foundation.

[538] The Guardian, 'Cuts Have Left 250,000 Older People without State Care, Report Says', the Guardian, 26 Mawrth 2014.

[539] The Guardian, 'Councils Could be Plundering Public Health Budgets, Journal Suggests', the Guardian, 31 Mawrth 2014.

[540] Dyma oedd dechrau y cyfnod o bum mlynedd y bu'r Glymblaid Geidwadol-Democratiaid Rhyddfrydol mewn grym.

wasanaethau iechyd o ryw £2.7 biliwn dros y tair blynedd diwethaf.[541] Mae'r caledi economaidd wedi dod ar adeg pan fod y nifer o bobl oedrannus yn tyfu'n gyflymach nag erioed.[542] Golyga'r tebygolrwydd cynyddol o eiddilwch ac anabledd yn ddiweddarach mewn bywyd bod pobl oedrannus, fel grŵp, yn gwneud defnydd sylweddol uwch o'r gwasanaethau iechyd na gweddill y boblogaeth.[543] Amcangyfrifa'r Adran Iechyd mai £190 yn unig yw'r gwariant cyfartalog ar gyfer person rhwng 16-64 mlwydd oed. Cwyd y gost gyfartalog yn serth wedi hynny i £570 y person rhwng 65-74 mlwydd oed, ac i £1,475 y person tu hwnt i 75 mlwydd oed.[544] Gwelir heriau ymarferol ac ariannol darparu gwasanaeth iechyd ar gyfer poblogaeth sy'n heneiddio yn glir yma, gan fod yr agendor o ran cost wrth gymharu oedrannau yn drawiadol.[545]

Dywed mudiad Spain,[546] taw ychydig o dan hanner cyllidebau iechyd cynghorau a gaiff ei wario ar yr henoed, er gwaethaf y ffaith mai nhw sy'n cyfrif am bron dwy ran o dair o gleientiaid. Nodir bod 62% o bobl sy'n derbyn gofal iechyd yn henoed, ond er hyn, dim ond 47% o'r cyllid sy'n cael eu clustnodi ar eu cyfer yn ôl ffigurau ar gyfer Cymru a Lloegr.[547] Sgîl

[541] The Telegraph, 'Million More Elderly outside Care System than Before Financial Crash', the Telegraph, 5 Tachwedd 2014.

[542] The Telegraph, '900,000 Elderly Needing Care Left to Fend for Themselves', the Telegraph, 14 Awst 2014.

[543] Hughes, D. 'NHS Contracting in England and Wales: Changing Contexts and Relationships', [2011] NIHR SDO, 120.

[544] Henwood, M. 'No Sense of Urgency: Age Discrimination in Health Care', [1991] 2 Crit Public Health 4, 10.

[545] The Guardian, 'The Health Service Needs More than a Bag of Grapes to Get Better', the Guardian, 26 Hydref 2014.

[546] Grŵp o elusennau sy'n cynnwys Age Concern a Help the Aged.

[547] BBC News, 'Older People 'Denied Social Care'', (Adroddiad Newyddion 2005) http://news.bbc.co.uk/1/hi/health/4713873.stm mynediad 6 Tachwedd 2014.

effaith hyn yw bod cyfanswm y nifer o'r henoed sydd ag anghenion gofal heb eu diwallu wedi codi 9% ers yr amcangyfrif blaenorol, ddwy flynedd yn ôl.[548]

Dangosodd ymchwil gan Age Concern bod mwy na thri chwarter (77%) o feddygon teulu a holwyd mewn arolwg yn credu bod dogni gofal iechyd ar sail oedran yn digwydd ar draws y GIG. Dywedodd un ymhob tri ohonynt nad yw cleifion hŷn yn mwynhau'r un ansawdd gofal iechyd mewn cymhariaeth â chleifion eraill. Mae hyn er gwaethaf sicrwydd y GIG a'r llywodraeth bod triniaeth yn seiliedig ar angen meddygol yn unig.[549] Mae'r cysyniad o ddogni gofal iechyd yn ymddangos i danseilio a gwrth-ddweud yr egwyddorion y seilir y GIG arnynt.[550]

Y bygythiad diweddaraf i ofal iechyd yr henoed, yw cyfaddefiad y corff dogni cyffuriau NICE[551] bod gweinidogion yn awyddus taw pobl sy'n gweithio ac yn cyfrannu at yr economi sy'n cael blaenoriaeth pan ddaw i ofal iechyd. Gorchmynnwyd NICE i gymryd i ystyriaeth y *"budd cymdeithasol ehangach"* wrth ystyried pa gyffuriau i'w hariannu. Cyfaddefa'r corff gwarchod cyffuriau eisoes y byddai meini prawf o'r fath yn anochel yn ystyried oed y person.[552]

[548] The Telegraph, '900,000 Elderly Needing Care Left to Fend for Themselves', the Telegraph, 14 Awst 2014.

[549] BBC News, 'GPs Say NHS is Ageist', (Adroddiad Newyddion 2000) http://news.bbc.co.uk/1/hi/health/750494.stm mynediad 8 Tachwedd 2014.

[550] Sef i ddarparu 'gwasanaeth iechyd cynhwysfawr a gynlluniwyd i sicrhau gwelliant yn iechyd corfforol a meddyliol pobl'.

[551] National Institute for Health and Care Excellence.

[552] Express News Paper, 'NHS Ban Medicine if you are 'Too Old' in New Attack on Britain's Elderly', Express News Paper, 18 Chwefror 2014.

Mewn astudiaeth gan Goleg Brenhinol y Llawfeddygon, ac Age UK, canfuwyd bod gweithwyr iechyd proffesiynol yn rhy barod i benderfynu yn erbyn cynnig llawdriniaeth oherwydd *"outdated assumptions of age and fitness".*[553] Datgela'r astudiaeth y caiff pobl hŷn eu hamddifadu o lawdriniaethau hanfodol ar gyfer canser, trwsio torgest a chymalau newydd oherwydd bod y GIG yn gosod "*cutoffs*" ar gyfer triniaeth ar sail oedran, er mwyn arbed arian.[554] Datgenir gan yr Athro Norman Williams[555] 'The gap between the increasing health needs and access to surgery means many older people are missing out on potentially lifesaving treatment … It is alarming to think the treatment a patient receives may be influenced by their age'.[556] Awgryma'r adroddiad yma bod dogni gofal iechyd ar gyfer yr henoed yn ganlyniad uniongyrchol o doriadau ariannol i'r GIG a'r byrddau iechyd lleol.

Gall dogni gofal iechyd i'r henoed fod yn uniongyrchol, e.e. pan gaiff person ei drin yn llai ffafriol oherwydd ei oedran. Ond gall dogni ddigwydd yn anuniongyrchol hefyd, e.e. pan fydd gofal yn cael ei gynnig yn y fath ffordd sy'n golygu bod pobl hŷn dan anfantais oherwydd cânt eu trin yn anghyfartal.[557] Enghraifft amlwg o hyn ydyw gofal yr henoed mewn cartrefi preswyl. Datgela ffigurau diweddar, byddai llai nag un ymhob pedwar oedolyn yn fodlon ystyried symud i gartref petaent yn fregus yn eu henaint. Pryderon am y risg o dderbyn camdriniaeth gan staff sy'n cael ei nodi fel prif reswm dros hyn.[558] Ceir cadarnhad o hyn

[553] The Guardian, 'NHS Accused of Age Discrimination over Lifesaving Surgery', the Guardian, 15 Hydref 2012.

[554] Callahan, D. 'Must we Ration Health Care for the Elderly?', [2012] 40(1) J Law Med Ethics 10, 13.

[555] Llywydd Coleg Brenhinol y Llawfeddygon.

[556] The Guardian, 'NHS Accused of Age Discrimination over Lifesaving Surgery', the Guardian, 15 Hydref 2012.

[557] Kings Fund's Briefing Note, 'Age Discrimination in Health and Social Care', 1 Mehefin 2000.

[558] The Telegraph, 'Elderly who Fear Care Home Abuse', the Telegraph, 12 Tachwedd 2013.

mewn adroddiad gan Age UK ar gartrefi gofal i'r henoed, lle gwelwyd 'abuse and neglect … and many examples of older people being … deprived of basic privacy or denied respect for their hygiene or personal appearance'.[559]

Derbynia hyd yn oed llysoedd yn y DU bellach bod dogni'n rhan o'r system cyflenwi gofal iechyd. Mae'r Llys Apêl wedi datgan droeon ei bod yn gyfreithlon i'r GIG ddogni mynediad i ofal iechyd. Nid ymagwedd newydd na diweddar yw hyn, ceir tystiolaeth o'r fath gydnabyddiaeth gan y llysoedd ers nifer o flynyddoedd. Er enghraifft, gellid edrych yn ôl i 1997, pan bwysleisiodd yr Arglwydd Bingham yn achos *R v Cambridge Health Authority ex parte B*[560] bod gan y GIG ddisgresiwn eang i ddosbarthu adnoddau fel y mynnent, ond bod dim dyletswydd pendant arnynt i wneud hynny.[561]

Realiti'r sefyllfa erbyn hyn yw bod yna ffactorau niferus wedi achosi i'r GIG a'r byrddau Iechyd lleol i orfod dogni gofal iechyd. Mewn gwirionedd, gellid dadlau a chytuno gyda safbwynt Albert Weale[562] bod hyn bellach yn sefyllfa anochel. Teimla Weale, yn sgil y sefyllfa bresennol, bod y tair egwyddor bennaf y seilir y GIG arnynt, sef darparu gwasanaeth cynhwysfawr, o safon uchel, i bawb, bellach bron yn amhosib i'w gweithredu gyda'i gilydd.

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[559] The Telegraph, 'Elderly Ignored and Treated as 'Objects' in Care System', the Telegraph, 21 Chwefror 2012.

[560] [1995] 1 WLR 898.

[561] Syrett, K. 'Courts, Expertise and Resource Allocation: Is there a Judicial 'Legitimacy Problem'?', [2014] 7(2) Public Health Ethics 112, 120. Dywedodd yr Arglwydd Bingham: "I have no doubt that in a perfect world any treatment which a patient sought would be provided … no matter how much it costs … particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world … Health authorities … are constantly pressed to make ends meet … Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients."

[562] Weale, A. 'Rationing Health Care: A Logical Solution to an Inconsistent Triad', [1998] 316 BMJ, 410.

Dadleuodd efallai bod modd cael gwasanaeth cynhwysfawr sydd o ansawdd uchel, ond na fyddai ar gael i bawb; neu wasanaeth cynhwysfawr ar gael am ddim i bawb, ond na fyddai o ansawdd uchel; neu wasanaeth o ansawdd uchel ar gael am ddim i bawb, ond sydd ddim yn gynhwysfawr.

Er gwaethaf amcanion y GIG i ddarparu gofal iechyd safonol, sy'n gynhwysfawr i bawb, nid yw hyn bellach yn realistig. Yn ogystal â'r cyfyngiadau ariannol, mae'r llysoedd wedi chwarae rôl wrth erydu'r amcanion hyn hefyd. Wrth i achosion llys ddatgan nad oes rhwymedigaeth bendant ar y GIG i ddarparu triniaeth gofal iechyd cyflawn,[563] ymddengys hyn fel petai'n cyfiawnhau penderfyniad y GIG i ddogni gofal iechyd i'r henoed.

Wedi ystyried yr holl ffeithiau ynglŷn â dogni gofal iechyd yn ei gyfanrwydd, amlygir bod yr henoed yn cael eu heffeithio'n ddifrifol gan ddarpariaeth gofal iechyd cyfyngedig y byrddau iechyd. Mae'r ffaith bod yr henoed yn cael eu heffeithio'n waeth gan y dogni nag unrhyw grŵp arall o bobl yn anfoesol. Wedi'r cyfan, mae'r mwyafrif o'r bobl mewn oed wedi gweithio ar hyd eu hoes gan dalu trethi ac yswiriant gwladol, ac felly onid ydynt yn llawn haeddu triniaeth gyflawn ac o safon uchel, gan gynnwys mynediad i'r cyffuriau meddygol diweddaraf gan y GIG?

Ar un llaw, wrth ystyried yr holl gyfyngiadau a phwysau ariannol sydd ar y GIG, mae'n amlwg bod rhyw fath o ddogni gofal iechyd bellach yn ganlyniad anochel o'r sefyllfa bresennol. Ar y llaw arall, mae'r ffaith bod dogni'n cael effaith gwaeth ar yr henoed yn annheg ac anfoesol. Wrth edrych i'r dyfodol, mae safbwynt Simon Stevens yn amlygu'r heriau sydd yn wynebu

[563] Yn achos *R v North West Lancashire HA ex parte A,D, and G* [1999] EWCA Civ 2022, gwnaeth y llys ddatgan nad yw Erthygl 8 o'r Ddeddf Hawliau Dynol yn gosod rhwymedigaeth bendant i ddarparu triniaeth feddygol. *R v Cambridge Health Authority ex parte B* [1995] 1 WLR 898.

darpariaeth gofal iechyd[564] "… the NHS faces a severe and continued financial challenge … there are some intense short-term pressures to be dealt with and some long term unavoidable choices ahead',[565] ac ni ddaw datrysiad i'r argyfwng hwn yn hawdd na chyflym.

[564] Prif Weithredwr y GIG yn Lloegr.

[565] Kings Fund's Interim Report, 'A New Settlement for Health and Social Care', 3 Ebrill 2014.

The Abandonment of Proportionality: A Critical Analysis of s.43 of the Crime and Courts Act 2013

Jack Hickling

Introduction

This paper will focus on the changes made to the law of self-defence by s.43 of The Crime and Courts Act 2013. Self-defence has undergone a number of legislative changes in recent years. S.43 amends s.76 of The Criminal Justice and Immigration Act 2008 by providing an enhanced defence to householders when their property is being burgled. Providing the householder believes themselves or another to be in danger, they are permitted to us 'up to grossly disproportionate' force in self-defence.

This can be contrasted with the previous law, which still applies in non-householder cases whereby an individual is permitted to use 'proportionate' force to the threat that is believed to be posed to themselves, others, or their property. The changes made by the 2013 Act therefore greatly extend the level of force permitted. Furthermore, this means that there are now two tests of self-defence in operation in England and Wales and the implications of this provide the foundation for this research.

There have been calls for an enhanced defence for the last decade. The instigating event for the campaign was the prosecution of Tony Martin, a Norfolk farmer who shot dead one intruder and severely injured another in 1999. This led to an appeal which reduced his conviction to one of voluntary manslaughter on the basis of diminished responsibility in 2001,[566] and his subsequent release in 2003.

[566] *R v Martin (Anthony)* [2001] All ER 435 (CA).

There was concern Martin would be subject to civil litigation, as the surviving intruder had been awarded legal aid to claim damages for the injuries suffered.[567] This led to a clause being included within the Criminal Justice Act 2003, namely s.329 which provides that civil claims brought by individuals injured in excessive self-defence would be struck out, unless the defender responded with 'grossly disproportionate' force.

Notably, in 2003 a poll by Radio 4 found that 37% of listeners wanted a new Bill to change the law to protect homeowners.[568] The Bill was to be put to the House of Commons by Stephen Pound MP but he failed to do this. The Bill[569] was eventually introduced to Parliament by Roger Gale MP. The Bill would have provided a defence to a householder who attacked a trespasser on his property. Ultimately, this Bill went no further after consultation with the DPP.[570]

Another attempt to introduce a similar Bill was carried out by Conservative MP, Patrick Mercer, in 2005.The Bill[571] would have amended the Criminal Law Act 1967[572] in much the

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[567] Sapsted, D, *Burglar wins legal aid to sue Tony Martin* (*The Telegraph*: 6th July 2002) http://www.telegraph.co.uk/news/uknews/1400522/Burglar-wins-legal-aid-to-sue-Tony-Martin.html (accessed 16/03/2014; Watson, M. (2003), *Self-defence and the Home*, (2003) 167 JPN 486, pg. 1.

[568] *Martin Case tops BBC's Today poll*, (*BBC News*: 1st Jan 2004) http://news.bbc.co.uk/1/hi/uk/3360765.stm (accessed 14/4/14); *Law – The Verdict* (*BBC Today*: Jan 2004) http://www.bbc.co.uk/radio4/today/reports/misc/law_result_20040101.shtml (accessed 14/4/14).

[569] The Criminal Justice (Justifiable Conduct) Bill 2003-2004 found at http://www.publications.parliament.uk/pa/cm200304/cmbills/036/2004036.pdf (accessed 14/4/14).

[570] Manning, R. (2006), *Justifiable Force*, Barry Rose Law Publishers, pg. 166.

[571] The Criminal Law (Amendment) (Householder Protection) Bill 2004-2005; found at http://www.publications.parliament.uk/pa/cm200405/cmbills/020/2005020.pdf (accessed 14/4/14).

[572] Which was the governing piece of legislation for self-defence at the time.

same terms as the 2013 Act operates. It provided an enhanced defence available to property owners, permitting them to use 'up to grossly disproportionate force' in defence of themselves, property and prevention of crime. The significant distinctions between this Bill and the 2013 Act are that the recent amendments are only concerned with 'the common law of self-defence'[573] and the bill potentially applied to those on commercial premises.[574]

Again, this Bill failed because it was not supported by the Labour Party, who formed Government at the time.[575] The Criminal Law (Amendment) (Protection of Property Bill)[576] was then put to Parliament by Anne McIntosh MP, which was essentially the same Bill as that put forward by Patrick Mercer MP a year prior.

The first legislative change to the law of self-defence occurred in 2008, with the Criminal Justice and Immigration Act. However, s.76 of the Act did not materially change the law of self-defence, but merely codified the existing provisions found in the common law. The first statutory change to the law of self-defence occurred via the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.148. The section provides that a defender has no duty to retreat, however this is a factor to be taken into account when determining the reasonableness of the force used.

[573] This will be discussed in part 4 below.

[574] The Bill possibly applied to commercial premises in all contexts. The 2013 Act does extend to commercial premises in very specific circumstances (see part 4) but does not apply generally to commercial properties.

[575] Jefferson, M. (2005), *Householders and the Use of Force against intruders,* 69 J Crim L 405 2005, pg. 411

[576] 2005-2006; http://www.publications.parliament.uk/pa/cm200506/cmbills/018/2006018.pdf.

This leads to the changes made to the law by the Crime and Courts Act 2013; operating to provide the enhanced defence for householders that have been campaigned for by the Conservative Party for the last decade.

It will be argued that the rationale underlying the changes is at times unsatisfactory, particular in light of the substantive changes made. For instance, it appears to be unclear why the changes permit the defence to be relied upon by those in commercial premises in particular circumstances, who is not the 'startled householder' that the legislation is aimed at protecting.

This paper will proceed in five parts. In part 1, a detailed analysis of the law of self-defence, excluding the recent amendments, will be undertaken to provide a background for the law prior to the 2013 Act, which continues to apply when the enhanced defence does not. Part 2 will then consider the arguments which were advanced in favour of the enhanced defence available to householders, with the counter-arguments also being analysed.

The arguments against the changes will then be analysed in part 3. In particular, it will be argued that the 2013 Act may appear to conflict with the requirement of proportionality inherent in Article 2 of the European Convention of Human Rights, and that if the significance of the home is an accepted rationale for the changes, the requirement that the enhanced defence is only available when the aggressor is a trespasser lacks explanation.

In part 4, the substantive changes made by the 2013 Act will be examined. Considering the scope of the changes with an attempt to predict their application, this analysis will be carried out in light of the arguments for and against the provisions as outlined in the previous two parts. Finally, part 5 will conclude the discussion of the provisions of the 2013 Act.

1. Setting out the Defence

This part seeks to provide a brief overview of the law of self-defence within the criminal law of England and Wales. It will provide an introduction to many of the problematic areas of self-defence such as mistake and the concerns regarding Article 2 of the European Convention on Human Rights 1950.[577]

a) The Rationale of the Defence

Firstly, the basis for the right of individuals to defend themselves must be considered. The rationale of self-defence, at its most basic, is the right to prevent an attack against oneself. Notable attempts to explain the rationale of the defence have been put forward by Uniacke,[578] Leverick,[579] and Sangero.[580] Whilst each of these have their own merits, it is the position of Leverick which will be used in this discussion[581] - despite her analysis being limited to killing in self-defence.[582] Leverick's basis is a forfeiture approach grounded in the right to life, as protected by Article 2 ECHR, of both parties.[583] The right to life of the

[577] Henceforth referred to as the ECHR.

[578] Uniacke, S. (1996), *Permissible Killing,* Cambridge University Press; Uniacke's basis for self-defence is grounded on the right to life which is conditional on behaviour. Whilst this appears to very much the same as a forfeiture approach, Uniacke terms it specification.

[579] Leverick, F. (2006), *Killing in Self-Defence*, Oxford University Press.

[580] Sangero, B. (2006), *Self-Defence in Criminal Law*, Hart Publishing; Sangero's theory of self-defence is based on three things; i) the autonomy of the attacked, ii) the guilt of the aggressor, and iii) the social-legal order. The combination of these permits an individual to act in self-defence when they are under threat.

[581] Specifically due to similar rhetoric being used by David Carmeron when arguing that burglars *"leave their Human Rights outside*" when arguing in favour of the expanded defence; see: Prince, R. & Whitehead, T. '*David Cameron: burglars leave their human rights at the door'* (*The Telegraph*: 1st Feb 2010) http://www.telegraph.co.uk/news/politics/david-cameron/7104132/David-Cameron-burglars-leave-human-rights-at-the-door.html accessed 11/04/14.

[582] Although it can apply to lesser harms.

[583] Leverick (2006), 3.

aggressor is forfeited when they pose an unjust immediate threat to the life of the defender, and there must be no other way in which the threat can be avoided.[584]

This has particular implications for this analysis, because it could be inferred that if the basis is the right to life of the individuals, that killing in defence of property could never by justified. Indeed, this is the conclusion reached by Leverick.[585] However, the substantive changes made by s.43 suggest that the enhanced defence will only apply when there is a threat, or a believed threat, to the life of the homeowners or those dear to him.[586] If the homeowner acts solely in defence of property the enhanced defence will not be available. Therefore, it is believed that Leverick's rationale for the right to self-defence is a suitable approach for the following discussion.

b) The Law of England and Wales

The scope of self-defence appears to be wide, with it being available to any offence which involves the use of force; not being confined to offences against the person. This is provided by *Renouf* [587] where it was held that self-defence should have been put to the jury regarding the offence of dangerous driving[588]; with the defendant ramming his car into another falling under the definition of 'force' for the purpose of s.3 of The Criminal Law Act 1967.[589]

[584] Leverick (2006), pg. 66.

[585] Leverick (2006), 7.

[586] See part 4 below.

[587] *R v Renouf* [1986] 1 WLR 522 (CA).

[588] Also see: *R v Symonds (Jonathon Yoan)* [1988] Crim LR 280 (CA).

[589] The 1967 Act provides a defence of the 'prevention of crime' which operates within the same framework as self-defence.

Furthermore, self-defence appears to be available not only when violence is used, but when there is a threat of violence.[590] The defence extend as far as the protection of others,[591] the protection of property,[592] and the prevention of crime generally.[593]

There are two main elements that must be satisfied for the use of force to be covered by self-defence. Firstly, the use of force must be necessary, and secondly, it should be proportionate in the circumstances.[594] These elements fall under the requirement for 'reasonable force', and both must be satisfied for the defence to be available to an individual.

i) Necessity

The first requirement is that the use of force is necessary. Allen states that 'the use of force is not justified if it is not necessary.'[595] The rationale of the defence, as outlined previously, is that the use of force must be necessary for the defence to be available – without it the rights of the aggressor are not forfeited. If the use of force is not necessary the defence will not be available.

However, this is only true to an extent. Due to the unique nature of necessity of defensive force being determined subjectively – there is the possibility that force could be necessary,

[590] *R v Cousins (Robert William)* [1982] 2 WLR 621 (CA).

[591] *R v Duffy* [1967] 1 QB 63 (CA).

[592] *R v Faraj* [2007] EWCA Crim 1033 (CA).

[593] S.3 The Criminal Law Act 1967.

[594] Johnathan Herring (2010), *Criminal Law: Text, Cases, and Materials,* 4th Edition, Oxford University Press, pp. 640-643; Manning (2005), pg. 61.

[595] Allen, M. (2011), *Textbook on Criminal Law,* 11th Edition, Oxford University Press, pg. 206.

even if there is no objective need for force.[596] This is in accordance with s.76 (4) of The Criminal Justice and Immigration Act 2008,[597] which provides:

'If D claims to have held a particular belief as regards the existence of any circumstances—

(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but

(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—

(i) it was mistaken, or

(ii) (if it was mistaken) the mistake was a reasonable one to have made.'

The case of *Gladstone*[598] is illustrative; the defendant (W) saw and individual (M) arresting a youth. M claimed to be a police officer, but could not product a warrant card when asked. Believing the youth was being unlawfully assaulted, W assaulted M. It was held that W's mistake did not need to be reasonable; he was judged in accordance with the circumstances that he honestly believed them to be at the time of the offence.

[596] A subjective standard is one which is determined by characteristics of the individual in question at the relevant time. An objective standard is determined by the standard of the 'reasonable man' (i.e. by how a reasonable person would have responded), and the individual characteristics of the individual in question may not be relevance. Self-defence involves the use of both of these standards. As regards to the necessity of the use of force, the defendant is judged by the circumstances he honestly believed to be the case (subjective). However, as for the level of force used, this is judge by the standards of the reasonable man (objective).

[597] CJIA.

[598] *R v Gladstone (Williams)* [1987] 3 All ER 411 (CA).

Therefore, the use of force does not have to be objectively necessary for the defence to be available. It is only required that the defendant *honestly* believed that the use of force was necessary for the defence to be available.

One particular requirement that the courts have insisted upon is that the use, or threat, of force against the defendant, by the aggressor,[599] must be sufficiently imminent to require the use of defensive force.[600] This is provided for by *Devlin v Armstrong*[601] where the claim of self-defence failed because the danger in question was not sufficiently imminent to deem her actions necessary in the circumstances.

However, this requirement of imminence does not preclude an individual for preparing for an anticipated attack,[602] [603] nor performing a pre-emptive strike[604] [605]; both can be justified in the circumstances. Nonetheless, the case of *Fegan*[606] appears to suggest that the threat posed must not be able to be reasonably met by more peaceful means for the use of force to be necessary. This could be indicative of a duty to retreat, however as will be discussed below – there is no such duty in English and Welsh law.

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[599] The victim.

[600] Allen (2011), pg. 206.

[601] [1971] NI 13 (CA) – Northern Ireland.

[602] *Attorney-General's Reference No 2 of 1983* [1984] EWCA Crim 1 (CA).

[603] This has particular implication for possession offences, which is beyond the scope of this essay. See: *Evans v Hughes* [1972] 1 WLR 1452; Llewelyn, F. (2013), *Protecting lives, restricting knives – the issue of self-defence and possession offences,* Vol 3, Queen Mary Law Journal: Postgraduate Conference Edition: Taking Risks and Challenging Legal Thought.

[604] *R v Beckford* [1988] AC 130 (PC) – Jamaica; See Lord Griffiths at 144.

[605] Pre-emptive strikes will be discussed later in this part under the 'Other Factors' subheading.

[606] [1972] NI 80 (CA) – Northern Ireland.

ii) Proportionality

The second requirement is that the force used must be reasonable in the circumstances as the defendant honestly believed them to be. As Aquinas states: 'somebody who uses more violence than necessary to defend himself will be doing something wrong'[607]; and if necessity were the only requirement individuals could kill in response to the most trivial interference.[608] Reasonable force requires that the force use is 'proportionate'. However, due to the operation of s.43 of the 2013 Act[609] there are now two schemes of self-defence. Namely, non-householder cases, permitted to use 'proportionate' force,[610] and householder cases, permitted to use up to 'grossly disproportionate' force.[611]

These schemes define what level of force is to be considered reasonable in particular circumstances. Reasonableness is the standard which the rationale for self-defence demands, if the force used is unreasonable – being excessive to the threat posed, then the defence will not be available[612]. Using Leverick's analysis to provide an extreme example; one is not permitted to kill in self-defence if the aggressor merely threatens to strike the defender; the aggressor will not have forfeited their right to life.

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[607] Aquinas, T. (1265-1274), *Summa Theologica, II-II, Qu. 64, A.7.* http://www.egs.edu/library/thomas-aquinas/articles/summa-theologica-part-ii-ii-secunda-secundae-translated-by-fathers-of-the-english-dominican-province/treatise-on-the-cardinal-virtues-qq-47-170/question-64of-murder/ (accessed 6/5/14).

[608] Manning (2005), pg. 61.

[609] Which amends s.76 of The Criminal Justice and Immigration Act 2008.

[610] S.76(6) of The Criminal Justice and Immigration Act 2008.

[611] S.76(5) of The Criminal Justice and Immigration Act 2008.

[612] *R v Clegg* [1995] 1 AC 482 (HL).

For Ashworth, the reasonableness of the force used, whether proportionate or disproportionate to the threat posed, is judged not on the beliefs of the defendant, but by an objective assessment –the standard of the 'reasonable man'.[613] This is demonstrated by *Owino*[614] where it was held that a misjudgement by the defendant as to the level of force required is not a defence. This is a mistake of law, not fact. However, it would appear that there is some limited scope for mistakes regarding the level of force via the *dictum* in *Palmer.*[615]

If the force is deemed to be reasonable in the circumstances that the defendant honestly believes to be the case, then it will be 'justified in every sense'.[616] This applies to claims in both civil and criminal proceedings although there are distinctions between them.[617] [618] There is some guidance regarding reasonable force to be found in s.76 (7) of the 2008 Act;[619]

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[613] Ashworth, A & Horder, J. (2013), *Principles of Criminal Law*, 7th Edition, Oxford University Press, pg. 120.

[614] *R v Owino (Nimrod)* [1996] 2 Cr App R 128 (CA).

[615] *R v Palmer* [1971] AC 814 (PC); see Lord Morris at 832. Further discussion on *Palmer* is to be found in part 2(b) regarding the reasonable force test.

[616] Ormerod, D. (2011), *Smith and Hogan's Criminal Law*, 13th Edition, Oxford University Press, pg. 386.

[617] *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25 (HL).

[618] This is unfortunately beyond the scope of this essay; as s.43 of the Crime and Courts Act 2013 does not extend to the defence of civil claims using self-defence. One significant difference between self-defence in civil and criminal cases is that in civil law an honest, but unreasonable mistake is no defence. However, it is worthy of note that civil actions for trespass to the person will be struck out where there is self-defence by the defendant, unless the action in self-defence is deemed to be 'grossly disproportionate'; s.329 the Criminal Justice Act 2003. This matches the standard of force in householder cases following the changes made by s.43 of The Crime and Courts Act 2013.

[619] Which provides: 'In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—

> (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and

however it does not adequately provide any reference as to a test to use when determining the proportionality of force used in self-defence.

iii) Other factors

There are a number of others factors to self-defence, which must be considered for the sake of completeness.[620] The first of these is mistake in self-defence. As previously stated, the defendant is judged by the circumstances that he reasonably believed to be the case, even if that belief is unreasonable.[621] One proviso to this is that the defendant cannot rely on a mistaken belief which is caused by intoxication, as per *O'Grady,*[622] the *dictum* of which is now statutory, due to s.76 (5) of the 2008 Act.[623] Furthermore, it is clear from *Martin*[624] that psychological characteristics of the defendant which make him likely to perceive heightened threats will not be contemplated when assessing mistake for in self-defence.[625]

(b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.'

[620] Although unfortunately there will be little time to consider any of them in any significant depth.

[621] *R v Williams (Gladstone).*

[622] *R v O'Grady* [1987] 3 All ER 420 (CA).

[623] Which provides:'(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.'

[624] *R v Martin (Anthony)* [2001] All ER 435 (CA).

[625] This has been criticised as running contrary to the authority of *Williams (Gladstone)* from which it would be believed that psychological and physical characteristics of the D would be taken into account when assessing the potential for a subjective mistake; particularly when it is considered that such evidence is allowed in cases of provocation. Furthermore, the reasoning of Lord Woolf is unsatisfactory when it is considered that Martin was charged with murder, and not a lesser offence. One of the possible reasons for this distinction is the fact that self-defence provides a complete defence, whereas provocation (now loss of control) provides only a partial defence, and does not result in an acquittal. Furthermore, self-defence is available to any offence which involves the use of force, whereas provocation is only a defence to murder; see Ashworth & Horder (2013), pp. 209-211.

Linked to mistake are unknown circumstances of justification. This is when a defendant could have acted in the way he did on the basis of a justification such as self-defence, but was not aware of the justifying circumstances. In *Dadson*[626], it was held that unknown circumstances do not provide a defence, because the defendant was not acting on the basis of that justification.[627]

A second concern is the possible effect of Article 2 of the ECHR[628], which protects the right to life, on self-defence. Article 2 provides:

'1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence…'[629]

[626] *R v Dadson* (1850) 2 Den 35 (Assizes).

[627] Affirmed in *Chapman v DPP* (1988) Times, 30 June (QBD), see also: Hogan B. (1989), *The Dadson Principle*, Crim LR 1989, Oct, 679-686.

[628] Which is implemented into domestic law by virtue of The Human Rights Act 1998.

[629] Article 2 continues: 'b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c. in action lawfully taken for the purpose of quelling a riot or insurrection.'

It is argued by Leverick,[630] drawing on case law,[631] that the position of English law regarding mistake is incompatible with the Convention, due to the requirement of Article 2 that the deprivation of life is only permissible when 'absolutely necessary'.[632] For Article 2, any mistake must be held for 'good reasons' – whereas English law, only requires an honest belief, it need not be reasonable.[633]

It is believed, that Article 2 and the current law on self-defence do conflict. A move to a 'reasonable belief' based approach could be beneficial in resolving this conflict, and would reflect mistake in other areas of criminal offences, such as consent in sexual offences.[634]

Thirdly, is the question of a duty to retreat – mentioned previously when discussing *Fegan*[635]- where there was a requirement that force in self-defence was used only when the defendant had retreated before using force.[636] However, this is no longer the case. In *Bird*[637]

[630] Leverick, F. (2002), *Is English self-defence law incompatible with Article 2 of the ECHR?* Crim LR 2002, May, 347-362.

[631] *McCann v United Kingdom* (1996) 21 E.H.R.R. 97; *Andronicou and Constantinou v. Cyprus* (1998) 25 E.H.R.R. 491; *Kelly et al. v. United Kingdom* (2001) 11 B.H.R.C. 1; *Gül v. Turkey* (2002) 34 E.H.R.R 435

[632] See also: Parsons, S. & Andoh, B. (2012), *Private and public defence in the criminal law and in the law of tort – a comparison,* J. Crim. L. 2012, 76(1), 22-28, pp. 27-28.

[633] Unfortunately, this argument is beyond the scope of this essay, but for further discussion see: Smith, J.C (2002), *The use of force in public or private defence and Article 2*, Crim LR 2002, Dec, 958-962, and Leverick, F. (2002), *The use of force in public or private defence and Article 2: A reply to Professor Sir John Smith*, Crim LR 2002, Dec, 963-967; *Bubbins v. UK* (2001) 41 EHRR 24 (ECtHR); *R (on the application of Bennett) v. HM Coroner for Inner South London* [2006] EWHC 196 (Admin) (QBD) approved in [2007] EWCA Civ 617 (CA).

[634] *DPP v Morgan* [1976] AC 182 (HL); s.1(1) of the Sexual Offences Act 2003.

[635] See pg, 7, footnotes 41.

[636] Ashworth (2013), pg. 209.

[637] *R v Bird* (1985) 81 Cr App R 110 (CA).

it was stated by Lord Lane that there was no duty to retreat, but the possibility of retreat was a factor to consider when assessing the reasonableness and the necessity of force.[638]

This is on a statutory basis via s.148 of The Legal Aid, Sentencing and Punishment of Offenders Act 2012, which amends s.76 of the 2008 Act, which now provides:

'(6A) In deciding the question mentioned in subsection (3), a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a duty to retreat.'

Therefore an individual claiming self-defence has no duty to retreat. However, it is a factor that will still be considered when determining the availability of the defence.

Finally, are cases of self-induced attack; a claim to self-defence will fail where the defendant provokes the attack from the victim. This is stated by Lord Lowry in *Browne:*[639]

'The need to act must not have been created by conduct of the accused in the immediate context of the incident which was likely or was intended to give rise to that need [of self-defence].'

This is qualified by the limitation that a defendant may rely on the defence where the victim has reacted to the incitement in a manner that is disproportionate.[640]

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[638] Lord Lane at 114.

[639] *R v Browne* [1973] NI 96 (CA) – Northern Ireland.

[640] *R v Rashford (Nicholas)* [2006] Crim LR 647 (CA); *R v Keane* [2010] EWCA Crim 2514 (CA).

It is important to note that this rule does not preclude a defendant from going somewhere where he knows he will, or is likely to be attacked. The case of *Field*[641] illustrates this point. In this case the defendant was warned that W and others were intending to attack him. F did not heed this warning, and when W found F, F stabbed him in self-defence. F's plea of self-defence was not defeated by him refusing to stay inside despite the warnings. A distinction can be drawn between a person acting lawfully with the realisation of possible violence[642]and when a person provokes a self-induced attack and claims self-defence.[643]

The key aspects of self-defence have now been considered. Subsequently, the arguments for and against the changes made by the 2013 Act can now be addressed. This will be done in light of the discussion regarding the law of self-defence prior to the amendments, which still applies in circumstances where the enhanced defence have not.

2. Arguments for the Amendments

This part will examine the rationale behind the changes made by s.43 of The Crime and Courts Act 2013. There are three arguments underlying the changes made by s.43 which will be considered in turn. Firstly, it is argued that the previous balance of the law favoured the

[641] *R v Field* [1972] Crim LR 435 (CA).

[642] *Beatty v Gillbanks* (1882) 9 QBD 308 (DC).

[643] As in *Browne.* The defendant shot and killed a policeman after being stopped in his vehicle. The rule in *Brown* regarding self-induced attack is to preclude an individual from claiming the defence for what is a deliberate act of violence. Self-defence only applies when an individual is acting to genuinely defend themselves and not to carry out an attack on another person under the guise of the defence.

intruder over the homeowner,[644] secondly that the 'reasonable force' test was unclear,[645] and finally, that the law failed to recognise the significance of the home.[646]

a) Balance of the Law

The primary argument behind the expansion of self-defence which was undertaken by the Crime and Courts Act was that it was believed that the law favoured the intruder and did not protect the homeowner.[647] Damien Green MP[648] stated that the provisions of the 2013 Act 'provide an extra level of protection that is not currently available for householders in the particularly and terrifying circumstances of finding an intruder in their home.'[649] In particular, it was felt that the law of self-defence did not reflect that it was the burglar who was the 'villain', with the homeowner being the innocent party. Two *cause célèbres* are frequently cited in support of this argument – the cases of *Martin*[650] and *Hussain*[651].

[644] Christopher Grayling, *Chris Grayling speech in full*, (*Politics.co.uk*, 9th Oct 2012; http://www.politics.co.uk/comment-analysis/2012/10/09/chris-grayling-speech-in-full (accessed 12/3/14

[645] See Damien Green MP and Shailesh Vara MP in the Public Bill Committee; *Crime and Courts Bill [Lords]*, Ninth Sitting, PBC (Bill 115) 2012-2013, 5th Feb 2013.

[646] Miller, S. (2013), *"Grossly disproportionate": home owners' legal licence to kill*, J Crim L 2013, 77(4), 229-309, pg. 305.

[647] Malcolm, J.L. (2011). *Self-defence in England: Not Quite Dead,* accessed: http://www.alicemariebeard.com/scholars/texts/Malcolm_self-defence.doc (1/3/14), pg. 6.

[648] Minister of State for Policing and Criminal Justice.

[649] Public Bill committee, *Crime and Courts Bill* [Lords], pg. 287; see also, *Use of force in self defence at place of residence,* Crimminal Legal and Legal Policy Unit, (26 April 2013), Minister of Justice: Circular No. 2013/02.

[650] *R v Martin (Anthony)* [2001] EWCA Crim 2245 (CA).

[651] *R v Tokeer Hussain & Munir Hussain* [2010] EWCA Crim 94 (CA).

In *Martin,* the defendant shot two individuals who were burgling his farmhouse. One of the victims died, and the other was injured. The defendant claimed that he shot the victims after being awoken by noises made during the burglary.[652] However, it was alleged by the prosecution that Martin had lain in wait for the victims, intended to kill or seriously injure them[653]. It was stated by Lord Woolf at paragraph 80 that:

'Mr Martin was entitled to use reasonable force to protect himself and his home, but the jury were surely correct in coming to their judgement that Mr Martin was not acting reasonably in shooting one of the intruders, who happened to be 16, dead and seriously injuring the other.'

Whilst we cannot know the basis on which the jury found the actions of Martin to be excessive it was not disputed that Martin shot the burglars from behind. This action appears *prima facie* excessive, because they did not pose a threat to him and appeared to be fleeing. The defendant's appeal that self-defence should have been available was dismissed. However, the court did reduce his conviction from murder to manslaughter on the grounds of diminished responsibility.[654]

[652] See Lord Chief Justice Woolf in *Martin* at [12].

[653] See Lord Chief Justice Woolf in *Martin* at [13].

[654] As governed by s.2(1) of the Homicide Act 1957. The partial defence, available only to murder, reduces a can reduce the offence to voluntary manslaughter on the basis that the defendant was suffering from an abnormality of mind which impaired his mental responsibility for his involvement in the killing.

Martin was suffering from paranoid personality order, in addition to depression. He claimed that this made him more likely as an individual to act in excessive self-defence. Such psychiatric conditions are not relevant in relation to self-defence, as discussed previously, however they were relevant to the issue of diminished responsibility.

In *Hussain* the defendants were brothers who were prosecuted after chasing fleeing burglars and striking the burglar they caught (Salem) over the head with a cricket bat, causing brain damage.[655] The prosecution focused solely on the injuries caused when Salem was defenceless on the ground, and not on the events which occurred inside Hussain's home. Self-defence was not available as Salem posed no threat.[656]

Supporters of the reforms argue that these are examples of homeowners being unreasonably prosecuted for actions which they undertook in defence of themselves and their homes.[657] Comparatively, the homeowners received much longer sentences than the intruders.[658] This is evident in *Hussain* where the victim was not fit to plead in relation to the burglary due to the injuries he suffered, yet had gone on to commit further offences.[659] Contrastingly, the brothers received sentences of imprisonment at first instance,[660] which were reduced to suspended sentences on appeal.[661]

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[655] See Lord Chief Justice Judge in *Hussain* at [17] and [17].

[656] See Lord Chief Justice Judge in *Hussain* at [19].

[657] Hennessey P, & Kite, M. *Tories back new rights to help home owners protect themselves from burglars,* (*The Telegraph*: 19th Dec 2009), http://www.telegraph.co.uk/news/uknews/law-and-order/6844682/Tories-back-new-rights-to-help-home-owners-protect-themselves-from-burglars.html (accessed 4/4/14).

[658] Whitehead, T. *Seven in ten burglars avoid prison, figures show* (*The Telegraph*: 8th April 2009), http://www.telegraph.co.uk/news/uknews/law-and-order/5119818/Seven-in-ten-burglars-avoid-prison-figures-show.html (accessed 1/5/14).

[659] See Lord Chief Justice Judge in *Hussain* at [13].

[660] Tokeer Hussain was sentenced to three years and three months imprisonment, and Munir two years and six months imprisonment.

[661] See Lord Chief Justice Judge in *Hussain* at [13], [45] and [46].

However, this reasoning is rejected as the *cause célèbres* cited in support of this argument are not cases of self-defence, and would not fall within the ambit of the enhanced defence. In relation to *Martin*, Patrick Mercer MP when discussing an earlier Bill with identical provisions[662] stated that the expanded defence would not apply, with self-defence continuing to be unavailable.[663] Furthermore, *Hussain* was a revenge attack on a burglar who did not pose a threat.[664] It too would not fall within the enhanced defence because the force was not used in a dwelling.[665]

Elliott and Quinn state that the Crown Prosecution Service have only brought 11 prosecutions in the 15 years between 1990 and 2005[666] [667] concerning individuals defending both commercial and residential premises from burglars.[668] It is also noted by Squires that the UK courts have been historically sympathetic to self-defence cases.[669] When this is

[662] The Criminal Law (Amendment Householder Protection) Bill 2004-2005.

[663] Broadbridge S., *Criminal Law (Amendment) (Householder Protection) Bill,* Research Paper 05/10, Home Affairs Section: House of Commons Library, pg. 27; Mercer, P. *Patrick Mercer: Even Tony Martin intruder said the law should be harder. So why on earth isn't it?* (*Mail Online*: 8th Sep 2012), http://www.dailymail.co.uk/news/article-2200445/PATRICK-MERCER-Even-Tony-Martin-intruder-said-law-harder-So-earth-isnt-it.html (accessed 14/4/14). See also Ann McIntosh discussing her Bill; *New bid for tougher intruder law*, (*BBC News*: 28th Oct 2005), http://news.bbc.co.uk/1/hi/uk_politics/4383970.stm (accessed 2/3/14).

[664] See Lord Chief Justice Judge at [34].

[665] See s.76(8A)(b) and part 4 below discussing the requirement of a householder case.

[666] Elliott, C. & Quinn, F. (2008), *Criminal Law*, 7th Edition, Pearson Education, pg. 335.

[667] Although this figure has been dispute by the Telegraph; Miller, K. & Hennessy, P.; *We show that the fight-back figures are wrong,* (*The Telegraph* 1st Jan 2006), http://www.telegraph.co.uk/news/uknews/1481283/We-show-that-the-fight-back-figures-are-wrong.html (accessed 1/4/14).

[668] Note that the enhanced provisions do not usually include commercial premises; see part 4.

[669] Squires, P. (2006), *Beyond July 4th?: Critical Reflections on the Self-Defence Debate from a British Perspective,* 2 J.L. Econ. & Pol'y 221 2006, pg. 223.

considered, it seems Miller's[670] conclusion that this argument does not justify the changes made to the law is unavoidable. The cases used in support are not self-defence, and there are so few cases that the change may only have a limited effect.[671]

On this basis, it would appear that the argument that the law was imbalanced is not a strong one. The cases cited in support of the argument would not be decided any differently under the new law. Additionally, there appear to be very few cases from which to base the conclusion that the law is in fact imbalanced, with only 11 in 15 years, including the two discussed above. It would appear that the reasonable force test was an adequate filter in permitting lawful actions of self-defence, and filtering unlawful actions from legal protection.

b) The Reasonable Force Test Lacks Clarity

Secondly, is the argument that the reasonable force test[672] was unclear? Damien Green MP in the Lords Committee debate on the Crime and Courts Bill stated:
'The purpose of the provision is to give not only greater protection to householders, but greater clarity about the protection they can seek, not least so that judges know what Parliament intends.'[673]

[670] Miller (2013), pg. 303.

[671] With only 11 cases in 15 years between 1990 and 2005 according to a CPS informal trawl; Almandras, S. (2010), *Use of force against intruders,* Key Issues for the New Parliament 2010: House of Commons Library Research.

[672] This is still used in all cases of self-defence. However, the use of 'reasonable' in householder cases has been expanded to include disproportionate force.

[673] Public Bill committee, *Crime and Courts Bill* [Lords], pg. 278.

The dissatisfaction from the reasonable force test stems from the question being one which is left to the discretion of the jury.[674] This means that the test can be difficult to adequately define, as the very definition of what is 'reasonable' is inherently circumstantial. It could therefore be difficult for an individual to know what level of force they are permitted to use in the circumstances in which they find themselves.

However, it is difficult to see how the amendments made by the 2013 Act clarify the law for the individual who seeks to rely on self-defence. The question of what is 'grossly disproportionate' still left to the 'black box' discretion of the jury.[675] The movement from one subjective standard to another ensures that the difficulties with the reasonable force test will remain.

The thinking underlying the criticism of the reasonable force test is rejected by Dennis[676] who states that it 'overlooks the significant of Lord Morris' dictum in Palmer'.[677] In *Palmer,*[678] Lord Morris stated that a person is not expected to 'weigh to a nicety the exact measure of his defensive action',[679] a statement which is now on a statutory footing via the operation of the s.76(7)(a) of the 2008 Act.[680]

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[674] Getzler, J. (2006), *Use of Force in Protecting Property,* 7 Theoretical Inq L 131 2006, pg. 151.

[675] Getzler (2006), pg. 151; see Lord Diplock in *Attorney-General for Northern Ireland's Reference (No. 1 1975)* [1977] AC 105 (HL), at 133.

[676] Dennis, I. (2000), *What should be done about the law on self-defence?* Crim LR 2000, Jun, 417-418.

[677] At pg. 417.

[678] *R v Palmer* [1971] AC 814.

[679] At pg. 832.

[680] Note that Dennis was writing prior to the enactment of the 2008 Act.

The *dictum* of Lord Morris demonstrates that there is an element of discretion in favour of the defendant in the reasonable force test. It acknowledges the criticism of the test; that an individual may not know exactly what level of harm they are permitted to use in self-defence, and allows them a limited amount of leeway if they fall on the wrong side of the test. On this basis, the criticism that the reasonable force test lacks clarity seems inappropriate. The test appears to intentionally lack certainty to allow discretion in favour of the individual acting in self-defence, and the inherent flexibility in the test is one of the primary strengths of the law in this area.

Furthermore, it is arguable that the substantive changes made may confuse the law for two reasons. Firstly, as stated by Jenny Chapman MP,[681] there was already clarity in the law prior to the changes,[682] with a substantial amount of common law helping to define reasonable force. Whilst the question was ultimately left to the jury, the case law may have assisted them in their deliberations. This case law no longer provides any assistance as to the level of force which is permitted in self-defence under the enhanced doctrine.

Secondly, it is possible that the existence of two standards of self-defence could cause confusion within the law. This is compounded by important distinctions within the amendments, which mean that there can be a fine line between a householder case and a non-householder case; where significantly differing levels of force are permitted.[683]

[681] Shadow Minister for Justice.

[682] Public Bill committee, *Crime and Courts Bill* [Lords], pg. 273.

[683] The requirements of a householder case will be discussed in detail in Part 4 (a).

It would appear, even if the reasonable force test is deemed to lack clarity – which is true to an extent, the reforms do little to solve the issue. The amendment merely expands the ambit of permissible force in self-defence, and fails to address the problem that is cited in its favour. Bearing this in mind, it would appear that the amendments were not necessary to achieve this aim.

c) The Significance of the 'Home'

The final argument that will be considered is that the previous provisions which governed the law on self-defence failed to appreciate the significance of the home. It is argued that the law should permit individuals to use greater force due to the frightening nature of home invasions. An argument to this effect is put forward by Joyce Lee Malcolm, who argues that the scope of self-defence should be extended. Much of Malcolm's argument is based on the claim that crime is on the rise, and that this can be prevented by expanding the ambit of self-defence.[684]

However, when domestic burglary[685] rates are considered, this claim does not appear to be the case. The number of domestic burglaries in England and Wales between October 2012 and September 2013 was 222,291. This represented a drop of 5% on the previous year. Perhaps more significantly, this was a drop of 49% on the number of domestic burglaries ten years previously.[686]

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[684] Malcolm (2011), pp. 1-2.

[685] Whereas Malcolm focuses on violent and gun crime, it is believed that domestic burglary rates are the more telling indicator regarding the claim that the ambit of self-defence in the home should be expanded.

[686] Office for National Statistics, *Crime in England and Wales; Year Ending September 2013*, pg. 18; http://www.ons.gov.uk/ons/dcp171778_349849.pdf (accessed 13/3/14).

Whilst these statistics are for police reported crimes, and therefore do not take into account unreported burglaries, it is submitted that these figures are nonetheless indicative of an overall downward trend. In light of this, Malcolm's claims for an enhanced law of self-defence do not appear to be as pressing as made out to be.

Further academic support for the significance of the home is to be found in the work of Sangero, who states that there is a 'special emotional affinity between a person and his home'.[687] There has been some support in English and Welsh law of this line of thought prior to the 2013 Act. This is seen in *Hussey*[688] where the Lord Chief Justice, in quoting Archbold's *Criminal Pleading: Evidence and Practice* stated:

'In defence of a man's house, the owner or his family may kill a trespasser, who would forcibly dispossess him of it in the same manner as he might, by law, kill in self-defence a man who attacks him personally; with this distinction, however that in defending his home he need not retreat, as in other cases of self-defence, for that would be giving up his house to his adversary.'[689]

However, such an argument could be indicative of a shift towards a US-esque 'castle doctrine' whereby a homeowner may be permitted to kill an intruder simply for entering the property, even if they pose no threat to the life of the homeowner.[690] The problem with this shift is noted by Dennis who states:

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[687] Sangero (2006), pg. 267.

[688] *R v Hussey* (1924) 18 Cr App R 160.

[689] At pg. 161.

[690] The US models of self-defence will be considered later; along with cases such as that of Trayvon Martin.

'if an Englishman should be allowed to kill in defence in his castle - then the aggressive armed burglar can be safely be despatched, but so can be the ten-year-old body found stealing apples from the kitchen.'[691]

Killing in defence of property is rejected emphatically by Leverick,[692] whose basis for self-defence is a rights-based forfeiture approach.[693] Interestingly, it has been stated by David Cameron PM that when a burglar enters another's home they 'leave their human rights outside'[694] – this claim is rejected; posing a threat to property does not lead to forfeiture of the right to life.

Killing to protect property would not sufficiently respect the right to life of the victim, and would possibly conflict with Article 2 of the ECHR, because the killing is not 'absolutely necessary'.[695] Such action would only be necessary when a significant threat to the individual is posed. It is noteworthy that that the enhanced defence requires that the householder believes that they are acting in defence of themselves, or another, and not in defence of their property.[696]

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[691] Dennis (2000), pg. 417.

[692] Leverick (2006), 7.

[693] Leverick (2006), 2, See also 2 above discussing the rationale behind the defence.

[694] Prince, R. & Whitehead T. *David Cameron: burglars leave their human rights at the door*' (*The Telegraph*: 1st Feb 2010) http://www.telegraph.co.uk/news/politics/david-cameron/7104132/David-Cameron-burglars-leave-human-rights-at-the-door.html accessed 11/04/14.

[695] This will be discussed in depth in a 4.

[696] In accordance with the requirement of s.76(8A)(a) that it is a case of 'common law' self-defence; this will be discussed in 5.

In conclusion, it would appear that none of the arguments in favour of the amendments made by the 2013 Act are particularly persuasive. On an analysis of the case law it does not appear that the law favoured the intruder over the homeowner; and it actually appears that the CPS and Courts were lenient in favour of the homeowner.[697] Furthermore, the changes made do not resolve the lack of clarity in the law prior to the amendments. Broadening the scope of the doctrine does not make the ambit of the defence any clearer; it simply means that it is available in more circumstances. It is possible that the changes will actually operate to confuse the defence due to the existence of two standards.

Finally, the notion that the sacredness of the home means it is worthy of special protection is rejected. Whilst the reasoning behind this rejection is focused on instances of killing in self-defence, the argument behind the change is unsatisfactory by itself due to the leeway already permitted to people using force in self-defence.

3. Arguments against the Amendments

This part will examine the arguments made against the changes to the law of self-defence. The first argument is that the changes unsatisfactorily broaden the scope of self-defence. The second is that the reforms will lead to increased violence, and the third is that the reforms may be contrary to Article 2 of the ECHR. Fourthly, the amendments conflate the defences of loss of control and self-defence, and finally, the changes discriminate against harm from within the home.

[697] Lipscombe, S. (2013), *Householders and the criminal law of self-defence*, 10th Jan 2013, SN/HA/2959, pp. 3, 6-9.

a) Broadening the Scope of Self-Defence

The first argument is that the changes unsatisfactorily broaden the scope of self-defence – legitimising the use of disproportionate force.[698] The provisions have been condemned by Liberty who state they are 'unnecessary and set a dangerously low threshold for what will be considered acceptable violence.'[699] Many of those who advocate this viewpoint are of the opinion that the previous law adequately protected homeowners.

This criticism relies upon the abandonment of the requirement of proportionality which does not sit easily with the rationale underlying self-defence as outlined in part 1. The abandonment of the requirement, in favour of permitting up to 'grossly disproportionate' force has been described as 'backwards and barbaric.'[700] This argument is particularly persuasive as without the requirement of proportionality the scenario outlined in the extreme example in part 1 would be self-defence. This is despite the fact that the action from the defender, in killing the victim, is unnecessary as the threat posed does not require such a response.

[698] Wake, N. (2013), *Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives,* J Crim L 2013, 77(5), 433-457, pg. 456.

[699] Liberty (2013), *Liberty's Report stage briefing on the Crime and Courts Bill in the House of Commons,* March 2013; http://www.liberty-human-rights.org.uk/pdfs/policy13/liberty-s-hoc-report-stage-briefing-crime-and-courts-bill-march-2013-.pdf (accessed 4/3/14), pg. 13.

[700] Hirsch, A.; *A barbaric take on self-defence,* (*The Guardian*: 2nd Feb 2010), http://www.theguardian.com/commentisfree/henryporter/2010/feb/02/self-defence-burglary-conservatives (accessed 7/04/14).

Of particular concern is that the enhanced defence could lead to a similar tragedy as the death of Trayvon Martin in the US.[701] [702] Martin was unarmed when he was shot dead by George Zimmerman, after an altercation between the two. This occurred after Zimmerman reported Martin to the police for looking suspicious in his neighbourhood at night-time, and had been warned by officers not to follow Martin.[703] Zimmerman ignored this warning, but was acquitted on the basis of Florida's 'stand your ground' self-defence law.

Such legislation permits the use of deadly force when somebody feels they are at risk of bodily harm in a confrontation - with no duty to retreat.[704] Such legislation is distinct from the castle doctrine; which eliminate the requirement to retreat when a defender is in their home.[705] However, in many states this has been expanded to include areas such as cars.[706]

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[701] Liberty (2013), pg. 14; Turner, J.; *The UK's new self-defence law opens the door for a Trayvon Martin case*, (*New Statesman*; 23rd July 2013) http://www.newstatesman.com/law/2013/07/uks-new-self-defence-law-opens-door-trayvon-martin-case (accessed 8/3/14).

[702] Also seen the recent case of Diren Dede a German exchange student, who was shot dead after entering into a garage, which was left open with a purse in view; *German student Diren Dede killed In 'castle doctrine' case,* (*BBC News*: 1st May 2014), http://www.bbc.co.uk/news/world-us-canada-27243115 (accessed 1/5/14); Associated Press & Daily Mail Reporter; *German exchange student, 17, shot dead by Montana homeowner honoured at memorial service in Hamburg,* (*The Daily Mail:* 4th May 2014) http://www.dailymail.co.uk/news/article-2619956/Slain-German-exchange-student-honored-memorial.html (accessed 6/5/14); the complaint in the case can be accessed here: http://www1.kpax.com/files/jpcopier@co.missoula.mt.us_20140428_152924.pdf (accessed 6/5/14).

[703] Rudolf, J. & Lee, T. *Trayvon Martin Case Spotlights Flordia Town's History Of 'Sloppy' Police Work*, (*Huffington Post*; 4th Sep 2012), http://www.huffingtonpost.com/2012/04/09/trayvon-martin-cops-botched-investigation_n_1409277.html (accessed 8/3/14).

[704] Lerner, R.L. (2007), *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 Journal of Law, Economics, and Policy, *http://ssrn.com/abstract=961468,* pp. 7-18.

[705] Green, S.P. (1999), *Castles and Carjackers: Proportionality and the use of deadly force in defence of dwellings and vehicles,* 1999 U Ill L Rev 1 1999, pg. 6; Drake, D.M. (2007), *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 St Mary's LJ 573 2007-2008, pg. 574.

[706] Green (1999), pg. 3.

This has led to calls for the repeal of the 'stand your ground' law in Florida, and similar legislation in other states.[707] One concern is that due to the death of Martin, only Zimmerman's version of events could be put to the jury. This is an issue when any death occurs in self-defence, with it being possible that the events did not occur as claimed by the defendant. Of concern in *Martin* were the accusations of racial profiling at trial.

This case highlights the concerns with the amendments made to self-defence. To permit such force contradicts the principle of proportionality – which is one of the core tenets of self-defence. The movement towards populist reforms, which prioritises the views of the public over responsible law making, should be condemned.[708] It is hoped that due to the rare nature of such cases,[709] that the reforms made will have little effect. However, there remains the possibility that the expanded defence will allow claims to the defence which should not fall within it on the basis of its rationale.

The counter-argument to this viewpoint is that individuals should have the right to defend themselves from attack,[710] which is predicated on the sanctity of the home argument as discussed previously. This argument states that the enhanced defence reflects the fear that householders experience when being burgled, and that they are not expected to act rationally when this is the case. In agreement with the arguments advanced it is believed by the author that that the test of reasonable force used prior to the amendment sufficiently

[707] Montana; Haake, K. *Missoula Rep. Hill looks to repear part of 'castle doctrine'* (*Missoulian*: 1st May 2014) http://missoulian.com/news/local/missoula-rep-hill-looks-to-repeal-part-of-castle-doctrine/article_68641320-d0cc-11e3-a1be-001a4bcf887a.html (accessed 1/5/2014).

[708] Skinner, S. (2005), *Populist politics and shooting burglars: comparative comments on the Lega Nord's proposal to reform Italian self-defence law,* Crim LR 2005, Apr, 275-284.

[709] With only 11 in the last 15 years.

[710] This has been discussed in 3.

protected householders, and the claim that the law expected householders to act rationally fails to attach weight to the *dictum* in *Palmer.*[711]

b) Encouraging more Violence

The second criticism is that the changes will encourage vigilantism by the homeowner against intruders[712] due to the legitimatisation of disproportionate force. This could subsequently increase the number of weapons carrying burglars, because they are aware of the greater threat homeowners may pose.[713] This would place homeowners at greater risk of attack.

However, this critique is rejected by Malcolm who believes that the enhanced defence will discourage burglaries.[714] Cited in support of this argument is a statement by Brendon Fearon, the surviving burglar in *Martin*, claiming that the enhanced defence would have deterred him from burgling due to the greater threat homeowners posed to him.[715]

The validity of the claim that the enhanced defence may act as a deterrent can be assessed by considering the effect of similar provisions in other jurisdictions on burglary rates. For this

[711] See criticism of Dennis (2000) in 3.

[712] Liberty (2013), pg. 14.

[713] Moore-Bridger, B. *Tory change of intruders law "licence to kill",* (*London Evening Standard*: 25th Jan 2010), http://www.standard.co.uk/news/torychange-of-intruders-law-licence-to-kill-6745373.html (accessed 21/3/14).

[714] Malcolm (2011), pp. 18

[715] Ibid.

purpose, Florida will be considered because in 2005 a 'stand your ground' law[716] was passed, enabling individuals to use deadly force with no duty to retreat. There is also a presumption of imminent danger when an intruder enters into a dwelling.

Somewhat surprisingly, the datum (see *fig*. 1) appears to show that during the time period immediately after the legislation was introduced burglary rates rose and did not fall.

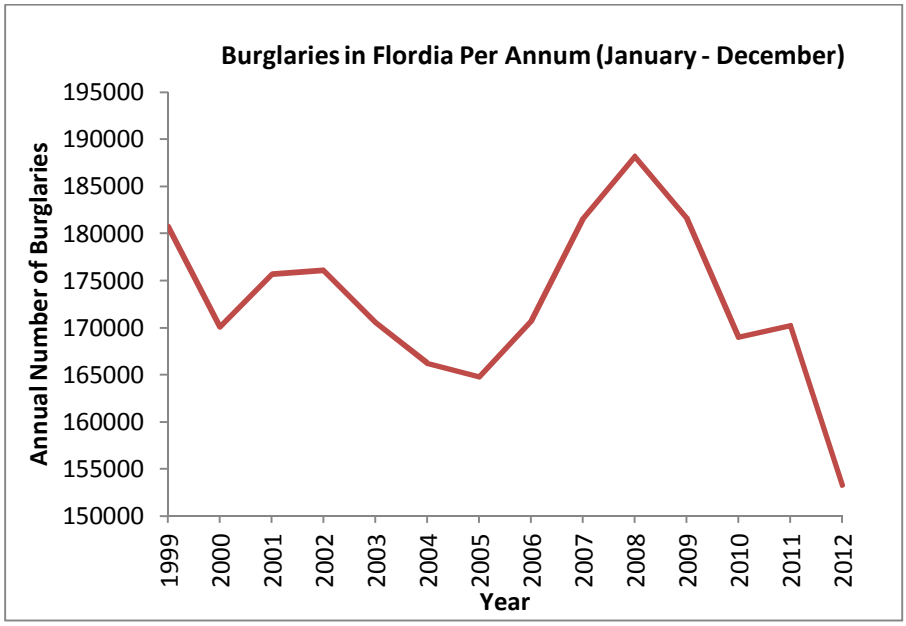

fig 1[717]

However, there are a number of limitations with the datum that must be acknowledged. Firstly, the figures are official, so may not take unreported crimes into account. Furthermore, the figures in question include all burglaries in Florida which, unlike the UK data, makes no distinction between dwelling-home and other burglaries.

[716] See the 2013 Florida Statutes at: http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0776/0776ContentsIndex.html&StatuteYear=2013&Title=-%3E2013-%3E%20776.

[717] Data gathered from http://www.fdle.state.fl.us/Content/FSAC/UCR/UCR-Home.aspx (accessed 1/4/14). Thanks to George Middleton for assistance with the graph.

It is also noteworthy that the Florida legislation applies to all forms of self-defence, and is not confined to dwelling-home intrusion. It is possible that the legislation may have had a deterrent effect on other criminal behaviour. Finally, there are inherent differences between the two jurisdictions (such as the ownership of firearms[718]) which could mean that the effect of the legislation in the UK may be different.

On this basis, it would appear the claim that the enhanced defence would have a deterrent effect should be rejected. However, what must be noted is that the statistics considered do not establish the criticism that the amendments will lead to vigilantism and burglars carrying weapons. Therefore, this is not a satisfactory argument against the changes made by the 2013 Act.

c) The Amendment may Violate Article 2 ECHR

Thirdly, it has been argued that the amendments may be contrary to Article 2 of the ECHR which protects the right to life.[719] The possible incompatibility of self-defence generally with Article 2 has been discussed previously,[720] and many of the concerns with the previous law continue to apply.

The permission of up to 'grossly disproportionate' force in self-defence may fall foul of the 'absolute necessity' requirement contained in Article 2. The exceptions to Article 2 encompass not only the necessity of the force, as discussed previously, but also to the level

[718] Firearms are much more readily available in the US due to the Second Amendment. In the UK a licence must be obtained to possess, own and use a firearm; and particular weapons (such as automatic rifles) are completely prohibited under The Firearms Act 1968.

[719] As incorporated into domestic law by The Human Rights Act 1998.

[720] See 2 regarding mistake and Article 2 ECHR.

of force used. Whilst this is not expressly stated in the text of Article 2 – it is clearly established in case law.[721]

An example is provided by *Wasilewska.*[722] Here, Mr Kałucki was shot dead after attempting to escape from armed police. The officers in question were from an anti-terrorist unit, and many of them did not bare visible signs which identified themselves as police. Furthermore, the officers claimed they attempted to resuscitate Mr Kałucki after he was shot, and also claimed they attempted to shoot the tyres of his vehicle, but no evidence of this was found.[723] In finding a violation of Article 2 it was clear from the judgement of the ECtHR that there is a 'principle of strict proportionality inherent in Article 2.'[724]

On this basis, the permission of disproportionate force by householders in self-defence is incompatible with Article 2(2) – as it permits a level of force which is not 'absolutely necessary'. If the amendments are found to be in breach then the courts may have to make a declaration of incompatibility in accordance with s.4 of the Human Rights Act 1998, or attempt to interpret the legislation in a manner which is compatible in accordance with s.3. There could also be challenges in the ECtHR which could lead to the UK being found in breach.

[721] European Court of Human Rights, Fact Sheet – Right to life; http://www.echr.coe.int/Documents/FS_Life_ENG.pdf (accessed 28/3/14), pp. 2-3.

[722] *Wasilewska and another v Poland* [2010] ECHR 28975/04.

[723] Press Release – Chamber Judgements, *Police operation resulting in death of a suspect breached the convention,* 23rd Feb 2010; http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3042405-3360132 (accessed 28/3/13).

[724] At [45] of the decision of the ECtHR.

d) Conflation of Loss of Control and Self-Defence

Fourthly, it is argued by Wake[725] that the expanded defence overlaps with the defence of loss of control. Loss of control replaced the partial defence to murder of provocation[726] and is governed by s.54 of the Coroners and Justice Act 2009. Loss of control provides a defence when a defendant loses their self-control as a result of a qualifying trigger;[727] one of which is a fear of serious violence.[728]

Loss of control would provide a partial defence when a defender has killed in excessive self-defence,[729] with self-defence traditionally being unavailable due to the requirement of proportionality not being met as per *Clegg.*[730] Under the expanded defence an overlap would arise when the defendant has killed in disproportionate self-defence inside his home.[731]

However, the overlap causes difficulties because a defendant may seek to rely on the enhanced provisions of the 2008 Act, and in the alternative rely on loss of control. The difficulty with this is firstly, the defendant is arguing that his actions occurred in reasonable

[725] Wake (2013), pp. 3-8.

[726] Provocation was a partial defence to murder, which result in a manslaughter conviction if successful. It required that the defendant lost his control due to some provoking act.

The new defence of loss of control requires that the defendant is provoked by a specified act; a 'qualifying trigger' and is therefore much narrower than the previous defence of provocation which was governed by s.3 of The Homicide Act 1957.

[727] S.54(1) of The Coroners and Justice Act 2009.

[728] S.54(3) of The Coroners and Justice Act 2009.

[729] Wake (2013), pp. 439-440.

[730] *R v Clegg* [1995] 1 AC 482 (HL).

[731] Wake (2013), pg. 438.

self-defence, but in the alternative that he acted excessively and lost his self-control.[732] The reversion to loss of control is difficult because the idea of a defendant who lost his control, but is acting reasonably, is contradictory.

This has implications for defendants, because if their actions fall within the overlap between the two defences, they may have to choose between the two. This is because a claim of either of the defences precludes the other. This could be problematic; because if they claim self-defence and fail, they may not be able to rely on loss of control, and if they claim loss of control and succeed, they may have been able to claim self-defence which would have resulted in an acquittal, but are restricted from doing so.

e) Harm from within the Home

The final issue is that the expanded defence is not available when the harm originates from within the home. This is because of the requirement in s.76(8A)(d) of the 2008 Act[733] that the defendant believed the victim to be in, or entering, the building as a trespasser. This would preclude those from suffering domestic abuse originating from within the home from relying on the extended defence.[734] The 'startled householder' is in a better position than any other defendant who attempts to rely on self-defence.[735]

[732] Wake (2013), pg. 437.

[733] As amended by the 2013 Act.

[734] Wake (2013), pg. 451; for detailed discussion of this point in relation to US 'castle-doctrine' defences see; Carpenter, C.L. (2003), *Of the enemy within, the castle doctrine, and self-defense,* 86 Marq. L. Rev. 653 2002-2003.

[735] Wake (2013), pg. 448.

This is concerning because one of the arguments in favour of the changes was that the previous regime failed to recognised the significance of the home.[736] If such reasoning is accepted as the rationale behind the enhanced defence then it would appear it should be available to individuals such as battered persons[737] within the home.

This is because abuse and violence are equally damaging, regardless of their origin. For the individual suffering from abuse from within the home the only option may be to act violently, which could be disproportionate for the same reason the householder may act disproportionality – out of fear. It would appear this distinction regarding the availability of the defence is not tenable considering the underlying reasons behind the substantive changes.

In conclusion, many of the arguments against the changes made are persuasive. Particularly convincing are the arguments regarding the concerns with Article 2 and the issues from harm within the home. On the basis of these arguments it would appear that the changes made are unnecessary, and may cause more problems than it attempts to solve.

[736] See 3 above.

[737] Battered person syndrome is a condition which is suffered by persons who have suffered from abuse from another individual. This condition forms the basis for the battered woman defence which has been used in cases of domestically abused women who have killed their abusers; however such women have struggled to rely on the defence of provocation. It is yet to be seen exactly how their cases will be effected by the new defence of loss of control as a result of the 2009 Act; see the cases of *R v Ahluwalia* [1992] 4 All ER 889 (CA); *R v Thornton (No. 2)* [1996] 1 WLR 1174 (CA) and *R v Charlton* [2003] EWCA Crim 415 (CA).

4. The Substantive Changes Made

This part will explore the substantive amendments to the law of self-defence by the 2013 Act, considering what a 'householder' case is, and exploring the nature of the 'grossly disproportionate' force test in light of the arguments for and against the changes. Particular reference is made to the law of burglary to determine what a householder case is, as well as to s.329 of the Criminal Justice Act 2004, which created a defence to civil actions brought by victims of excessive self-defence when the force was not 'grossly disproportionate'.

a) What is Householder Case?

According to s.76 (8A) of the 2008 Act (as amended) a householder case is one where:

(a) the defence concerned is the common law defence of self-defence;

(b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both);

(c) D is not a trespasser at the time the force is used; and

(d) at that time D believed V to be in, or entering, the building or part as a trespasser.

The first requirement is that a householder case is one where the action of the defendant falls under the 'common law of self-defence'. Whilst this phrase is unclear, it would appear from the Ministry of Justice Circular[738] that this section is intended to ensure that a householder may only rely on the enhanced defence when they are using force to protect

[738] Ministry of Justice Circular No. 2013/02, *Use of force in self defence at place of residence,* pg. 5; also see the Joint Public Statement from the Crown Prosecution Services and the Association of Chief Police Officers (2013), *Householders and the use of force against intruders,* pg. 1, https://www.cps.gov.uk/publications/docs/householders_2013.pdf (accessed 3/4/14).

themselves or others.[739] This would preclude an individual from relying on the defence when they are acting to protect property, or for any other purposes, such as revenge.[740]

However, one issue with this is in many instances, an individual may presume that there is a threat to themselves or others, when their property is under threat despite objectively there being no threat to persons. This presumption is utilised in many US states which use a 'castle doctrine' defence. Is this to be assessed according to an objective or subjective determination? It is believed that due to the relationship between self-defence and mistake that this requirement would be subjective;[741] however there is a lack of clarity. Furthermore, if a subjective approach is taken, the enhanced defence may apply when there is no objective threat and the mistake by the householder is unreasonable.

The second requirement is contained in s.76 (8C) which provides:

'Where—

(a) a part of a building is forces accommodation that is living or sleeping accommodation for D,

(b) another part of the building is a place of work for D or another person for whom the first part is living or sleeping accommodation, and

[739] Common law self-defence is traditionally only concerned with protection of the self, and possibly property. S.3 of The Criminal Law Act 1967 provides a defence to an individual who is using force to prevent the commission of a crime. See 2 above.

[740] See *R v Hussain.*

[741] *R v Gladstone (Williams)*; See 2 above.

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is forces accommodation.'

This requirement restricts the circumstances in which the enhanced defence will apply to circumstances when the force is used inside a building, or part of a building, that is a dwelling or forces accommodation. It is submitted that due to the identical language used both in the revised section of the CJIA and s.9 of the Theft Act 1968, which governs burglary, that the same interpretation will be applied by the courts.[742]

The requirement that the building, or part of it, is a 'dwelling' is likely to be uncontroversial.[743] However, the inclusion of 'forces accommodation' under the expanded defence could be a concern. In accordance with s.76 (8F) 'forces accommodation' must be interpreted in line with s.96 of the Armed Forces Act 2006.[744]

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[742] In particular the phrases 'building', 'part of a building' and 'entry'. A building requires a permanent structure of some sort; see *B and S v Leathley* [1979] Crim LR 314; *Norfolk Constabulary v Seekings and Gould* [1986] Crim LR 167. To constitute part of a building there must be some form of physical barrier; *R v Walkington* [1979] 2 All ER 716 (CA). For entry, it is widely accepted that entry does not require the whole body to be inside the building, and it does not require enough of the body to be inside the building to enable the D to commit his crime; *R v Brown* [1985] Crim LR 212 (CA); *R v Ryan* [1996] Crim LR 320 (CA)

[743] Commercial premises will be discussed below.

[744] For reference this section provides:

'(1) In this Part "service living accommodation" means (subject to subsection (2))–
(a) any building or part of a building which is occupied for the purposes of any of Her Majesty's forces but is provided for the exclusive use of a person [within subsection (1A)] , or of such a person and members of his family, as living accommodation or as a garage;
(b) any other room, structure or area (whether on land or on a ship) which is occupied for the purposes of any of Her Majesty's forces and is used for the provision of sleeping accommodation for one or more persons [within subsection (1A)]; or
(c) any locker which–
(i) is provided by any of Her Majesty's forces for personal use by a person [within subsection (1A)] in connection with his sleeping accommodation, but
(ii) is not in a room, structure or area falling within paragraph (b).
(1A) The following are persons within this subsection—

The availability of the extended defence to members of the Armed Forces is concerning. Such individuals (with the exception of their families) will be trained in the use of force; so would be in a better position to judge what force is in the reasonable circumstances than the 'startled householder' would be. There appears to be little reason for the extended doctrine to apply to such individuals - aside from the protection it would give to the members of the family who are not trained.[745]

Furthermore, the use of disproportionate force, by a member of the Armed Forces, upon property provided by the Crown, could lead to further issues. This is because the legitimisation of disproportionate force in such circumstances could lead to infringement of Article 2. This is particularly significant because, whilst the act may be private in nature, it is taking place on public authority[746] by an agent of the state. Therefore, there appears to be considerable problems with the availability of the enhanced defence to those in forces accommodation.

Further clarification as to the application of the requirement in s.76 (8A)(b) is provided by s.76(8B) of the Act which states that these criteria are fulfilled where:

> (a) a part of a building is a dwelling where D dwells;
>
> (b) another part of the building is a place of work for D or another person who dwells in the first part; and

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(a) a person subject to service law;
(b) a civilian subject to service discipline.

[745] It is likely extended to such individuals due to the special nature of the home. This argument has been considered in detail in 3 above. However, it is the belief of the author that whilst the home may be worthy of protection; the law prior to the 2013 Act already afforded that protection.

[746] For the purposes of s.6 of The Human Rights Act 1998.

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is a dwelling.

Identical clarification is provided by s.76 (8C) in relation to forces accommodation.

The effect of these sections is that it would permit a defender to rely on the enhanced defence where they only dwell, or sleep, in part of the building, and the other part of that building is a place of work. For instance, this would allow a shopkeeper who lives above his shop to rely on the enhanced defence inside his shop, providing it is internally connected to his dwelling, and the other criteria of the defence are fulfilled.

However, the inclusion of this is problematic. This is because in cases such as the example provided above, the requirement that the intruder pose a threat to the householder may not be objectively met. It is possible, that the intruder, who has not entered the dwelling, is seeking to carry out a commercial burglary.

Furthermore, there is no requirement that the shopkeeper is in his residence at the time of the intrusion. It would appear to apply to shopkeepers and others who live in the building (the defence would not apply to customers[747]) regardless of the circumstances of the burglary place. In such circumstances, the enhanced defence goes beyond the ambit permitted by the rationale outlined earlier. The shopkeeper, when the burglary is taking place solely in the commercial premises, is not a 'startled householder' and his home is not under threat. The extended defence, even if the arguments in favour of it are accepted, should not apply.

[747] Because of the requirement that the building is a dwelling where the defendant dwells; s.76(8B)(a).

The final requirement is that the defendant is not a trespasser at the time the force was used, and he believed that the intruder was a trespasser, or entering as a trespasser at the time. It is submitted that both these requirements will be interpreted in light of the case law on the meaning of trespasser under s.9 of The Theft Act.[748] Therefore, this will not be considered any further.

b) What is Grossly Disproportionate Force?

If the requirements of a householder case are fulfilled, then, in accordance with s.76 (5A), the degree of force used by the defendant will only be unreasonable if it is 'grossly disproportionate' in the circumstances as he honestly believed them to be. The phrase mirrors the language in s.329 of the Criminal Justice Act 2003, which provides a defence to civil actions when the defendant acted in excessive self-defence. According to this Act, the defendant will have a defence providing the level of force is not 'grossly disproportionate'.

Despite the 'grossly disproportionate' force test being used for 10 years, there is scant case law as to the interpretation the courts will give to this phrase. The primary case on the matter is *Adorian.*[749] However, both the High Court and the Court of Appeal omitted to define what 'grossly disproportionate' force is.

[748] In accordance with *R v Collins*[1973] QB 100 (CA) a burglar is a trespasser when they are on the premises without permission, and aware of that fact. The requirement of awareness is not relevant for the purposes of s.43; which is concerned with the individual being there without permission. Also note that an individual can become a trespasser if permission to be on the premises is withdrawn, or if they act in excess of their permission to be on the premises; *R v Jones & Smith* [1976] 3 All ER 54 (CA).

[749] *Adorian v. Commission of Police of the Metropolis*; [2008] EWHC 1081 (QB), [2009] EWCA Civ 18, [2010] EWHC 2861 (QB).

The only indication as to what force would not be permitted was provided by Patrick Mercers MP, when discussing the earlier Criminal Law Bill.[750] Mercer states that his Bill, which used identical provisions as in the 2013 Act, would not apply to cases such as *Martin*. However, it would apply to *Osborn.*[751]

Brett Osborn was sentenced to five years imprisonment[752] for the killing of Wayne Halling. Halling ingested cocaine and began injuring himself. Two females left Osborn's house and were accosted by Halling. When they retreated into the property Halling attempted to follow them. Osborn stated that Halling came towards him, he then picked up a knife and stabbed Halling five times. Halling was taken away by paramedics but died on the way to hospital.[753]

As the matter on appeal was that of sentence, no comment was made by Justice Curtis regarding the level of force used. Furthermore, the opinion of Patrick Mercer MP is non-judicial, and was made in relation to a Bill that failed to pass a decade ago, so little weight can be attached to his opinion. It is submitted the question of 'grossly disproportionate' force is one which will be put to the jury, but the guidance they receive on this point is a different matter. The author hopes that the circular test from gross negligence manslaughter

[750] The Criminal Law (Amendment Householder Protection) Bill 2004-2005.

[751] *R v Osborn* [2004] EWCA Crim 2059 (CA).

[752] Palmer, A. *Five years in prison for acting in self-defence*, (*The Telegraph*: 9/5/2004) http://www.telegraph.co.uk/news/uknews/1461346/Five-years-in-prison-for-acting-in-self-defence.html (accessed 12/3/14); It was reduced to three and a half years on appeal.

[753] See *Osborn* at [3] to [5].

is not recycled here; to the effect that grossly disproportionate force is defined as force which is grossly disproportionate.[754]

Michael Wolkind QC[755] made the following comments on the 'grossly disproportionate' test: 'If I manage to tackle a criminal and get him to the ground, I kick him once, and that's reasonable, I kick him twice and that's understandable, three times forgivable, four times, debatable, five times, disproportionate, six times it's very disproportionate, seven times extremely disproportionate—eight times, and it's grossly disproportionate. It is a horrible test. It sounds like state-sponsored revenge.'[756]

This quotation outlines the wide range of force which may fall under the test contained within the 2013 Act and demonstrates how far the 'grossly disproportionate' force test could be interpreted. Wolkind provides a practical example of the core issue with the 'grossly disproportionate' force test; the abandonment of proportionality.

It is believed that the 'grossly disproportionate' force test is inherently unclear, and juries may struggle to apply it. The lack of guidance as to the level of force permitted, means homeowners and jurors would struggle to know what level of force is legally permissible.

In conclusion, it would appear there are problems with the implementation of the enhanced defence. The expanded defence including both forces accommodation and commercial

[754] In accordance with the case of *R v Adomako* [1995] 1 AC 171 (HL) gross negligence is defined as negligence so gross as to warrant a criminal conviction. This is an ill-defined circular test.

[755] Who represented both Tony Martin and Munir Hussain.

[756] Michael Wolkind QC, Sky News: Property Householder Self-Defence Rights, http://www.topcriminalqc.co.uk/property-householder-self-defence-rights-barrister-qc.html (accessed on 14/4/14).

premises[757] does not sit easily with the rationale for the changes outlined in part 2. In both instances it is likely that the defendant is not the 'startled householder' that the amendments seek to protect. Furthermore, the level of force permitted is inadequately defined, despite 10 years of utilisation in civil claims. This means the law is likely be more opaque than it was before the changes were made; this is an area for concern when it is remembered that the lack of clarity of the reasonable force test was one argument in favour of the amendments.

5. Conclusion

Overall, it is believed the changes made by s.43 of the 2013 Act are unsatisfactory. On an analysis of the underlying rationale, there appears to be little persuasive argument in favour of the extended defence, particularly when the substance of those changes is borne in mind. Firstly, the argument that the law favoured the intruder is weak when it is considered that the cases cited in favour of this argument, *Martin*[758] and *Hussain*[759], are not be covered by the enhanced defence.

Secondly, whilst it is acknowledged that due to the discretionary nature of the reasonable force test it may be unclear, the *dictum* of *Palmer*[760] makes it clear that force on the borderline of proportionality will be judged in favour of the defender. Similarly, the changes do not resolve the lack of certainty. The changes have widened the ambit of the defence so

[757] In specific circumstances.

[758] *R v Martin (Anthony)* [2001] All ER 435.

[759] *R v Hussain (Tokeer) & Hussain (Munir)* [2010] EWCA Crim 94.

[760] *R v Palmer* [1971] AC 814.

higher levels of force fall within self-defence. The 'grossly disproportionate' force test is still left to the jury.

Finally, the sanctity of the home argument runs into difficulties when it is considered burglary rates have dropped significantly. Likewise, if this argument is accepted as the rationale underlying the changes it is unclear why the requirement that the intruder be a trespasser is accepted. Surely, if the sanctity of the home is the reason why householders should be afforded an extended defence, the origin of the threat should not matter, providing the threat occurs inside the home?

On this basis the arguments in favour of the changes appeared to be weak and were rejected. However, the difficulties with the extension of the defence did not end there. Firstly, it was argued that the changes unsatisfactorily broaden the scope of self-defence; with an abandonment of the requirement of proportionality, which is inherent within the rationale underlying self-defence. Linked to the abandonment of proportionality is the argument that the changes may be contrary to Article 2; due to the innate requirement of proportionality found within the Convention. Both of these arguments are accepted. The abandonment of proportionality is concerning, and could lead to tragedies such as that of Trayvon Martin occurring in the UK.

Other arguments considered include the reforms leading to vigilantism and violent crime. Whilst little evidence can be found of this; it is a possibility that cannot be ignored. The counter-argument to this statement was that the changes may result in fewer burglaries due to the deterrent effect that the provisions may have. On a study of Florida, similar provisions

had no such effect, with burglaries appearing to increase.[761] On this basis the argument that the provisions would deter burglaries looks uncertain.

Finally, there is the argument the enhanced defence may lead to conflation of the defences of loss of control and self-defence. Whilst this is a practical concern; it would appear that there is an overlap between the two defences, which occurs despite the conflict between the two. One applies when the defendant was acting rationally, the other when he has lost his self-control.

It is believed that the previous law adequately protected the needs of the homeowner; and if anything, the 2013 Act creates more problems. Whilst, the provisions of the 2013 Act extend the protection afforded to homeowners, the existences of two categories of self-defence make the law opaque.

Additionally, as regards to the substance of the legislation; the extension of the 'grossly disproportionate' force test to include both those in Forces Accommodation, and owners of commercial premises[762] is concerning. The inclusion of these does not fit with the arguments in favour of the extension of the defendant in part 2, and it is concerning the defence extends to such individuals, as they may not be the 'startled householder' that the legislation intended to protect.

On the whole, it would appear that the enhanced defence is not necessary, but appeals to popular opinion. Cases such as *Martin* and *Hussain* have led to calls for an enhanced defence

[761] See discussion in part 4.

[762] In particular circumstances.

because it was felt that injustice was done, even though the amendments would have no effect on the decisions in those cases. It is believed that this legislation is not fit for purpose and causes more harm than good. The previous law provided sufficient protection and the view of the public that it did not, appears to be misplaced. Whilst it is not clear how the courts will interpret the 'grossly disproportionate' force test, it would appear that the permission of disproportionate force conflicts with Article 2 of the European Convention and will lead to legal challenges in the future.

Littering: The Cinderella of Criminology

Catrin Stephenson

Abstract

Despite its visual and environmental impact, littering has attracted very little criminological attention. Using an extended literature review of the available academic works and survey findings, I will endeavour to examine (a) the legal and practical definitions of litter; (b) the variables of age, gender, class and educational level that may explain littering behaviour; (c) the criminological theories that can elucidate and/or corroborate this data; and, finally (d) the policy deductions and practical solutions that flow from these criminological theories.

My tentative conclusion is that there is a significant effect for age, class and educational levels on littering behaviour, with offenders tending to be from the 'C2DE' demographic. On the theoretical front, radical criminology has been curiously silent on this issue the only viable explanations and solutions currently emanate from the neo-classical, rational choice and right-realist perspectives, particularly 'Broken Windows', Situational Crime Prevention, Routine Activities theory and Social Control/Self Control theories. Thankfully, these theories have provided a robust underpinning for the practical interventions of government and anti-litter campaign groups, and even point the way towards new forms of policing and communal stewardship of the problem.

Introduction

Litter is a blight on the landscape, the seascape and the urban street-scene. Unlike serial killing, paedophile assaults, banker fraud and other headline-grabbing crimes, it is

ubiquitous. It affects everyone - not just the rich, not just parents, not just the poor. Yet it is the Cinderella of Criminology; rarely acknowledged and rarely researched. In a recent review of the available literature, Nic Groombridge observes that "...whilst there is a lot of cultural/philosophical/political writing, indeed hand-wringing and exhortation, about litter...there is very little explicitly or self-identified criminological writing [on the subject]" (Groombridge: 2013, p394).

It is time to redress the balance. Indeed, if criminology cannot constructively and persuasively address this supposedly 'minor' (yet all-pervasive) issue, cynics might question whether the discipline is worthy of academic status. Could the cynics be right? Let us try to prove them wrong.

But let us begin at the beginning with a definition of what littering actually is. Indeed, was Cinderella's accidentally discarded glass slipper...'litter'?

Definitions

Cultural theorists may try to persuade him otherwise, but to the proverbial 'Man on the Clapham Omnibus' pondering on the two-and-a-quarter million pieces of litter jettisoned in the UK every day, litter is neither ‘art’ nor 'poetry' and it never will be. He knows what it is, what it looks like and what it smells like.

Unfortunately, the law itself is not so straightforward. On the subject of littering, it is somewhat ambiguous, if not tautological.

Section 87 of the Environmental Protection Act 1990 provides for an offence of 'littering'. Section 87(1) states "a person is guilty of an offence if he throws down, drops or otherwise deposits any litter in any place to which this section applies and leaves it". But the Act does not provide a specific definition of the word 'litter'. So at face value we are left in definitional circularity: 'littering' is the dropping of 'litter' and 'litter' is what is dropped in 'littering'. Thankfully there is nothing in the Act to suggest that 'litter' is to be given some special or unusual meaning other than that in common parlance (Brutus-v-Cozens: 1973). And there is a concrete, though partial, definition in Section 98(5A); “litter” includes (a) the discarded ends of cigarettes, cigars and like products, and (b) discarded chewing gum and the discarded remains of other products designed for chewing.

A more detailed Governmental view as to what constitutes 'litter' can be found in the Department for Environment Food & Rural Affairs (DEFRA) Code of Practice on Litter and Refuse (April 2006). Part 1, Paragraph 5 acknowledges that the Environmental Protection Act 1990 does not provide a comprehensive definition of litter, so compensates by providing "as a guide...common definitions used in cleansing contracts".

Paragraph 5.2 states that "Litter is most commonly assumed to include materials, often associated with smoking, eating and drinking, that are improperly discarded and left by members of the public...As a guideline...a single plastic sack of rubbish should usually be considered fly-tipping rather than litter".

Littering is a summary offence, falling under the jurisdiction of the Magistrates' Court. Section 88 of the Environmental Protection Act 1990 makes provision for fixed penalties, the maximum being a Level 4 fine (£2500). A surcharge can be added to that and, possibly, costs.

Yet even though littering is deemed to be a summary offence. Legal opinion is undecided on whether it is a strict liability offence, or whether *mens rea* is required. If it was strict liability, then even accidental depositing of something - like Cinderella's slipper - might constitute an offence. The *actus reus* is throwing down, dropping and leaving. "Throwing down" (Section 87) is certainly a deliberate act. But "dropping or otherwise depositing and leaving it" might be done deliberately, negligently or even accidentally. Strict liability is, of course, an extensive topic covering many pages in the legal textbooks where the application of the law can be ambiguous. Even DEFRA itself seems to be uncertain. In its non-statutory guidance Local Environmental Enforcement – Guidance on the use of Fixed Penalty Notices, issued in 2007, DEFRA states “a fixed penalty notice should only be issued where there is evidence of intent; this is to say that someone clearly meant to drop the litter in the first place”. So in DEFRA’s opinion - at least in this publication - *mens rea* is required. Thus the jury is still out on the question of whether Cinderella's accidentally-discarded glass slipper would have constituted 'litter'.

This legal and definitional ambiguity has allowed anomalous verdicts and rulings to emerge. There have been instances where the Section 87(1) definition has been stretched to its very limit. For example, there have been several fixed-penalty cases involving the 'throwing down' of bread whilst feeding pigeons, ducks and seagulls, urinating in the street and spitting in public.

However, most legal commentators would hesitate to endorse these Magistrates' Court decisions. In fact, the courts' rulings that urine and spit constitute litter are seen by many to be perverse decisions. Urine, sputum and faeces all fall under the category of human biological detritus, and they should ideally be dealt with in the same legal manner. But

categorising them all as 'litter' would certainly be pushing definitional boundaries well beyond the limits of Clapham Omnibus common sense.

So for the purposes of this essay, and in the absence of any superior definition, I shall adopt DEFRA's quantitative definition of litter as small items of improperly discarded detritus, smaller in volume than a black bin bag. For further elucidation, I include Leeds Council's 2009 description of litter as "paper, chewing gum, cans, bottles, food and drink containers, plastic, left-over food, cigarette ends, etc., although this list is not exhaustive" (Quoted in Groombridge: 2013, p396). As a rule of thumb, this dual definition is certainly workable, and readily recognisable.

Culprits and Context: *Unmasking the 'Litterbug'.*

The number of defendants found guilty in court for littering offences in England and Wales rose from 2,304 in 2007 to 3,573 in 2010 (Source: Hansard - HC Deb, 13 October 2011, c514W). These figures do not include Fixed Penalty Notice fines (FPNs) for littering as suspects only go to court if they refuse to pay. 35,000 littering FPNs were issued in the UK in 2008/09 (this is the latest figure available as DEFRA no longer collects statistics on FPNs).

Unfortunately, centrally held information by the Ministry of Justice on the Court Proceedings Database does not contain details about the circumstances behind each case, let alone the demographic profile of the offenders. So we must look elsewhere for clarification.

When, how and why people litter is clearly influenced by factors such as location, what convenient disposal options are available, the item to be disposed of, and whether people are alone or in groups. For instance, a group of friends might readily leave litter at the Glastonbury Festival, but as individuals they would be unlikely to repeat this behaviour on a public street. Research, conducted largely by campaign groups, does give some guide to the more likely suspects, depending on circumstances and setting. The Victorian Litter Action Alliance neatly summarises Australian research findings as follows:

- Young people are more likely to litter when they are in a group.
- Older people are more likely to litter when alone.
- Men litter more than women.
- Women use bins more than men.
- In a group of ten people in a public place, three will litter and seven will do the right thing.

- More smokers will litter their cigarette ends rather than use a bin.
- People are more likely to litter in an already littered or unkempt location.
- The most common reasons for littering are "too lazy" (24%), "no ashtray" (23%) or "no bin" (21%).
- Less than one-third of older people who were seen littering admitted their behaviour when questioned.

(Victorian Litter Action Alliance - Accessed 22/11/2014).

Unsurprisingly, littering is often subsumed under the heading *Anti-Social Behaviour.* Indeed, the Home Office explicitly includes 'Litter/Rubbish' in its list of examples of ASB. The British Crime Survey (2011) discovered that it was more probable that adults aged 16 to 24 years were going to be involved in anti-social behaviour (21%) than higher age brackets, with only 3% of those aged 75 years and over being involved (Home Office 2000). Litter, abandoned cars and graffiti consistently top the list of public concerns in the majority of towns and cities (Burney, E: 2009). Another significant concern is 'teenagers hanging around'. Could this point to a causative link between the number of youths who loiter in the streets and the rate of littering?

Academic empirical research into the variables and causation of littering behaviour is rare. However, using non-participant observation, and extrapolating from prior littering studies, Schultz *et al* (2011) were able to examine the disposal behaviour of pedestrians at various public areas and note the characteristics of these individuals and the contextual factors around them.

The results showed, at an individual level, a statistically significant and consistent effect for age, with young adults (18-29) being more inclined to litter than the older generation. The

inverse correlation between age and littering has been recorded in various survey reviews of littering behaviour (Beck, 2007).

Krauss *et al.* (1978) considered the reasoning behind young people being the predominant litterers and explained that normative control needs both cognitive information and internal controls, both of which evolve through the socialisation process.

With regards to *gender* culpability of littering, Schultz *et al* found that although it was a significant predictor of littering in general - males generally littered more than females - there was, strangely, no tangible difference in gender littering rates for cigarette butts (Schultz *et al:* 2011). This secondary finding is in keeping with earlier observational studies showing no significant difference in gender littering rates (Finnie: 1973).

However, the survey undertaken by Torgler and colleagues in 2008 questions some of these earlier findings. Using European Values Survey (EVS) data for 30 Western and Eastern European countries, the researchers attempt to demonstrate a strong empirical link between environmental participation and reduced public littering. At first glance, this would seem to be an almost tautological foregone conclusion; if you are against littering and other environmental degradation, then you will not yourself be a litterbug. But the study does tease out some interesting insights into attitudes to littering using the variables of age, gender, educational level, religious adherence etc.

One of the survey's atypical (virtually counter-intuitive) conclusions is that it is older single males (50-59 years) who are least likely to have a strong environmental conscience. Previous research (Zelezny *et al*: 2000), alongside Torgler *et al*'s study, does indeed indicate that females are more conscious of environmental issues than males, so are less inclined to litter.

Literature regarding social norms evidently signifies that women are more accepting and willing to abide by society's rules (Torgler, 2007). This links in with their findings that it is unmarried men, presumably not having the guidance of the environmentally conscious female, who tend to be more blasé about littering. This is an interesting spin on, and partial corroboration of, the Social Control perspective.

Torgler *et al* also look at *education* as a factor for littering behaviour and state that prior research (Blomquist and Whitehead, 1998; Veisten *et al*., 2004) demonstrates a notable positive impact on willingness to contribute to the quality of the environment by those who have been in extended, formal education. Whether the education was achieved through an informal or formal process is irrelevant; the assumption is that well-informed residents are more mindful of environmental issues and concerns and have stronger environmental attitudes because they are more aware of the possible damage which could be caused (Danielson *et al*., 1995; Torgler *et al*: 2007).

Education naturally leads on to *socio-economic status*. The study reports that the more affluent members of public have a higher demand for an uncluttered environment. Income has also been considered in past empirical literature. Veisten *et al*. (2004) concluded that unemployed citizens frequently exhibit lower preferences for environmental protection schemes. But Torgler, somewhat incongruously, found that unemployed people actually self-report a *high*er level of compliance with anti-littering rules (Torgler *et al*: 2008).

Turning closer to home, *Keep Britain Tidy* has used market segmentation research since 2001 to categorise the population into five specific sections based upon their behaviour and attitudes in order to target the appropriate demographic sectors with anti-litter campaigns.

This is a radical change from the 1970s approach, which launched anti-litter campaigns and indiscriminately targeted all members of society (Keep Britain Tidy, October 2010).

The five segments of littering behaviour and demographic background are detailed below:

Beautifully Behaved (43% of the population)

Littering behaviour; They discarded apple cores and small bits of paper, but not much else, and quite often refrained from seeing this as a problem.

Background; People in this category would often take pride in their home town and could almost be seen as 'smug' in terms of their seemingly 'perfect' behaviour. They were brought up not to litter and would claim that bad parenting and thoughtlessness was one of the biggest agents of littering. They would be mortified if someone caught them disposing litter in the street and would pick it up immediately if this was the case. Members of this category tended to be females aged 25 and under who were also non-smokers.

Justifier (25% of the population)

Littering behaviour;They would say that 'everyone else is doing it' to justify their behaviour and blamed the deficiency of bins for their littering habit, which predominantly comprised cigarette butts and chewing gum. Dog fouling was another problem, with some members of this group simply refusing to pick it up.

Background; Although justifying their purpose, they would be embarrassed if anyone caught them littering and similar to the 'beautifully behaved' would offer to pick it up. They perceived people who littered as lazy. Justifiers were predominantly male. They were aged 34 and under and were often smokers.

'Life's Too Short' and 'Am I Bothered' (12% of the population)

Littering behaviour; They both had complete disregard for the impact of littering on the environment. Life's Too Short had more important things to worry about than the consequences of dropping litter, whereas Am I Bothered? were totally unaware of the consequences and, even if they were, did not care.

Background: Neither group would feel guilty if they were caught littering, and would not offer to pick the disposed item up. In some cases, they might even become aggressive. However, if someone dropped litter in front of them, they would consider it rude. Young male smokers were the predominant members of this group.

Guilty (10% of the population)

Littering behaviour; Although they knew littering was 'wrong' and regarded others who littered as inconsiderate and lazy, they felt that carrying it was inconvenient and so went about littering in a clandestine manner i.e. littering when there was no one else around, particularly from the car or at public events. Unsurprisingly, they would feel extremely guilty if caught in the act and would pick the litter up immediately.

Background: As with the *Beautifully Behaved,* the Guilty section was predominantly female, 25 and under, non-smokers.

Blamer (9% of the population)

Littering behaviour: They blamed their littering on the council for their lack of bins. They even blamed fast food agencies and manufacturers for over packaging food and other goods. Members of this group would be embarrassed if caught littering and would pick it up while making excuses for their behaviour. They thought littering in general was inconsiderate, but acknowledged that if there bins weren't provided, or if the bins were overflowing or full then it was perfectly acceptable.

Background: The dominant presence within this group were young, male, smokers.
(Keep Britain Tidy: October 2010)

In 2010 *Keep Wales Tidy* created its own segmentation model of 809 Welsh adults who admitted to littering. The findings largely mirror the results of the *Keep Britain Tidy* study, right down to the verbatim rationalisations used by the participants. There is, however, a more explicit emphasis on the 'C2DE'* demographic, and smokers, as primary culprits (Keep Wales Tidy: November 2010, summarised in Appendix to this essay). **Under the NRS demographic classification, 'C2' refers to skilled manual workers, 'D' to unskilled manual workers and 'E' to casual workers, the unemployed and benefits-recipients.*

Keeping the focus on Wales, in 2009 Professor Martin Innes and colleagues conducted a survey in Cardiff to explore the local public's experiences and perceptions of crime, disorder and policing. We shall re-visit Innes' 'Signal Crimes Perspective' later in this essay. Suffice it

to say here that litter ranked as the second highest 'expression code' of public concern, only surpassed by 'groups of youths'. Again, this could indicate a *causative* link between the number of youths visibly congregating on the streets and the rate of littering in the area. We cannot ignore, either, Innes' findings that in socially-deprived areas of Cardiff such as Grangetown and Plasnewydd, littering was deemed to be a conspicuous and very real problem (Innes *et al*: 2009). This would concur with the Torgler study, which found evidence to suggest that *social class* has an impact on the rate of littering (Torgler *et al*: 2008).

Continuing on this theme of *class,* campaign group surveys have shown that cigarette ends and packets are consistently the most prevalent litter items, followed by confectionery packaging; drink bottles/cans; and fast-food packaging (see, for instance, Barnes: 2010 and Keep Britain Tidy Report: 2013). **As smokers' materials feature so prominently in both the definition and actual content of litter, we can look for clues as to the identity of the associated litterers in the demographics of smoking itself. Survey after survey has shown** a clear social gradient in smoking; smoking rates are markedly higher among poorer people than among those who are wealthier (Crosier: 2005).

To some extent this is corroborated by the branding of the littered items. The 'Litter Heroes' survey conducted in 2010 found that amongst the discarded cigarette packets surveyed, lower-priced brands predominated. A similar tendency was observed with the branding of discarded beer and lager cans and bottles. (Barnes: 2010)

As an aside, the increasing popularity of electronic cigarettes will undoubtedly have an ameliorative impact on this form of littering in due course. According to ASH, the use of electronic cigarettes among adults has tripled in Britain from an estimated 700,000 users in 2012 to 2.1 million in 2014. One can only speculate at the reduction in smoking-related litter

this switch-over has already achieved. However, early indications are that it will take some considerable time for vaping to oust cigarettes as the smoking currency of teenagers and young adults in the C2DE social grouping (Doward: 2014).

The class correlation we have inferred with regard to smokers' litter is admittedly not so clear-cut in respect of the other predominant litter types. However, fast-food packaging does give us pause for thought. Fast-food is often portrayed as a cheaper (or only) alternative to healthy food amongst poorer families. So it is not inconceivable that this group are significant culprits with regard to discarded fast-food packaging. This would appear to be supported by the findings of the 2010 *Keep Wales Tidy* Report, which highlighted the prominence of the C2DE social groupings in heavy littering.

Yes, much of the evidence is largely circumstantial. But there is plenty of it (Innes *et al:* 2009; Torgler *et al*: 2008; Veisten *et al:* 2004). There is at the very least a *prima facie* case for postulating a general pyramidal 'shape of littering', namely that there is an inverse correlation between class and the propensity for littering.

The context in which littering takes place is also important, and there have been a number of studies of littering behaviour in public areas. For instance, Cialdini *et al.* (1991) report a higher likelihood of littering in areas where litter is already present compared to cleaner areas. This implies that if certain individuals are aware of other people littering, their tendency to litter escalates, reducing the moral constraints which normally would compel individuals to act in a socially acceptable manner. Previous research (Finnie, 1973; Heberlein, 1971) has also concluded that clean areas stay clean. Hence, an individual's perception of the behaviour of other citizens is likely to influence their own behaviour. Krauss *et al*. (1976) summarise this phenomenon as*: "…any norm violation that is observed tends to weaken the*

norm by detracting from its social validity". As we shall see in the next section, this finds a tangible resonance in 'Broken Windows' and 'Control' theories.

Criminological Perspectives

According to campaign-group surveys the reasons why people drop litter are manifold and varied. They include sheer indolence, ignorance of the law, no sense of ownership or pride for the locality, insufficient or poorly-sited litter bins, absence of visible and consistent enforcement, an already highly-littered environment, group pressure to litter "like the rest of the lads" and even rebellion against society through the flaunting of a wilful *jemenfoutisme*.

A number of these motivations and contexts have echoes of familiarity within criminology itself. But not all criminological theories are equal when it comes to tackling the problem of littering head-on. Doubtlessly, Subcultural and Cultural criminologists can capture the *jemenfoutiste* bravado, the momentary thrills and kicks, the status-enhancement within the gang hierarchy, and even the perverted 'glamour' of littering. But such perspectives tend to rely on over-romanticised subjective descriptions at the expense of objective analysis and practical policy deductions. Even Groombridge, in his quest for a distinctive 'green solution' to littering observes ruefully that "...litter is seen by the...left as a minimal issue used by moral entrepreneurs to criminalise the already marginalised...within criminology, litter is seen as archetypically a 'right realist' concern." (Groombridge: 2013 pp 398-399).

Groombridge is quite correct. Radical criminologists, whether left idealist, feminist or even mainstream Green, have focused their attention almost exclusively on the environmental degradation wrought by organised criminals (preferably of the white-collar genre), large

corporations and governments. Indeed, the radical logic of new deviancy/labelling theories might lead the unsuspecting reader to conclude that the humble litterbug is in fact an existential adventurer seeking to carve out an authentic identity in the shadows of the oppressive state apparatus. Even the Left Realist School seems to have reservations about slotting littering into its celebrated 'square of crime'. Perhaps this is because there are no immediately-identifiable victims, or perhaps it is a more generalised distaste for stigmatising the C2DE demographic. This distaste may be ideologically understandable, even emotionally understandable, but it is not necessarily good criminology.

Unfortunately, Groombridge's own search for a non-stigmatising Green perspective on litter is a triumph of hope over substance. There is talk of reclaiming the streets under the inclusive banner of citizenship. There is a fleeting reference to ‘radical’, ‘peace’ or ‘guerrilla’ gardening, as exemplified by the community garden experiments in San Francisco, New York and London. And there is a pious hope that the (as-yet-undefined), "green solution to litter would not be to cleanse the streets, but to breathe life into them." (Groombridge: 2013, p405).

It is hardly surprising, therefore, those anti-litter campaigners, property management companies and many, otherwise radical, environmentalists have been obliged to base their programmes and campaign literature on theories located at the conservative/neo-classical end of the criminological spectrum. These theories also, of course, underpin many of the attitudes and strategies of the police and other enforcement agencies.

Conservative criminology recommends a return to classical basics. There are three recurring assumptions:

1. A distrust of generalised theories of crime causation, and a rejection of utopian panaceas based on protracted (and cost-ineffective) offender rehabilitation and/or root-and-branch socio-economic restructuring.

2. A view, primarily at least, of man as a rational agent, whose actions are the outcome of free choices and decisions made to maximise rewards and minimise effort and/or pain…in short, Bentham's Hedonic Calculus or its modern embodiment, cost/benefit analysis.

3. With some variations of emphasis, conservative criminology rejects the neo-positivist conception of human nature as a social or cultural construct. Instead, it shares Durkheim's view of man as *homo duplex*: a dual-natured being that is capable of criminal acts as well as law-abiding conformity.

These themes are clearly apparent in the writings of James Q Wilson who, along with George Kelling, launched the 'Broken Windows' theory in 1982 (Wilson & Kelling:1982, pp29-38). Despite its many critics on the Left, 'Broken Windows' is perhaps the most recurrent theoretical underpinning of anti-litter campaign literature...far more so than liberal, radical, and even other conservative ideas. Ironically, the term 'litter' only appears once in the original 1982 article, and the following oft-quoted extract does not actually appear in the article itself. It nevertheless provides a neat introduction to the theory:

"Consider a building with a few broken windows. If the windows are not repaired, the tendency is for vandals to break a few more windows. Eventually, they may even break into the building, and if it's unoccupied, perhaps become squatters or light fires inside. Or consider a pavement. Some litter accumulates. Soon, more litter accumulates. Eventually,

people even start leaving bags of refuse from take-out restaurants there, or even break into cars." (Quoted in, for example, Barajas: 2014).

Wilson and Kelling highlight the linkage between 'disorder' (low-level criminality and incivility such as littering, vandalism, graffiti, aggressive begging etc) and more serious crime. Disorder is not seen as a direct cause of serious crime. Rather, the 'broken window' is a symbol or signal of unaccountability. Potential criminals take cues from their surroundings and configure their behaviour accordingly. If an urban area is litter-free and its buildings are well-maintained, people will be less likely to litter or vandalise there, because they will sense that they will be held accountable if they do so. The theory maintains that minor crimes will progressively increase concern and fear in local residents - and that when the fear causes the residents to retreat, a sense of neglect will pervade the area, which then allows more serious crime to infiltrate because of the decline of informal social control.

Police have a key function in disrupting this process. If they focus on disorder and minor crime in neighbourhoods that haven't yet been overtaken by more serious crime, they can help reduce fear and resident withdrawal. Promoting greater informal social control will help residents themselves protect their neighbourhood and prevent serious crime from permeating.

William Bratton, as New York Police Commissioner, translated the 'broken window' diagnosis into a vigorous policing strategy. If order fosters accountability and disorder enables crime, then enforcing the smallest laws could prevent the larger ones from being broken. Bratton had zero tolerance for graffiti and turnstile-jumping. He also cracked down on so-called 'squeegee men' (Bratton: 1998). In the 1990s there was a 51% decrease in violent crime and overall homicide dropped 72 % in New York City. At the time, these

impressive results virtually gave both the broken windows theory and the policies it inspired the status of a self-evident truth.

Critics of 'broken windows' have subsequently pointed out that as the economy strengthened and unemployment dropped in New York, so did violent crime. Surely these factors have equal importance as that of the disappearance of squeegee guys? Other researchers discovered that rather than disorder *causing* crime, disorder and crime actually co-exist and are caused by the same economic and social factors (Kircher: 2004).

Despite these criticisms, the 'broken windows' theory has not been conclusively discredited. Far from it. The idea that 'litter begets litter' through the environmental signals of apathy and unaccountability surely accounts for several of the verbatim rationalisations offered by culprits in the *Keep Britain Tidy* and *Keep Wales Tidy* reports we referred to in the previous section. It would also explain why, for instance, the hypothetical group of friends at the Glastonbury Festival might readily leave litter at an already litter-inundated site, but would not do so in a litter-free and well-maintained public street. Indeed, for every empirical study that attempts to refute the theory, there is another that supports it. For instance, Kees Keizer and colleagues from the University of Groningen conducted a series of controlled experiments in 2007/2008 to decipher whether the effect of existent disorders (such as litter or graffiti) increased the occurrence of additional offences such as theft, further littering, or other forms of antisocial behaviour.

Keizer's initial study was conducted in an alleyway frequently used to park bicycles. In the first scenario, the walls of the alley were freshly painted; in the second scenario, they were covered with roughly-scrawled graffiti. Keizer found that 69% of the riders littered in the alley containing graffiti compared with 33% when the walls were clean.

However, the most significant result showed a doubling in the number of people who were prepared to steal in a scenario of disorder. In this experiment, an envelope containing a €5 note (clearly visible through the address window) was left sticking out of a post box. In a clean, ordered environment, 13% of those passing took the envelope (instead of leaving it or pushing it into the box) compared with 27% who took the envelope from the post box covered in graffiti.

The researchers conclude that one example of disorder, like graffiti or littering, can in fact encourage another, such as stealing. This does not necessarily imply that people will automatically imitate the bad behaviour they observe around them. But it can certainly foster the violation of other behavioural norms. The message for policymakers and police officers is that clearing up graffiti or littering promptly could help fight the spread of crime (Keizer *et al:* 2008 - See also: Anon, 20 Nov 2008).

For Bratton, the remedy was zero tolerance. But an alternative, and possibly more constructive, response to the 'broken windows' diagnosis has been developed in the UK by Professor Martin Innes and colleagues under the title **'Signal Crime Perspective'**. The aim was to narrow the 'reassurance gap' i.e. the paradoxical situation in which the public's 'fear of crime' (as measured by the British Crime Survey/Crime Survey for England and Wales) does not change in tandem with the overall crime rate. Innes argues that fear of crime and people's risk perceptions - the perceived likelihood of being victimised - are linked to certain 'signal' crimes or events.

Litter is one of these signal events. In a 2009 study, Innes and colleagues identified ten 'broken windows'-style hotspots in Cardiff. In three of them, litter was identified as the top problem:

"Overall litter is also a powerful proxy signal that is associated in the minds of residents with social decline, increased sense of threat, anger and fear. It is therefore suggested that if assertive and effective measures were taken to address the litter problem, this would have a significant impact on the perception of insecurity across the city." (Innes *et al:* 2009, p110).

In a report published in 2010, Innes and Weston expand on this 'broken windows' theme, and link it up, quite naturally, to the 'Big Society', a communitarian concept and ideal now shared - in spirit if not name - by the three major UK political parties:

"Research has demonstrated that untreated ASB [Anti-Social Behaviour] acts like a magnet for other problems. Therefore, dealing effectively and quickly with incidents when they present may act to suppress other problems. Managing ASB can create a space in which communities can mobilise and improve their capacity to resolve problems through informal social control and their own collective efficacy, rather than being dependent upon the police." (Innes & Weston: 2010, p44).

Innes and Weston hope that this marriage of 'Broken Windows' and 'Big Society' will ultimately give birth to a genuinely community-based 'Reassurance Policing'. We shall re-visit this theme later in the essay.

Practicality and applicability are qualities also shared by the various 'Rational Choice' theories often subsumed (sometimes with a note of disparagement) under the umbrella title

' Administrative Criminology'. These theories share the neo-classical view of man as a rational agent and *homo duplex*, but the emphasis is on rationality rather than inherent criminality. In the writings of Rational Choice theorists like Ron Clarke, unlike many on the hard right, the temptation to focus on tougher policing and tougher punishment is largely resisted (Clarke:1980). Clarke is not primarily concerned with the capture, punishment, cure or even moral culpability of offenders. The aim of his so-called **'Situational Crime Prevention'** is simply to make criminal action less attractive to potential offenders, and/or to increase the chances of offenders being caught.

Examples of Situational Crime Prevention in practice are too numerous to list comprehensively here (for a full survey, see for example: Clarke:1997). They range from fitting good quality locks and alarms to reduce rates of domestic burglary to the extension of CCTV coverage, and passenger and baggage screening at airports. They also draw upon early US studies in Environmental Criminology such as “Crime Prevention through Environmental Design” by C R Jeffery (1971) and the “Defensible Space” theory of the architect Oscar Newman (1972). Clarke readily acknowledges Newman’s arguments about the criminogenic potential of large inhuman tower blocks and housing estates. Newman had shown that through relatively minor changes - window alterations and improved lighting; clear boundary demarcations and regulatory signage; and the vigorous removal of litter and graffiti - communal 'natural surveillance' was enhanced, and so too was a sense of territorial ownership. Consequently, residents felt more secure and proprietary about their building, and became extended eyes and ears in reporting and discouraging unwanted behaviour. Crime rates, and littering rates, declined accordingly.

Many of the practical solutions we shall examine later in this essay can be seen as the positive offspring of Situational Crime Prevention, whether it be the introduction of more

and better-sited/designed litter bins (ironically Situational Crime Prevention would also have supported the removal of these bins in the wake of UK terrorist threats!) or the highly-successful introduction of carrier bag charges in Ireland and parts of the UK. It is also worth noting that one of the most common criticisms levelled against the theory (that increased surveillance and/or target hardening merely *displaces* the criminality to less protected locations) hardly applies to littering. Since the primary benefit to casual litterers is avoiding the inconvenience of carrying the litter and/or the effort of locating and walking to a bin, they are hardly going to tramp across town to find a less secure area to dump their rubbish! The displacement effect is more likely to hold true for motivated fly-tipping...a different legal and criminological beast altogether.

Routine Activities Theory developed by Lawrence Cohen and Marcus Felson (1979) shares the same rational choice underpinnings, and can be seen as a development of, and complement to, Situational Crime Prevention. The central idea is that daily routines and everyday activities create the convergence in time and space of the three elements necessary for a crime to occur; motivated offenders, suitable targets or victims, and the absence of 'guardians' capable of preventing (or at least reporting) the crime. Capable Guardianship can take the form of a person who is able to act in a protective manner; or mechanical devices such as CCTV surveillance or security systems. Human capable guardians include the police and the general public. But they also include, perhaps more importantly, routine staff such as bus conductors, resident caretakers, apartment block doormen, shop assistants, football club stewards, car park attendants, and even post and milk deliverers.

With regard to littering, it is of course difficult to identify a specific 'victim', unless one points to abstractions like society-at-large or mother earth. Alternatively, one might identify the target as an unprotected area of the street or countryside. But that does not detract from

the applicability of the theory. Capable guardianship is obviously a crucial deterrent against littering. And by highlighting the importance of changes in life-styles and the physical environment, Routine Activities Theory allows us to tease out some interesting insights into the littering problem. The reduction in the number of police foot patrols in favour of patrol cars and the greater use of private cars, which tend to insulate us from our environment. The increasing popularity of 4x4s, whose armoured safety only serves to intensify the occupants' sense of insulation and isolation. The proliferation of drive-in fast food restaurants that do not require us to risk even the few steps between car and restaurant, then fails to encourage us to leave the safety of the car to dispose of the empty packaging in a responsible way; the concomitant reduction in the number of pedestrians using the pavements and countryside footpaths - even those who are obliged to travel on foot usually sink into a sort of social autism with the aid of their MP3 player or smart phone. The virtual obsolescence of doorstep milk deliveries not only divests us of yet another mode of capable guardianship, it also deprives us of a near-perfect form of bottle recycling. The increasing popularity of out-of-town shopping centres and online shopping has inevitably led to a reduced footfall of 'respectable citizens' in many traditional town centres, leaving the coast clear for the littering classes. The list could go on and on and, if left unchecked could potentially lead to the sort of dystopia that J K Galbraith dubbed "private affluence and public squalor."

As previously mentioned, all of the foregoing theories are more or less based on the concept of man as a rational calculator. This assumption, that offenders think before acting and conduct a cost-benefit analysis before deciding to engage in crime, has more than a few critics. The difficulty is that some offenders make almost no preparation for an offence, something that is especially true for young offenders. They do not consider the negative long-term consequences of the action; they are impulsive and focus on the immediacy of the

positive rewards associated with the offence. This criticism cannot be ignored, especially in the context of a casual or impulsive offence like littering. Even a conservative commentator like Theodore Dalrymple has serious misgivings about the rational choice premise:

"I do not ask myself, every time I have about me a piece of potential litter in a public place, 'Shall I throw this in the street, or shall I dispose of it in some other way?' Nor, having failed to ask such a question, do I rehearse in my mind all the possible pros and cons of throwing it in the street and, having weighed them up with the utmost care, decide against doing so. The reason I do not throw the potential litter in the street is my mother. Because of her, it simply does not occur to me to throw litter in the street, not even for a fraction of a second. Good behaviour is as much a matter of prejudice and habit as of ratiocination." (Dalrymple: 2011, p 151)

It is interesting that even Ron Clarke and his collaborators subsequently introduced the idea of 'bounded rationality', that is, they recognised psychological, cognitive or social limitations to the menu of options open to potential offenders. Although this deprived their theory of its original simplicity and objectivity, this development was perhaps necessary. Certainly, for our purposes, it enables us to explain the influence of Dalrymple's mother on his law-abiding behaviour. And it also allows us to link up with another conservative theory that stresses the importance of social norms without jettisoning the ideas of rational choice and free will.

Social Control Theory expounded by Travis Hirschi in his 1969 book 'Causes of Delinquency' - identifies the cause of crime as man's innate propensity for delinquency, combined with the weakening of social ties which allows such anti-social intransigence to break its bonds. But instead of focusing on why people commit crimes, he turned the question on its head. For Hirschi, it is law-abiding conformity that needs to be explained.

In Hirschi's initial theory, *social* bonds were the crucial restraint against criminality. He identified four types of bond: *attachment, commitment*, *involvement* and *belief*. In short, the stronger a person's links were to the conventional social order and ethical/legal norms, the less likely that person would be to commit crime (Hirschi: 1969). This almost goes without saying - it does indeed verge on the tautological. Nevertheless, and perhaps because of this very circularity, the theory retains both a logical and intuitive cogency.

In collaboration with Gottfredson, Hirschi subsequently shifted his focus from *social control* to ***Self-Control***. According to this later theory, once socialisation had occurred within the family, it was the life-long internalised ability to resist criminal temptation and/or delay gratification that was crucial. So the family is the key socialising institution responsible for restraining our natural human impulses toward deviance (Hirschi & Gottfredson: 1990 and 2005).

Torgler and his fellow researchers would certainly agree that it is social norms that help to explain law-abiding environmental compliance (Torgler *et al*: 2008). And Charles Murray (1990) in his 'Underclass' mode would applaud the emphasis on early socialisation within the family, though he would probably add that it is (non-absent) fathers who should be the primary role models, norm purveyors and capable guardians. Social Control/Self-Control theory is certainly well attuned to explaining low-level deviancy like littering, vandalism, etc and it gives some clues as to a longer-term solution to littering rather than just here-and-now prevention. Ironically perhaps, for a so-called right-realist perspective, this solution can involve state intervention in the early years of child socialisation. We shall revisit this strategy later in this essay. Suffice it to say here that for Hirschi and Gottfredson, the first

eight years are crucial. The Jesuits would certainly have agreed: *"Give me a child until he is seven, and I will give you the man".*

From the outset, Control theory was linked to a new research technique, the self-report survey. These surveys have consistently produced results that support the basic contentions of the theory, and have been used extensively by anti-litter campaign groups globally. The combination of a testable theory with a research technique that produces supportive results is very attractive, to say the least.

But in one respect, Control theory predicts and explains *too much* delinquency. For the norm-free, dysfunctionally-socialised, habitual litterbug, it hits the nail right on the head. But what about the casual, occasional litterer who is otherwise entirely law-abiding? For an answer to that question we have to turn to another variant of Control theory - **'Neutralisation and Drift'**.

According to Gresham Sykes and David Matza - in their 1957 essay - the majority of delinquents are not Hirschi's norm-free outsiders. Most of the time they are engaged in routine, law-abiding behaviours, just like everyone else, and most of them grow out of delinquency and settle down to law-abiding lives when they reach early adulthood. Acts that violate conventional social norms generate feelings of shame and guilt, which deters most adolescents from acts of delinquency. Potential offenders, therefore, must seek out ways to neutralise the guilt and guard their self-image if they choose to engage in delinquent behaviour. A way to do this is by conducting 'techniques of neutralisation' that provide short-term relief from moral constraint and allow individuals to drift back and forth between conventional and delinquent behaviour.

Although the theory is not comprehensive enough to serve as a stand-alone explanation for criminality, the idea of human beings drifting back and forth between a lower (individual) and higher (collective) level is uniquely equipped to account for occasional littering behaviour amongst otherwise law-abiding citizens. And the techniques of neutralisation clearly resonate within the rich array of verbatim rationales we encountered in Chapter 2 and the Appendix. *Denial of responsibility*: lack of bins, too much wrapping, it's just a fag end...that's not litter. *Denial of Injury*: Who's it harming? One more won't matter. *Denial of victims*: Who's complaining? They don't have to pick it up, everyone does it. *Condemnation of condemners*: nosey-parkers, do-gooders, kill-joys, what's it got to do with you, anyway? *Appeal to higher loyalties*: all of my mates do it; keeps the Council in a job, don't it? (this is the perfect neutralisation - the offence is perversely re-interpreted as a positive socio-economic intervention). The jury is still out on whether these excuses are actually pre-meditated moral anaesthesia, or simply *post-facto* rationalisations. But they are too common and too recurrent to ignore, and they show only too clearly the psychological hurdles that must be surmounted in the battle against litter.

So how have these criminological perspectives been implemented in practice?

Policy Interventions and Practical Solutions

As we have seen, the Broken Windows analysis became linked in the USA with the policing strategy of Zero Tolerance, developed by William Bratton, the NYPD chief during the 1990s. It involves highly-visible order maintenance and aggressive law enforcement, against even minor crimes and 'incivilities'. Researchers still disagree about whether the fall in New York crime rates in this period was a direct result of zero tolerance, or whether the causative factors lie in wider socio-economic changes. Zero tolerance certainly sends out a powerful rhetorical message, and there is little doubt that it eliminated signal incivilities such as littering and graffiti in many New York hot-spots. But it tends to ignore the fact that capable guardianship cannot be monopolised by the police. There literally aren't enough of them to go round. Any longer term solution must look towards guardianship being nurtured and embedded in the community itself. There is also the risk that over-zealous law enforcement could be counter-productive in the longer term if it was perceived to be heavy-handed and unfair.

This possibility is indeed recognised by Innes and Weston, who point out that intrusive and/or saturation policing can not only erode public trust in the police, but it can actually increase the sense of fear and perceptions of criminality within the community. Innes and Weston turn instead to the philosophy of community policing, underlining the need to engage with communities to understand the local problems that create insecurity. Local policing teams can then prioritise the issues that appear to have the highest signal values, and consequently improve local security and civic pride. The role of the police as an enabler is crucial:

"...'the big society' cannot do the heavy-lifting in tackling chronic ASB problems... Therefore, particularly in areas with a higher intensity of ASB problems, police have an important role in gripping the problems in order to create a space where community mobilisation can be seeded and grown...A certain degree of neighbourhood security appears to be a necessary condition for establishing citizen-based peer-to-peer cooperation and collaboration... How then can policing be used to facilitate these forms of increased citizen action and participation? There are important precedents for thinking about such matters to be found in the Home Office funded National Reassurance Policing Programme that ran between 2003-05 in 16 trial sites in England. This tested a policing model founded upon:

- Visible, accessible, familiar and effective officers;
- Community-intelligence led targeting of the signal crimes doing most harm to communities;
- Co-producing solutions with partners and the public." (Innes & Weston: 2010, pp 48-49).

The authors do acknowledge that when this programme was actually translated into Neighbourhood Policing, the last element (co-producing solutions with the public) was largely omitted from the standard operating procedures for localised policing. Therefore, the ultimate aim of leveraging the Big Society at grass-roots level was somewhat compromised. But the Signal Crime/Reassurance Policing model still has real potential. And it has the added bonus of taking the physical reality and social impact of littering very seriously.

Keeping our focus on longer term solutions, we must also recognise the positive impact of Control theories on early intervention programmes and wider educational initiatives. The Durkeimian heritage of Social Control theory means that it seeks regulation of the individual through policies fostering socialisation and integration into the social order, rather than

through policies of isolation and punishment. The theory therefore supports programmes to strengthen families, particularly with respect to effective child rearing. Where the focus is on Hirschi's later 'Self-Control' theory, the emphasis is on policies that assist the family to inculcate favourable self-concepts, impulse control, and frustration tolerance that can keep people out of trouble even in situations of weak external control. School programmes influenced by Control theory have tried to facilitate involvement in school activities and greater identification with the school and its local community. The aim is to urge school-children to accept the larger social structure and conventional 'middle-class' values as things to be taken for granted...as unconscious 'second nature'. Self-Control theory was, indeed, one of the inspirations behind New Labour's *Sure Start* and *Splash* programmes, which targeted parents whose children were seen to be at risk of offending, and offered them help and support. Analogous schemes can be found in the United States (*Head Start* and *Parents Anonymous*), Australia (*Head Start*) and Canada (Ontario's *Early Years Plan*).

Such schemes clearly hold promise for the future, especially in pre-empting C2DE youth littering. Perhaps this is the only way to implant Theodore Dalrymple's mother into the collective conscience! But these programmes are obviously expensive, and they have tended to become casualties of the shifting political and economic climate and the popularity of get-tough policies.

So in the here-and-now our hopes must fall back on the efficacy of the many practical solutions offered by 'Administrative Criminology'. And there are numerous success stories. For instance, Nottinghamshire Council conducted a local telephone survey of 1,000 households every six months and identified that alongside speeding vehicles and ‘boy racers’, around 29% of the local population claimed that littering was the biggest problem in their area (Burney, E. 2005, pp. 134-135). As a result, the Council introduced Neighbourhood

Wardens in 2003/04 to keep a watchful eye on littering and other incivilities. In contrast to some other warden experiments, Nottingham's wardens are empowered to issue Fixed Penalty Notices for a variety of offences which include, litter, graffiti and dog fouling. They have targeted particular littering hotspots, leading to more effective deterrence and apprehension rates. For instance, from April 2011 to January 2012, Mansfield District Council issued 454 penalty notices, a near 60% increase from the previous year (Anon, March 2012).

Another highly-successful application of Capable Guardianship is exemplified by Middlesbrough's celebrated talking CCTV, which aims to "bring the voice of authority to the street". The programme was trialled in early 2007 and proved to be an immediate success, with a noticeable drop in both anti-social behaviour and littering. Officials have observed that since its introduction, litterers have sheepishly picked up their rubbish and disposed of it in the nearest bin. According to Middlesbrough Council, the system created an extra layer of security and, as a result, the town's cleanliness has vastly improved (Home Office, April 2007).

Based on the success of the Middlesbrough experiment, twenty communities (including Darlington, Blackpool, Northampton and the London Boroughs of Southwark and Dagenham) have received funding from the Home Office to set up their own talking CCTV systems.

Arguably the most cost-effective anti-litter strategy has been the tax on the use of plastic carrier bags in retail outlets introduced in Ireland during 2002. This change brought about a significant reduction in littering (around 90%), and resulted in positive landscape effects (Convery *et al:* 2007). Wales, Northern Ireland and Scotland subsequently followed the Irish lead, and England is due to introduce the charge in 2015. Each year in England, more than

eight billion disposable bags are used; this breaks down to a staggering 130 per person. According to environmental campaigners, these bags can take up to 1,000 years to degrade. This causes serious harm to birds and marine life, with 70 bags littering every mile of Britain's coastline (Chapman: 2014).

Wales followed Ireland's initiative in 2011, introducing a 5p charge on the use of retail plastic carrier bags. Despite initial support for the carrier bag charge already being high (59% supported), the Welsh population became even more supportive after its implementation (70% supported). A study conducted by Poortinga *et al.* (2012) illustrated that own-bag usage in Wales rose from 61% before to 82% after the introduction of the charge. 64% of people in Wales now 'always' bring shopping bags to the supermarket (an increase of 22%). These findings coincide with the hypothesis of 'habit discontinuity' (Verplanken *et al*., 2008). Rather than using disposable carrier bags, people have embraced a more sustainable habit after the charge was implemented.

Scotland's decision to adopt the tax charge on plastic bags in June 2013 has been similarly successful, and it is hoped that this success will be repeated in October 2015 when England follows suit.

Since its establishment in 1955, Keep Britain Tidy has used a number of behaviour change strategies, ranging from the celebrity-endorsed campaigns - including the likes of Marc Bolan and Morecambe & Wise - in the 1970s, to the targeted campaigns used today, which focus on individual responsibility within identified market segments. Indeed, since 2001 Keep Britain Tidy has launched over twenty campaigns utilising this market segmentation concept, and has achieved 20-30% reductions in littering and over 70% changes in littering behaviour of participants questioned after a campaign (Keep Britain Tidy: October 2010)

A few examples will suffice...and give a useful insight into conceptualizing different types of litterer for possible future interventions:

- *Car Litter Campaign* (2009): based on the Litter Droppers segmentation data (as noted in Chapter 2), focusing on the 'Life's Too Short' segment;

- *General Litter Campaign* (2010) Litter Droppers segmentation research, targeting the 'Guilty' segment;

- *Dog Fouling Campaign* (2010): Litter Droppers segmentation research targeting the 'Justifiers' segment

- *Gum Campaign* (2012) (run with the Chewing Gum Action Group): based on the Gum Droppers segmentation data targeting the 'Excuses Excuses' segment.
Source: Zero Waste Scotland (2012)

One of Keep Britain Tidy's most successful behaviour interventions was its dog fouling campaign in 2002. To measure the success of the campaign (which used posters and celebrity campaigners to inform dog owners of the dangers of dog fouling), ten sites across England were monitored to examine whether the campaign had altered public behaviour. The results indicated there was a 40% drop in dog fouling in these areas. An attitude and awareness study also revealed that, of those questioned, 38% were likely to change their behaviour following the campaign (Keep Britain Tidy, October 2010).

Turning from organic to man-made detritus, in Sweden in 2006 a scheme was implemented for the returning and recycling of plastic bottles and aluminium cans, with financial incentives to encourage voluntary compliance (Bottle Bill Resource Guide, 2011).

The legislation requires every retailer to charge 0.5SEK (4p) extra on the original price of aluminium cans and 1SEK (8p) for plastic bottles. This is the consumer's deposit. To retrieve this deposit, the consumer, or whoever collects the container, must return it to the retailer or recycling depot. The system has achieved a return rate of 87% for aluminium cans and 83% for plastic bottles. This is substantially higher than the UK's 48% return rate for aluminium cans (Barnes, T 2008).

Bottle deposits used to be common in the UK until the late 1980s. The scheme was phased out as manufacturers found it cheaper to make new bottles or cans than to collect the old containers.

The 1950s style penny-for-a-bottle scheme was, in its time, a great success, with children actually collecting discarded bottles, and even canvassing householders door-to-door for unwanted bottles which they could then return to the seller to obtain the deposit. The Campaign to Protect Rural England urges Britain to bring back this method of recycling, arguing that it could save the country an estimated £160 million per annum for the public sector, working out to be around £7 per household, whilst also ensuring far more cans and bottles are recycled (Hogg, D., Fletcher, D., Elliot, T., and Von Eye, M. 2010).

Economic self-interest could clearly work wonders in the war against litter! And when such initiatives are effectively implemented, they remove many of the excuses from Matza's

techniques of neutralisation, and thereby block the 'Drift' of otherwise law-abiding citizens into littering behaviour.

Conclusion

We have seen how the definition of littering is at times ambiguous, even within legislation. The research regarding the determinants of littering and the identity of litterers has also been, on occasion, equivocal. On one hand there appears to be a statistically significant and consistent effect for age, with young adults (18-29) being more inclined to litter than the older generation. The findings for gender are rather more ambiguous. Even the age determinant was flipped on its head by Torgler *et al,* who found that the older, unmarried male generation is the least likely to have a strong environmental conscience. What does appear to be clear is that is a tangible correlation (and a possible causative link) between the number of youths on the streets and the level of littering. And researchers into Social Class and Littering have more or less concurred that those living in what are classed as C2DE areas, are more likely to litter than the more affluent members of society. This can be down to the education background as the more affluent tend to be more aware of the environmental impact of littering whereas those from the working class background tend to be less environmentally conscious. We have seen several success stories from local councils and anti-litter campaigns. However, from looking at international policies, such as the bottle bill in Sweden, we can see that Britain can still do more to prevent litter from plaguing our streets.

One must hope that in the longer term, a combination of economic disincentives (e.g. instant fines, carrier-bag charging and bottle/can deposits), ample provision and maintenance of litter-bins, capable guardianship (neighbourhood policing, neighbourhood

wardens, informal social control at community level, and CCTV surveillance) and well-funded early intervention programmes, will ultimately override the dysfunctional social and moral norms created by defective Social/Self Control.

More case studies are needed at the local level to allow a full evaluation of litter-prevention strategies. In this essay, I have focused primarily on the contributions of neo-classical/situational crime and right realist perspectives, as these are the only theories that have, to date, tackled the problem of littering head-on. Criminological theorists to the left of the political spectrum need to step up to the mark and show that their schools-of-thought can provide alternative and/or additional insights into the causes of, and solutions to, a problem that continues to affect the Man on the Clapham Omnibus on a daily basis. This may mean naming and shaming members of those socio-economic groups that the left traditionally regard as marginalised victims of labelling and stigmatisation. But only when Left Realists and Green Criminologists grapple with the problem practically and persuasively will littering truly cease to be the Cinderella of Criminology.

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Appendix

2010 *Keep Wales Tidy* Survey:

As part of a wider research project on littering in Wales, in 2010 *Keep Wales Tidy* created a segmentation model of 809 Welsh adults who admitted to littering. The objective was to improve understanding of attitudes towards littering, and how these link to the behaviour and demographics of those within each cluster. The results can be summarised as follows:

Segment Name	**Characteristics**	**Littering Behaviour**
Litter louts (17%)	Youngest, most male and most 'downmarket' segment; most likely to be smokers. More likely than other segments to access internet for social networking.	Heavy litterers; much more likely than other segments to drop a range of different items, including some larger items (e.g. fast food packaging, cans, bottles). Litter is an ingrained social habit. Find litter to be excusable and acceptable in a range of different scenarios. Give little, if any, thought to consequences.
Not my fault (28%)	More likely than the average litterer to be aged 16-34, C2DE, and to smoke. Even balance of genders. More likely than any other group to listen to commercial radio.	Second heaviest littering segment (although much lower than 'litter louts'). Most likely to consider littering as unacceptable in theory, but find excuses for littering when it is perceived to be beyond their control
Does that count? (28%)	More likely than the average litterer to be male and older. Social grade and propensity to smoke in line with average litterer. More likely than any other group to read local/regional newspapers.	Generally lighter litterers – fruit and cigarette ends most likely to be dropped. Largely anti-littering and do not look for excuses, but do not appear to count fruit and leaving things near a bin as littering.
Principled light litterers (27%)	Most 'upmarket' and most female segment, least likely to smoke. Also tend to be older. More likely than any other group to read UK national newspaper.	The lightest litterers of all segments – fruit and food are only items which are dropped where levels are above or close to the average litterer. Generally believe littering to be lazy and unacceptable.

Focus groups were then conducted with three of the four segments of litterer in greater detail: *Litter Louts*, *Not My Fault*, and *Does that Count*. This stage of the research explored rationales behind littering amongst three of the most prolific littering groups in Wales. The rationales are summarised in the table below:

Rationale	Key Issues	Example Verbatims
Others' responsibility	Local Council at fault, Never a bin when needed State of bins	"I'm not holding this any longer and I can't see any bins around. I've done that before, I've been somewhere and I've had a wrapper or something and I've held on to it for so long." (Not My Fault)
Social factors	Alcohol encourages Group mentality	"It's like when you're in a big group, if there's a big group you can't imagine someone walking to a bin…'excuse me, I'm just going to the bin'" (Litter Lout)
Habit	Never taught not to Just the norm	"It's just, like, from the way you've been brought up, living in these bad areas, it's just in your mind-set to think like that" (Litter Lout)
Not concerned	Little care for local area Self-focused Anti-authority	"I walked through another town … and I think I dropped something and the bloke said "pick that up now". And I gave him a few words of my choice but I weren't going to pick it up … I think it'd be more embarrassing for me to go and pick it up and put it in the bin than to just walk off" (Litter Lout)
No one can see me	Feel guilt Out of sight out of mind	"I think if I was walking down a country lane or something with rubbish, I'd probably think I'd drop it rather than just keep carrying it, just throw it in some hedge or something. No one is about, it's like driving in the car, goes out the window" (Not My Fault)
Prevalence	Gives permission Makes it the norm Run-down areas	"I just had an envelope where I'd opened my mail and where I live there we all rubbish by there and I was walking down to the shops and I just threw the empty envelope" (Not My Fault)
Size, condition	Smaller items OK If greasy, sticky	"If I've got food I'll drop it, but if I've got like a big bag then I will carry it until I see a bin somewhere" (Does that Count)
Not litter	Smaller items Fruit Certain scenarios	"[Butts] it's only a little thing, at the end of the day … What problem's it causing?" (Litter Lout)

Source: *Keep Wales Tidy: Litter in Wales: Understanding Littering and Litterers, Executive Summary Report (Nov 2010).*